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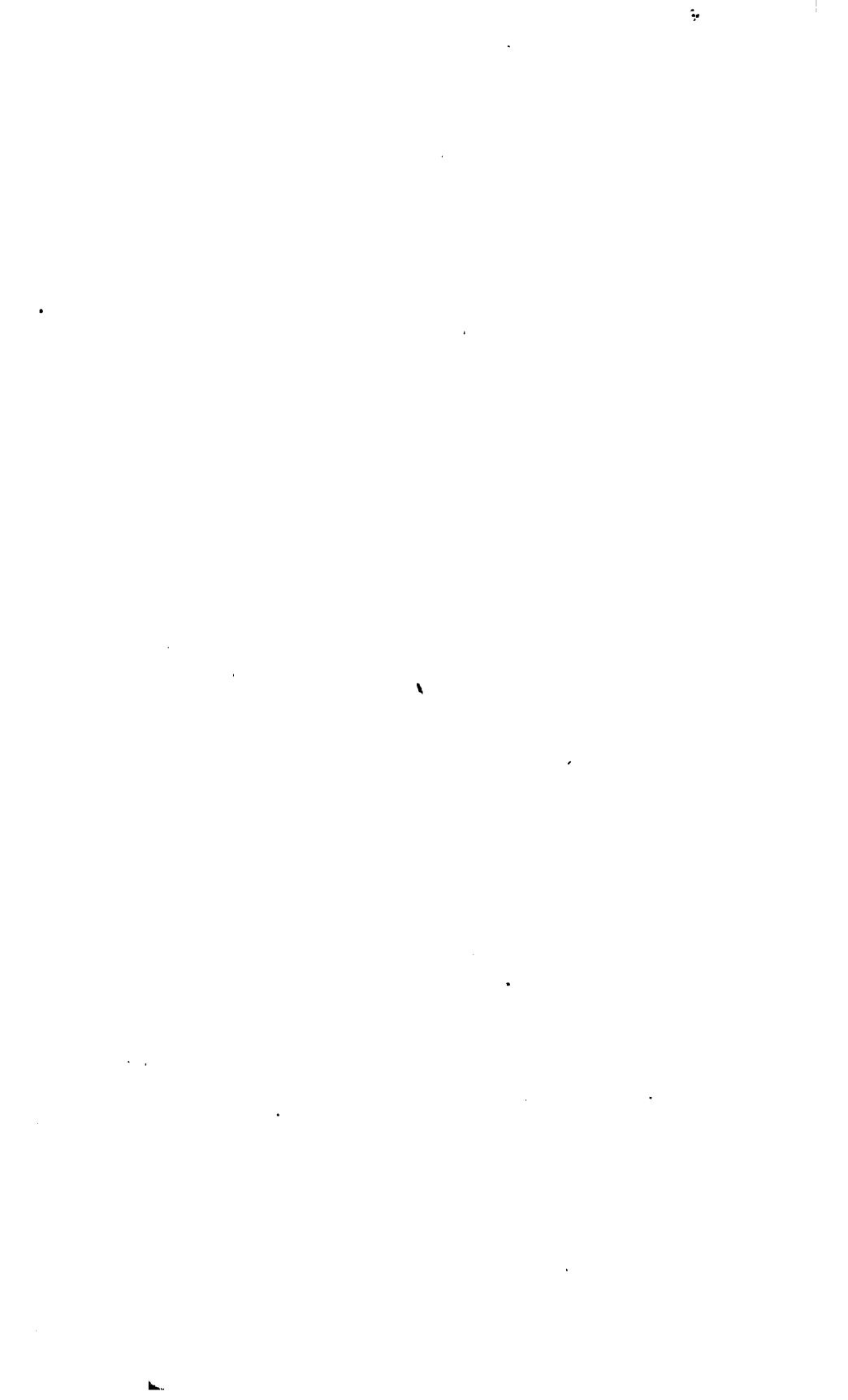
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A
TREATISE ON DAMAGES

COVERING THE
ENTIRE LAW OF DAMAGES

BOTH
GENERALLY AND SPECIFICALLY

BY
JOSEPH A. JOYCE
AUTHOR OF "JOYCE ON INSURANCE" AND JOINT AUTHOR OF "JOYCE ON
ELECTRIC LAW"

AND
HOWARD C. JOYCE
JOINT AUTHOR OF "JOYCE ON ELECTRIC LAW"

IN THREE VOLUMES
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BY JOSEPH A. JOYCE

AND

HOWARD C. JOYCE.

**DEDICATED
TO
THE MEMORY
OF
JOSEPH DEFENDORF JOYCE**



PREFACE.

In writing this treatise the authors have endeavored to present to the legal profession a work which exhaustively discusses the fundamental principles of the law of damages, not only as to their application in general, but also particularly in relation to the various subjects. With this purpose in view, definitions are first given, followed by a concise statement of the general principles of liability and damages, after which each and every specific subject, wherein the question of the recovery of damages or the measure thereof has arisen in the courts, is fully and conscientiously discussed and presented and is made thorough and complete within itself, thus enabling the court or lawyer to ascertain generally and specifically the entire law of damages. In order, however, to obtain this result, logical arrangement has not been sacrificed, but on the contrary has been followed as closely and as exactly as the judgment of the authors and the peculiar nature of some of the subjects would permit.

It is believed that every subject properly within the law of damages has been examined and treated in these three volumes. Matters which have seemed to the writers to be of peculiar or especial value, have been considered without regard to the fact whether or not the decisions covering them are few or numerous.

Inasmuch as actions to recover damages for personal injuries and for the death of a human being have occupied so largely in excess of others the attention of the courts, the authors have given to them the space and prominence which their proper consideration necessitates. The latter subject has also been treated by grouping together as nearly as possible all similar

statutory provisions so as to harmonize what otherwise might seem to be inconsistent decisions.

The adjudications upon the law of damages in relation to matters of insurance, the law of electricity, marine torts, shipping and admiralty, are of so much importance that it has been deemed advisable to exhaustively consider them in addition to other subjects, with a view of meeting the needs of special practitioners.

With the intention of affording every possible aid, to those who may find occasion or necessity for using these volumes, official and unofficial reports and series of selected cases have been cited, and the notes and illustrations have been made as full and complete as the space would permit.

The authors have in this treatise as in their preceding efforts endeavored to make the work valuable alike to the lawyer who looks for principles and to the one who depends upon cases.

The courtesy of the president and faculty of Columbia University in extending to the authors the use of its law library and likewise that of the president and officers of the American Law Library of this city for a like kindness is acknowledged with pleasure.

Trusting sincerely that this treatise will accomplish the purposes intended, it is respectfully submitted to the legal profession.

NEW YORK CITY,
June, 1903.

JOSEPH A. JOYCE.
HOWARD C. JOYCE.

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TITLE I.

GENERAL AND PARTICULAR TERMS AND DEFINITIONS.

CHAPTER I.

TERMS AND DEFINITIONS.

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§ 1. Damage defined.—Damage means every loss or diminution of what is a man's own occasioned by another's carelessness, fraud, design, default or fault. It includes acts of omission as well as of commission. It is not confined to the loss of a man's goods but includes all which is a man's own in a strict and proper sense. Nor was the word originally synonymous with, nor collateral to, the terms fine, penalty, revenge, chastisement, or punishment, even though its meaning in this respect has been extended somewhat as will appear hereinafter in connection with the consideration of exemplary damages generally.¹

¹Damage means every loss or diminution of what is a man's own occasioned by the fault of another. *Aggs v. Shackelford Co.*, 85 Tex. 145, 149; 19 S. W. 1085, per Tarlton, J., citing *Railway v. Fuller*, 63 Tex. 469. "Damage. The loss caused by one person to another, or to his property either with the design of injuring him, or with negligence and carelessness, or by inevitable accident." 1 Bouv. L. Dict. (ed. 1897) 491. "A synonym of damage, when applied to a person sustaining an injury, is loss. Loss is a generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage—in French, *dommage*; Latin, *damnum* from *demo*, to take away—signifies the thing taken away,—the lost thing which a party is entitled to have restored to him so that he may be made whole again . . . When used to signify the money which a plaintiff ought to receive, damage is never, nor in any sense, synonymous with nor collateral to the terms example, fine, penalty, punishment, revenge, discipline, or chastisement . . . 'By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another.' *Ruth. Inst. B. I.*, ch. xxii, sec. 1; *Grotius, Lib. II*, cap. xxii, 2. 'The definition of damage

extends the notion of it beyond a man's goods. His life, his limbs, his liberty, and exemption from pain, his character or reputation are all of them his own, in a strict and proper sense; so that the loss or diminution of any of them gives him a right to demand reparation from those by whose fault they have been lost or diminished.' *ibid.*" *Fay v. Parker*, 53 N. H. (5 Shirley) 342, 354, 356, 362, 16 Am. Rep. 270, per Foster, J. "Damage is the loss caused by one person to another, either to his person, property or relative rights, through design, carelessness or default." *Finch v. Heermans*, 5 Luz. Leg. Reg. 125. In a statute providing for damages for defects, etc., in bridges the words damage which shall happen to any person, etc., necessarily imply "all injury to property as well as person, the pecuniary loss to the pocket, as well as the bodily loss of bone or flesh and blood." *Woodman v. Nottingham*, 49 N. H. 387, 392, 6 Am. Rep. 526, per Nesmith, J. "Damnum, Lat.: In the Civil Law. Damage; the loss or diminution of what is a man's own, either by fraud, carelessness or accident. In pleading and old English law; damage, loss." *Black's L. Dict.* See also *Anderson's Dict. of Law*.

§ 2. Damages defined.—Damages is the compensation or indemnity recoverable by or awarded to the one who has sustained damage; the compensation or indemnity due from or awarded against the wrongdoer or the person who has occasioned the damage. The word is also used as defining the amount averred in the *ad damnum* clause as that which the plaintiff is entitled to recover. And it is not infrequently used as synonymous with the term injuries as the ground of damages.²

¹“‘Damages’ ‘*Damna* in the common law hath a special signification for the recompence that is given by the jury to the plaintiff or defendant’ (demandant) ‘for the wrong the defendant hath done unto him.’ 2 Coke Litt. 257a.” Coke Litt. (Butler & Hargraves, notes, 1853) 257a; *Macon & Western R. Co. v. Winn*, 26 Ga. 250, 271, per Benning, J. “Damages are the indemnity recoverable by the injured party from the party who has caused the injury.” *Finch v. Heermans*, 5 Luz. Leg. Reg. 125. “Damages sometimes signifies the clause or passage in a declaration in which the plaintiff alleges or ‘lays’ the sum or amount which he claims to recover; and the word is sometimes used, loosely, in the sense of injuries; causes for a recovery of damages.” 1 Abb. L. Dict. (ed. 1879) 336. “Damages 1. A pecuniary recompense awarded by judicial tribunals to indemnify one who has sustained an injury through some wrongful act or neglect; a sum recoverable as amends for a tort.” 1 Abbott’s L. Dict. (ed. 1879) 335. “Damages. The indemnity recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another. The sum claimed as such indemnity by a plaintiff in his declaration; the injury or loss for which compensation is sought.” 1 Bouv. L. Dict. (ed.

1897) 491; see also Black’s L. Dict. “Damages are a sum of money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former. Co. Litt. 257a; *Mayne on Dam.* 1;” Sweet’s Dict. of Eng. L. (ed. 1882) 239. “Damages in the ordinary legal sense means the compensation which the law will award for an injury done. If the law will give no compensation there is certainly no legal claim for damages.” *Kansas City & O. R. Co. v. Hicks*, 30 Kan. 288, 292, 1 Pac. 396, per Brewer, J. Damages “in legal parlance means the indemnity recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another. To constitute a right to recover damages the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with the loss.” *Collins v. East Tenn. & G. R. Co.*, 9 Heisk (Tenn.) 841, 850, per Sneed, J., citing 1 Bouv. L. Dict. “Damages. The compensation which the law will award for an injury done. A species of property given to a man by a jury as a compensation or satisfaction for some injury sustained.” Anderson’s Dict. of Law. “‘Damages,’ says Prof. Greenleaf, ‘are given as a compensation, recom-

§ 3. Damages defined—Codes and constitution.—In four states damages are defined as follows : Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages;³ and in Georgia damages are given as a compensation for the injury done.⁴ Under the Kentucky constitution providing that “damages may be recovered” for death resulting from injury inflicted by negligence or wrongful act, the word is used in its broadest sense, and includes all damages known to the law, and covers all compensatory and exemplary damages.⁵

§ 4. Damnum absque injuria defined.—Damnum absque injuria is injury without damage; that is, a damage may be sustained by the plaintiff, but it is a damage not occasioned by anything which constitutes such an injury in the law as that an action can be maintained therefor.⁶

pense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this whether it be to his person or estate. All damages must be the result of the injury complained of.’ 2 Greenl. Ev. secs. 253-4, 266-7, 272. . . . Mr. Tidd defines damages as ‘a pecuniary compensation for an injury.’ Tidd’s Pr. 870.” Fay v. Parker, 53 N. H. (5 Shirley) 342, 354, 356, 362, 16 Am. Rep. 270, per Foster, J. “Damna (Lat. damnum). Damages both inclusive and exclusive of costs.” 1 Bouv. L. Dict. (ed. 1897) 494. See also Pegram v. Stortz, 31 W. Va. 220, 229, for definition of damages.

³ Cal. Civ. Code (1899), sec. 3281; 1 Mont. Codes (1895), sec. 4270; Rev. Codes, N. D. (1899) sec. 4971; 2 Grantham’s Annot. Stat. S. D. (1901) sec. 5777.

⁴ 2 Ga. Civ. Code (1895), sec. 3905 (3065).

⁵ “Worcester defines the word as ‘the indemnity or pecuniary satisfaction awarded for an injury.’ Definitions of this class would clearly include all kinds of damages which might be awarded for an injury, and we think, as used in section 241 of the constitution, the word is used in its broadest sense and includes all varieties of damages known to the law. No limitation is put upon it so far as we have been able to find in any other part of the constitution,” and it covers compensatory and exemplary damages. Louisville & N. R. Co. v. Kelly, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452; 1 Am. Neg. Rep. 249, 251, per Du Relle, J. Denying rehearing, 19 Ky. L. Rep. 69; 7 Am. & Eng. R. Cas. N. S. 165.

⁶ Broom’s Leg. Max. (7th Am. ed. 1874) *195, 196. “Damnum absque injuria is a loss which does not give rise to an action of damages against the person causing it.” Sweet’s Dict. of Eng. L. (ed. 1882) 240. See also 1 Abb. L. Dict. (ed. 1879) 337;

§ 5. Measure of damages defined.—Measure of damages is the compensation based upon law, or upon law and fact for the injury, wrong or damage sustained; or the test, rule or method for ascertaining the amount of damages.⁷

§ 6. Measure of damages defined—Codes.—The Codes of four states provide as follows: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."⁸ "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not,"⁹ while the Code of Georgia reads: "Damages are given as compensation for the injury done, and generally this is the measure where the injury is of a character capable of being estimated in money. If the injury be small, or the mitigating circumstances be strong, nominal damages only are given."¹⁰

§ 7. Civil damages defined.—Civil damages are such as accrue to a person for violation of his rights as a citizen, or for an injury to his person or property, or to his relative rights by virtue of the domestic relations, being such rights as exist under certain constitutional and statutory provisions, guaranteeing what are known as civil rights to persons of African descent, and also the rights to damages under the civil damage laws of some states, covering the injury caused by the sale of intoxicating

Anderson's Dict. Law (1893), 310; Black's L. Dict.; 1 Bouv. L. Dict. (ed. 1879) 494.

⁷ Measure of damages is "the test by which the amount of damages is ascertained." Sweet's Dict. of Eng. L. (ed. 1882) 239. See also Anderson's Dict. L. (1893) 668; 2 Bouv. L. Dict. (ed. 1897) 385.

⁸ Civ. Code Cal. (1899) sec. 3300; 1 Mont. Codes (1895), sec. 4300; Rev.

Codes, N. D. (1899) sec. 4978 (with additional clause); 2 Grantham's Annot. Stats. S. D. (1901) sec. 5784.

⁹ Civ. Code Cal. (1899) sec. 3333; 1 Mont. Codes (1895), sec. 4330; Rev. Codes, N. D. (1899) sec. 4997; 2 Grantham's Annot. Stats. S. D. (1901) sec. 5803.

¹⁰ 2 Ga. Civ. Code (1895), sec. 3905 (3065).

liquors, etc. Civil damages may arise for discrimination as to jury service; as to public accommodations; as to public school privileges, etc.¹¹

§ 8. Nominal damages defined.—Nominal damages are a small and trivial sum awarded for a technical injury due to a violation or invasion of some legal right, and as a consequence of which, some damages must be awarded to determine the right.¹²

§ 9. Nominal damages defined—Codes.—When a breach of duty has caused an appreciable detriment to the party affected, he may yet recover nominal damages.¹³ Another provision is :

¹¹ See Anderson's Dict. of Law (1893), 305, 306.

¹² Joyce on Elec. Law (ed. 1900), sec. 943. Nominal damages are "when a trivial sum of six and a quarter cents is allowed in recognition that a mere right of plaintiffs has been infringed, but without important loss sustained." 1 Abb. L. Dict. (ed. 1879) 336. See Anderson's Dict. of Law, "Damages"; Black's L. Dict. "Damages." "Nominal damages are damages to such a small amount (e. g. a farthing) as to show that they are not intended as any equivalent or satisfaction to the party recovering them. They are given when the plaintiff, in an action for the invasion of a right, establishes his right, but does not show that he has sustained any damage." Sweet's Dict. of Eng. L. (ed. 1882) 240, citing Beaumont v. Greathead, 2 C. B. 494; Leake on Contracts, 567. Where a cause of action exists, at least nominal damages will be presumed and must be allowed, nor does the fact that the plaintiff insists upon substantial damages, and neither tried his case upon a claim of, asked for, or would have been satisfied with nominal damages, alter the rule. Van Velsor v. Seeburger, 35 Ill. App. 598, 602.

Nominal damages are those recoverable where a legal right is to be vindicated from an invasion that has produced no actual present loss of any kind. Duggan v. Baltimore & O. R. Co., 159 Pa. 248; 33 W. N. C. 381; 28 Atl. 182, 186; 25 Pitts. L. J. N. S. 13. Nominal damages are those which occur in cases where the judge is bound to tell the jury only to give such. Prehn v. Royal Bk. of Liverpool, L. R. 5 Exch. Cas. 92, 99, per Martin, B. Where there exists only a technical right of action, nominal damages can be collected. Haven v. Beidler Mfg. Co., 40 Mich. 286; Curtis v. Ritzman (City Ct. N. Y.), 7 Misc. 254; 27 N. Y. Supp. 259.

Nominal damages may be given where the evidence shows damages, but furnishes no basis for ascertaining the amount. Chicago & N. W. R. Co. v. Chicago (Ill.), 29 N. E. 1109; 4 Am. R. & Corp. Rep. 697; 50 Am. & Eng. R. Cas. 150. Every violation of a right imports some damage, and if none other be proved nominal damages are recoverable. Fullam v. Stearns, 30 Vt. 443, 453-457, per Bennet, J. There must be both an injury and a damage. Id.

¹³ Cal. Civ. Code (1899), sec. 336; 1 Mont. Codes (1895), sec. 4367;

"If the injury be small or the mitigating circumstances be strong, nominal damages only are given."¹⁴

§ 10. Constructive damages defined.—Constructive damages are such "as are imputed in law from an act of wrong to another person."¹⁵

§ 11. General damages defined.—General damages are those which the law implies or presumes to have been occasioned by the act of which the injured party complains. They do not depend upon evidence of any particular amount or loss, but rest upon the opinion and judgment of reasonable men, or the sound discretion of the jury, and not upon any measure of assessment which the judge may point out.¹⁶

Rev. Codes, N. D. (1899) sec. 5016;
2 Grantham's Annot. Stats. S. D.
(1901) sec. 5822.

¹⁴2 Ga. Civ. Code (1895), sec. 3905
(3065).

¹⁵Anderson's Dict. of Law,
"Damages."

¹⁶"The second kind is general damages and their nature is clearly stated by Crosswell, J., in *Rollin v. Steward*, 14 C. B. p. 606; 23 L. J. C. P. p. 151. They are such as the jury give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man." *Prehn v. Royal Bk. of Liverpool*, L. R. 5 Exch. Cas. 92, 99, per Martin, B.; *Bank of Commerce v. Goos*, 39 Neb. 437; 23 L. R. A. 190, 193; 10 Bkg. L. J. 352; 58 N. W. 84, per Ryan, C. Where a valid contract has been broken, plaintiff must be entitled to recover such damages as necessarily ensue from the breach. These are general damages, and need not specially be alleged. *Fitch v. Fitch*, 35 N. Y. Super. (3 J. & S.) 302, 303. See also *Jutte v. Hughes*, 67 N. Y.

267, rev'g 40 N. Y. Super. 126; *Laraway v. Perkins*, 10 N. Y. 371; *Alfaro v. Davidson*, 40 N. Y. Super. (8 J. & S.) 87, 89, per Friedman, J., citing *Chitty on Contracts* (ed. 1860), 985. "Damages are termed general, meaning those which, by implication of law, result from a tort, and are awarded in the sound discretion of the jury, and without calling for evidence of any particular loss." 1 Abbott's L. Dict. (ed. 1879) 335. See also Anderson's Dict. of Law, "Damages." "General damages: Those which necessarily and by implication of law result from the act or default complained of." 1 Bouv. L. Dict. (ed. 1897) 491. "General damages are such as necessarily result from the injury complained of, and may be recovered without being specially alleged." 2 Walt's Act. & Def. 434. General damages "are such as the law implies or presumes to have accrued from the wrong complained of." *Wisner v. Barber*, 10 Ore. 342, 344, per Lord, J. See also *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, 212, per Ellsworth, J.

§ 12. General damages defined—Code.—General damages are defined by the Georgia Code as “such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount.”¹⁷

§ 13. Special damages defined.—It is often very difficult to distinguish special from general damages; the former may, however, be defined as those which are not implied or presumed in law, but are such as actually and directly flow from the injury as the consequence thereof, and must be alleged and proven in order to be recovered. Special damages may constitute of themselves a ground of action, or may be shown in addition to or in aggravation of other damages.¹⁸

¹⁷ 2 Ga. Civ. Code (1895), sec. 3910 (3070).

¹⁸ Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. It is often very difficult to distinguish general from special damage. The necessary result of an injury is often and necessarily confounded with the natural and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage, and when it does not. It would seem, however, that when the consequences of an injury are peculiar to the circumstances and conditions of the injured party, the law could not imply damage simply from the act causing the injury. *Tomlinson v. Derby*, 43 Conn. 562, 567, per Loomis, J. See also *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, 212, per Ellsworth, J. Special damage is some damage of such a character that it may be given in evidence to aggravate the damages in an action, or be itself the substantive cause of

action. *Smith v. Sherman*, 4 Cush. (Mass.) 408, 413, per Shaw, C. J. “Special damages we believe are such as by competent evidence are directly traceable to a defendant’s failure to perform his contract obligation, or such duties as are imposed upon him by law.” *Bank of Commerce v. Goos*, 39 Neb. 437; 23 L. R. A. 190, 193, 10 Bkg. L. J. 352; 58 N. W. 84, per Ryan, C. “Special damages are given in respect of any consequences reasonably or probably arising from the breach complained of.” *Prehn v. Royal B’k of Liverpool*, L. R. 5 Exch. Cas. 92, 99, per Martin, B. “Special when they are such as really took place and are not implied by law, and are superadded to general damages arising from an act injurious in itself.” *Wisner v. Barber*, 10 Ore. 342, 344, per Lord, J. Special damages are “the indemnity allowable for the specific losses which plaintiff alleges and proves that he sustained.” 1 *Abbott’s L. Dict.* (ed. 1879) 335. See also *Anderson’s Dict. Law*, “Damages.” “Special damages, such as arise directly but not necessarily, or by implication of law from the act complained of.” 1 *Bouv. L. Dict.* (ed.

§ 14. Special damages defined—Code.—Special damages are such as actually flow from the act and must be proved in order to be recovered.¹⁹

§ 15. Direct damages defined.—Direct damages are those which are the direct, immediate or proximate result of some act or fault without the intervention of some other act or cause.²⁰

§ 16. Direct damages defined—Codes.—Direct damages are such as follow immediately upon the act done.²¹

§ 17. Prospective damages defined.—Prospective damages are such as arise from the loss of those benefits which it can be shown would have been reasonably probable or certain to have accrued except for the complained of injury, fault or tort, and which are a direct, natural or necessary consequence thereof or actually or proximately caused thereby, and not such as are merely conjectural, speculative or remote.²²

1897) 491. "Special damages: The damages recoverable for the actual injury incurred through the peculiar circumstances of the individual case, above and beyond those presumed by law from the general nature of the wrong." 2 Bouv. L. Dict. (ed. 1897) 392. "Special damage may be itself a distinct ground of action, or it may be given in evidence to aggravate the damages sued for in an action already pending. . . . But if the declaration be framed in reference to some special ground only, evidence cannot be introduced of any loss or damage beyond what is expressly alleged. *Graves v. Severens*, 40 Vt. 636." 2 Wait's Act. and Def. (1877) 435.

¹⁹ 2 Ga. Civ. Code (1895), sec. 3910 (3070).

²⁰ *Joyce on Elec. Law* (ed. 1900), sec. 945. Direct or immediate damages are "such as result from the operation of the tort without the intervention of intermediate causes."

1 Abb. L. Dict. (ed. 1879) 335.

"Such damages as result from an act without the intervention of any intermediate, controlling or self-efficient cause." *Anderson's Dict. Law, "Damages."* See also *Black's L. Dict.*; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, 212, per Ellsworth, J.

²¹ 2 Ga. Civ. Code (1895), sec. 3911 (3071). Damages are confined in Civ. Code, sec. 3333, to compensation for detriment proximately caused by breach of obligation not arising from contract. *Durgin v. Neal*, 82 Cal. 595; 23 Pac. 133; *Durgin v. McNally*, 82 Cal. 375.

²² *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305, 306, per Rapallo, J., case reverses 32 Hun (N. Y.), 20. See the numerous citations of the principal case cited in 2 *Silvernail's N. Y. Citations*. *Griffin v. Colver*, 16 N. Y. 489, 491; *Chicago, etc., Ry. Co. v. Henry*, 62 Ill. 142. The jury in assessing prospective damages should be confined to such as were reasonably certain to follow from the

§ 18. Consequential damages defined.—Consequential damages are those in which some other circumstance, act or cause intervenes to produce them, even though they result from or are traceable to the complained of act, fault or tort as the primary and efficient, though not the immediate, cause.²³

§ 19. Consequential damages defined—Code.—Consequential damages are such as are the necessary and connected effect of the tortious act, though to some extent depending upon other circumstances.²⁴

§ 20. Resulting damages defined.—Resulting damages is a term used generally to indicate consequential damages.²⁵

§ 21. Remote damages defined.—Remote damages are those which do not directly flow from an act, but are the result of the intervention of some intermediate cause without which no injury or loss would occur, although such cause may be attributable to the original act.²⁶ Remote and consequential dam-

injury complained of. *Pennsylvania R. Co. v. Files* (Ohio, 1901), 62 N. E. 1047, an action for personal injury. Again "when it appears that the injury is permanent and further pain to body or mind is reasonably certain, a sufficient basis is laid for compensation for these elements." *Smiley v. St. Louis & H. R. Co.* (Mo. 1901) 61 S. W. 667; 9 Am. Neg. Rep. 514, 518, per Brace, P. J. See *Anderson's Dict. of Law* (1893), 307; *Wharton v. Winch*, 140 N. Y. 287; 55 N. Y. St. R. 652; 35 N. E. 589, rev'g 46 N. Y. St. R. 187; 19 N. Y. Supp. 477; *Hamilton v. McPherson*, 28 N. Y. 72; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 514; *Freeman v. Clute*, 3 Barb. (N. Y.) 424; *Walter v. Post*, 6 Duer (N. Y.) 363; *Morey v. Metropolitan G. L. Co.*, 6 J. & S. (N. Y.) 185.

²³ "Consequential damages, those which though directly are not immediately consequential upon the act or default complained of." 1

Bouv. L. Dict. (ed. 1897) 491. See also *Black's L. Dict.* See *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, 212, per Ellsworth, J. See definition of remote damages herein.

²⁴ 2 Ga. Civ. Code (1895), sec. 3911 (3071).

²⁵ "Resulting damages; used to denote consequential damages." 1 *Bouv. L. Dict.* (ed. 1897) 491. Defendants are liable for resulting damages from blasting on their own premises when the work is negligently done. *Denken v. Canavan*, 17 Misc. (N. Y.) 392; 39 N. Y. Supp. 1078.

²⁶ *Joyce on Elec. Law* (ed. 1900), sec. 946. Consequential or remote damages are "such as the tort might not produce without the concurrence of other events and these last are generally disallowed." 1 *Abb. L. Dict.* (ed. 1879) 336. "Consequential or resulting, indirect or remote damages not produced without

ages have been used as synonymous terms, but there is this distinction: "All remote damages are consequential, but all consequential damages are not remote."⁷

§ 22. Contingent or too remote damages defined—Code.—

Under the Georgia Code, "if the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer,"⁸ and a "rule to ascertain" is given as follows: "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or natural consequence, are too remote and contingent,"⁹ while the "exception to the rule" reads: "If, however, the tort is committed, or the contract broken, or the duty omitted, with a knowledge and for the purpose of depriving the party injured of such benefits as are specified in the last paragraph, then the remote damages are made by such knowledge and intent a proper subject for consideration by the jury."¹⁰

§ 23. Contingent damages defined.—Contingent damages are those which may follow from the wrongful act, but are not certain to do so and may possibly not happen, for the said act may or may not operate to produce such damages, since the connecting event may or may not occur.¹¹

the concurrence of some other event attributable to the same origin or cause." Anderson' Dict. of Law, "Damages."

⁷ 1 Sedgwick on Dam. (8th ed.) sec. 110. See secs. 22, 24, 58, *post*, herein.

⁸ 2 Ga. Civ. Code (1895), sec. 3912 (3072).

⁹ 2 Ga. Civ. Code (1895), sec. 3913 (3073).

¹⁰ 2 Ga. Civ. Code (1895), sec. 3914 (3074).

¹¹ The doctrine of proximate cause is at the basis of contingent dam-

ages, and after an exhaustive examination of the authorities, we find an excellent illustration of the above in 1 Sutherland on Dam. (2d ed.) sec. 28, as where one wrongfully opens a fence, such act may or may not lead to injurious results and damages by reason of injury to animals, crops, etc. "Contingent damages; such damages as may or may not occur, or be suffered; such as depend upon an event which may or may not happen." 1 Anderson's Dict. Law (1893), p. 306.

§ 24. Speculative damages defined.—Speculative damages are those which rest upon conjectural circumstances or consequences, which are contingent or merely problematical, possible or apprehended, and concerning which the degree of probability of their occurring, as a result of the original injury, does not amount to a reasonable certainty.³²

§ 25. Actual or single damages defined.—Actual damages are such as the plaintiff can actually prove he has sustained, and are a compensation commensurate with the actual loss or injury.³³

§ 26. Compensatory damages defined.—Compensatory damages are those by which the actual loss sustained is measured and the injured party recompensed therefor.³⁴

§ 27. Substantial damages defined.—Substantial damages are generally where a considerable sum is awarded as a compensation; although where a sum is given in excess of nominal damages such sum is denominated substantial damages.³⁵

³² See *Streng v. Frank Ibert Brew. Co.* (App. Div. N. Y. 1900), 64 N. Y. Supp. 34; 7 Am. Neg. Rep. 650, per Woodward, J; *Anderson's Dict. Law* (1893), p. 308.

³³ *Joyce on Elec. Law* (ed. 1900), sec. 942. "Actual damages are such as the plaintiff can actually prove he has sustained as contra-distinguished from vindictive damages." *Bacon's Abr. (Bouv. 1854) "Damages"* (I), p. 82. "Actual or single damages; compensation for the real loss or injury." *Anderson's Dict. Law* (1893), 305. Damages "are actual or single, when the jury find the amount to be awarded and judgment is immediately rendered therefor." 1 Abb. L. Dict. (ed. 1879) 336. The term "single damages" has also been used in connection with joint and several damages, as in case of suit against several or a number. *Viner's Abr. "Damages"* (X), (Y). See also definitions of double and

treble damages, *post*, herein, and sec. 55, *post*, herein.

³⁴ "Damages should be such as adequately to compensate the actual loss or injury sustained." *Gilbert v. Kennedy*, 22 Mich. 117, 129, 130, per Christianity, J. Compensatory damages are such as measure the actual loss, and are given as amends therefor. *Talbott v. West Virginia C. & P. R. Co.*, 42 W. Va. 560; 26 S. E. 311. Compensatory damages are "such as are measured by the loss sustained by the plaintiff and are allowed him as a just amends therefor." 1 Abb. L. Dict. (ed. 1879) 336. "Compensatory damages, those allowed as a recompense for the injury actually received." 1 Bouv. L. Dict. (ed. 1897) 491. See also *Anderson's Dict. Law* (1893), 306. *Black's L. Dict.*; *Beck v. Thompson*, 31 W. Va. 459; 7 S. E. 447; 13 Am. St. Rep. 870. Examine sec. 55, *post*, herein.

³⁵ Substantial damages are "when

§ 28. Punitive, vindictive or exemplary damages defined.

—Punitive, vindictive or exemplary damages are those in excess of the actual loss, not intended as a compensation,³⁶ but rather designed as a punishment for the grossly negligent, wanton or malicious conduct, or act, or evil motive of one person towards another, as a result of which the latter has sustained some injury, loss or damage.³⁷

a considerable sum is found." 1 Abb. L. Dict. (ed. 1879) 338. See also Anderson's Dict. Law (1893), 307; Black's L. Dict. Damages, though very small, are substantial, and not nominal, where a real legal right is involved. *Michael v. Curtis*, 60 Conn. 363; 22 Atl. 949.

³⁶ But see secs. under chap. V herein entitled, "not as punishment but as compensation." "Doctrine of exemplary damages denied," and see sec. 55, *post*, herein.

³⁷ Joyce on Elec. Law (ed. 1900), sec. 944. See *Pegram v. Stortz*, 31 W. Va. 220, 230-237, 6 S E. 485, per Green, J. Exemplary, punitive or vindictive damages are those "allowed in excess of a simple compensation for the loss, and upon a theory of punishing the wrongdoer for the wrong inflicted upon plaintiff." 1 Abb. L. Dict. (ed. 1879) 338. See Anderson's Dict. Law, "Damages." "Exemplary damages. Those allowed for torts committed with fraud, actual malice or deliberate violence or oppression, as a punishment to the defendant and as a warning to other wrongdoers." 1 Bouv. L. Dict. (ed. 1897) 491. "Exemplary damages. Those allowed as a punishment for torts committed with fraud, actual malice or deliberate malice or oppression. . . . This allowance is termed 'smart money' or 'exemplary,' 'vindictive' or 'punitive' damages." 2 Bouv. L. Dict. (ed. 1897) 391. "Exemplary or vin-

dictive damages are damages given not merely as a pecuniary compensation for the loss actually sustained by the plaintiff, but likewise as a kind of punishment to the defendant, with the view of preventing similar wrongs in the future, as in actions of malicious injuries, fraud, seduction, oppression, continuing nuisances," etc. Sweet's Dict. of Eng. L. (ed. 1882) 240, citing *Broom's C. C. L.* 855; 2 *Smith's L. Cas.* 549. In actions of tort the damages are left very much to the discretion and judgment of the jury, and in all cases of malicious injuries and trespasses, accompanied by personal insult or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury recovered by a pecuniary standard may be but small. *Barlow v. Lowder*, 35 Ark. 492, 494, per English, C. J. Where a trespass is committed deliberately in wilful violation of the plaintiff's rights, in a manner and under circumstances of aggravation, showing a violent, reckless and lawless spirit, the law allows damages beyond the strict measure of compensation by way of punishment. *Champion v. Vincent*, 20 Tex. 811, 815, defendant shot plaintiff's hogs. *Malice* is the wilful purpose, the wilful doing of an act which one knows is liable to injure another, regardless of the consequences, although there may be no specific intention to hurt a par-

§ 29. Punitive, vindictive or exemplary damages defined—Codes.—In four states the Codes provide that “In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, or by way of punishing the defendant.”³⁸ So in Georgia, it is enacted that, “In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff,”³⁹ while another section of the Code reads as follows: “Vindictive damages. In some torts the entire injury is to the peace, happiness of feelings of the plaintiff; in such cases no measure of damages can be prescribed except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. The verdict of a jury in such a case should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy.”⁴⁰

§ 30. Double, treble, triple or increased damages defined.—Double, treble, triple or other increased damages are those given by statute in certain specified cases, being a double, treble or other increased sum given for the better prevention of injuries, the actual damages from which might otherwise be very small.⁴¹

ticular individual or class of individuals. *United States v. Reed* (C. S. D. N. Y.), 86 Fed. 308. See also *Anderson's Dict. Law* (1893), 648.

³⁸ Civ. Code. Cal. (1899) sec. 3294; 1 Mont. Codes (1895), sec. 4290; Rev. Codes, N. D. (1899) sec. 4977; 2 *Grantham's Annot. Stats. S. D.* (1901) sec. 5783.

³⁹ 2 Ga. Civ. Code (1895), sec. 3906 (3066).

⁴⁰ 2 Ga. Civ. Code (1895), sec. 3907 (3067). Under the Georgia Code,

sec. 2943, exemplary damages can never be allowed in cases arising on contract. *Chase v. Western Un. Teleg. Co.*, 44 Fed. 554; 3 Am. Elec. Cas. 817. Although the West Virginia Code allows damages for mental anguish and grief to be recovered against telegraph companies. *Supp. Code W. Va.* (1900) p. 78, act approved March 2, 1900.

⁴¹ “By double or treble damages is understood twice or three times as much as single damages. Statutes

§ 31. Double and single or joint and several damages defined.—Double and single or joint and several damages are those formerly awarded in case of a joint suit against a number, as in actions of joint tenancy, or in trespass for assault and cutting timber, or in trespass against two or three, or in several replevins against several.⁴²

§ 32. Additional damages defined.—Additional damages are those which may be recovered in a new suit when they accrue after the first judgment for injuries caused by negligence.⁴³

§ 33. Liquidated damages defined.—Liquidated damages are those which are definitely fixed by an act of the parties; or those specified by agreement as the amount of damages, under such circumstances and in such terms as do not constitute a penalty; or such damages as are fixed by a judgment of the court.⁴⁴

giving such damages have been liberally construed. The construction has been different from that given to double or treble costs. When double or treble damages are given by a statute, the demand of such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of the statute." Bacon's Abr. (Bouv. 1854) "Damages" (G), p. 81. Increased double or treble damages are where "upon some wrongs the statute authorizes the court to pass judgment for an increased amount as for twice the sum or three times the sum found by the jury." 1 Abb. L. Dict. (ed. 1879) 336. "Single damages as found by the jury enhanced by the court." Anderson's Dict. Law (1893), 305. "Double or treble damages. In some actions statutes give double or treble damages, and they have been liberally construed to mean actually treble damages. . . . Single dam-

ages may be recovered if the claim under the statute is not made out."

2 Bouv. L. Dict. (ed. 1897) 393; See 1 Stover's N. Y. Anno. Civ. Code, sec. 1020, p. 1047; 2 id. sec. 1901, p. 1746; Missouri Pac. R. Co. v. Humes, 115 U. S. 523, per Field, J. ⁴² Viner's Abr. "Damages" (X), (Y). See San Antonio v. Mackey, 14 Tex. Civ. App. 210; 36 S. W. 760; Schoneman v. Fiegley, 7 Pa. St. 433; note 46 Cent. L. J. 387.

⁴³ So under the law of Mexico (Evey v. Mexican C. R. Co. [U. S. C. C. A. 5th C.], 52 U. S. App. 118; 81 Fed. 294; 38 L. R. A. 387), such right to recover is a matter of remedy only. "Damages ultra: additional damages claimed by a plaintiff not satisfied with those paid into court by the defendant." Black's L. Dict. See also definitions herein of punitive, etc., damages.

⁴⁴ Joyce on Elec. Law (ed. 1900), sec. 947; 1 Abb. L. Dict. (ed. 1879) 336; And. Dict. Law (1893), 307; Black's L. Dict. See also Mills v. Paul

§ 34. Liquidated damages—Codes.—"Every contract by which the amount of damage to be paid, or other compensation to be made, for the breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."⁴⁵ The "next section" reads as follows: "The parties to a contract may agree thereon upon the amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."⁴⁶

§ 35. Unliquidated damages defined.—Unliquidated damages are those where the amount is neither fixed by act of the parties nor by judgment of the court, nor made definite by agreement.⁴⁷

§ 36. Temporary or permanent damages defined.—Temporary or permanent damages are terms not infrequently used to denote the character of the damages to be assessed with relation to the nature of an injury to land, as whether it is temporary or permanent.⁴⁸

§ 37. Continuing damages defined.—"Damages incurred or suffered between two dates as the beginning and end of the act, and more or less separated in time," are continuing damages.⁴⁹

(Tex. C. A. 1895), 30 S. W. 558; *Burk v. Dunn*, 55 Ill. App. 25; *Krutz v. Robbins*, 12 Wash. 7; 40 Pac. 415, 28 L. R. A. 676; *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47; *Shute v. Hamilton*, 3 Daly (N. Y.), 462; *Wallis Iron Works v. Monmouth Park Assoc.*, 55 N. J. L. (26 Vr.) 132; 26 Atl. 140; 19 L. R. A. 456. Liquidated damages, in so far as they depend upon agreement or are fixed, are also called stated or stipulated damages.

⁴⁵ Civ. Code Cal. (1899) sec. 1670; 1 Mont. Codes (1895), sec. 2243; Rev. Codes, N. D. (1899) sec. 3923; 2 Grantham's Annot. Stats. S. D. (1901) sec. 4769.

⁴⁶ Civ. Code Cal. (1899) sec. 1671;

1 Mont. Codes (1895), sec. 2244; Rev. Codes, N. D. (1899) sec. 3924; 2 Grantham's Annot. Stats. S. D. (1901) sec. 4770. See *Jack v. Sinshimer*, 125 Cal. 563; 58 Pac. 130, holding that a clause is void in a lease which fixes a certain sum as liquidated damages in case the premises are vacated, under the above Code provision.

⁴⁷ See definition *ante*, herein, of liquidated damages and note thereto. See also *McCord v. Williams*, 2 Ala. 71.

⁴⁸ See *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996; 24 S. E. 730; 32 L. R. A. 708; *Nichols v. Norfolk & C. R. Co.*, 120 N. C. 495; 26 S. E. 643.

⁴⁹ *Anderson's Dict. Law* (1893), 307.

§ 38. Entire damages defined.—Entire damages are those recoverable in one action, even though a part thereof are occasioned or result after action brought; or where the injury is of a permanent or continuing character and successive actions will not lie for the past or future damages; or where the damages are prospective as well as present.⁵⁰

§ 39. Excessive, inadequate or insufficient damages defined.—Excessive damages are those which are so largely in excess of what the circumstances or facts of the case and the law justify as to demonstrate that the jury have acted against the rules of law or have suffered their partiality, passions, prejudices or perverse disregard of justice to mislead them, or which are based upon ignorance or corruption.⁵¹ Inadequate or insufficient damages are those where, by a like test, the sum awarded is manifestly and grossly less than is justified.⁵²

§ 40. Reasonable damages—Code provisions.—“Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”⁵³

⁵⁰ Hughes v. Anderson, 68 Ala. 280; Story (U. S. C. C. D. Me.), 661; Fed. Savannah & O. C. Co. v. Bourquin, 51 Ga. 378; Pendergast v. McCaslin, 2 Ind. 87; Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 34; Benson v. Chicago & A. R. Co., 78 Mo. 504; Troy v. Cheshire R. Co., 23 N. H. 83; Ridley v. Seaboard & R. R. Co., 118 N. C. 996; 24 S. E. 730, 32 L. R. A. 708; Ritter v. Sieger, 105 Pa. 400.

⁵¹ Civ. Code Cal. (1899) sec. 3359; 1 Mont. Codes (1895), sec. 4366; Rev. Codes, N. D. (1899) sec. 5015; 2 Grantham's Annot. Stats. S. D. (1901) sec. 5821.

⁵² Joyce on Elec. Law (ed. 1900), sec. 950; 1 Abb. L. Dict. (ed. 1879)

⁵³ Whipple v. Cumberland Mfg., 2

336.

CHAPTER II.

PARTICULAR TERMS, MAXIMS AND PHRASES.

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| <p>§ 41. <i>Actio non datur non damnificato.</i>
 42. <i>Ad damnum.</i>
 43. <i>Ad quod damnum; writ of.</i>
 44. "Damage by the elements."
 45. <i>Damage feasant.</i>
 46. "Damages, costs and expenses."
 47. <i>Damni injuriæ actio.</i>
 48. <i>Damnify.</i>
 49. <i>Damnum fatale.</i>
 50. <i>Damnum infectum.</i></p> | <p>51. <i>Damnum rei amissæ.</i>
 52. <i>Damnum sine injuria esse potest.</i>
 53. <i>De minimis non curat lex.</i>
 54. <i>Indemnity.</i>
 55. <i>Indeterminate and determinate damages.</i>
 56. <i>Injuria sine damno.</i>
 57. <i>Inquiry of damages; writ of.</i>
 58. <i>Proximate damages.</i>
 59. "Sound in damages."</p> |
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§ 41. *Actio non datur non damnificato.*—These words mean an action is not given to one who is not injured.¹

§ 42. *Ad damnum.*—These words mean "to the damage," and are used to indicate the clause at the conclusion of the plaintiff's declaration, wherein he states the extent or amount of damages claimed. In libels in admiralty the same term is used.²

§ 43. *Ad quod damnum; writ of.*—These words mean "to what damage." Under the New York Code the writ *ad quod damnum* is now styled the "writ of assessment of damages," and is a mode of ascertaining, by an inquisition of damages by the jury, the sum to be paid by the people of the state for taking real property therein, whenever the governor thereof is authorized by law to take possession of the same and he cannot agree with the owners thereof for its purchase. The Code also provides as to the disposition of such damages and the claim-

¹ 1 "Cyc." of L. & P. 633.

² See 1 "Cyc." of L. & P. 763, citing *Abbott's L. Dict.; Jenks v.*

Lewis, 3 Mas. (U. S.) 503; 13 Fed. Cas. No. 7,279. See also Anderson's Dict. Law (1893), 309.

ant's procedure for obtaining them. The writ further applies where the legislature consents to the taking of any real property within the state for the use of the people of the United States.³

§ 44. "Damage by the elements."—These words are declared to be equivalent to act of God.⁴

§ 45. *Damage feasant*.—" (French *faisant*, damage, doing damage) a term usually applied to the injury which animals belonging to one person do upon the land of another by feeding there, treading down his grass, corn or other production of the earth."⁵

§ 46. "Damages, costs and expenses."—"When given as a penalty against a party for the nonperformance of a contract, means the necessary, natural and proximate damages resulting from such nonperformance, and not some remote, accidental or special injury to the party to whom the right of action accrues. Wherever special damages are recovered, it must be on a distinct and definite statement in the complaint."⁶

§ 47. *Damni injuriæ actio*.—" (Latin) In civil law: An action for the damage done by one who intentionally injured the beast of another."⁷

§ 48. *Damnify*.—"To cause damage or injurious loss to a person."⁸

³ Stover's Annot. Code Civ. Proc. N. Y. secs. 2103-2119. See *United States v. Dumplin Island*, 1 Barb. (N. Y.) 24. "A writ which ought to be issued before the owner grants further liberties as a fair market, etc., which may be prejudicial to others. It is addressed to the sheriff to inquire what damage" (a loss) "it may do to make such grant. It is also used to inquire of lands given in mortmain to any house of religion," etc. 1 "Cyo." L. & P. 938. *Anderson's Dict. Law* (1893), 309; 2 *Black. Com.* (1 Cooley) *271.

⁴ *Pope v. Farmers' Union & M. Co.* (Cal. 1900), 62 Pac. 384; 8 Am. Neg.

Rep. 364, used in this case in contract to deliver wheat, etc.; warehouseman.

⁵ 1 Bouv. L. Dict. (ed. 1897) 491. See also *Black's L. Dict.*

⁶ *Low v. Archer*, 12 N. Y. (2 Kern) 277, 282, per Dean, J., citing *Groat v. Gillespie*, 25 Wend. (N. Y.) 383; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535.

⁷ 1 Bouv. L. Dict. (ed. 1897) 494. "*Damni injuriæ actio*; an action given by the civil law for the damage done by one who intentionally injured the slave or beast of another. *Calvin.*" *Black's L. Dict.*

⁸ *Sweet's Dict. of Eng. L.* (ed. 1882) 240.

§§ 49-54 PARTICULAR TERMS, MAXIMS AND PHRASES.

§ 49. **Damnum fatale.**—"Injury from a cause beyond human control. In the civil law injury caused by a fortuitous event or inevitable accident. The phrase was used to distinguish a class of losses for which bailees were not held liable. Among these were included losses by shipwreck, lightning or similar casualty; even losses by fire, by pirates, by robbery, but theft was not included. The term is sometimes used by common-law writers in the same sense."⁹

§ 50. **Damnum infectum.**—"In Roman law damage not yet committed but threatened or impending. A preventive interdict might be obtained to prevent such damage from happening, and it was treated as a quasi delict because of the imminence of the danger."¹⁰

§ 51. **Damnum rei amissae.**—"In the civil law a loss arising from a payment made by a party in consequence of an error of law."¹¹

§ 52. **Damnum sine injuria esse potest.**—"There may be damage or injury inflicted without any act of injustice."¹²

§ 53. **De minimis non curat lex.**—This maxim means that the law does not concern itself about trifles.¹³

§ 54. **Indemnity.**—Indemnity is where a compensation is agreed upon or awarded as a satisfaction commensurate with the damage sustained or liable to accrue.¹⁴

⁹ 1 Abb. L. Dict. (ed. 1879) 337, citing *Thickstun v. Howard*, 8 Blackf. (Ind.) 535. "Damnum fatale. In civil law damages caused by a fortuitous event or inevitable accident; damages arising from the act of God. Among these were included losses by shipwreck, lightning or other casualty; also losses by pirates, or by vis major, by fire, robbery and burglary; but theft was not numbered among these casualties. In general bailees are not liable for such

damages; *Story, Bailees*, 471." 1 Bouv. L. Dict. (ed. 1897) 494. See also Black's Law Dict.; Anderson's Dict. Law.

¹⁰ Black's Law Dict.

¹¹ Black's Law Dict.

¹² Black's Law Dict. (Lofft. 112.)

¹³ Broom's Leg. Max. (7 Am. ed. 1874) 142, 143, 145, 146, 165 n. See secs. 71, 72, *post*, herein.

¹⁴ Examine Anderson's Dict. Law (1893), 534.

§ 55. **Indeterminate and determinate damages.**—These terms have been applied to a certain class of damages to distinguish them from those known as exemplary, punitive or vindictive, the basis for those designated as “indeterminate” being the fact that they can be admeasured by the pecuniary loss, while those which are specified as “determinate” rest upon no definite and exact pecuniary compensation.¹⁵

§ 56. **Injuria sine damno.**—If an injury is done and no legal damage results therefrom, it is *injuria sine damno*, a wrong for which no action lies in law.¹⁶ But it is declared that “it is impossible to imagine any such thing as *injuria sine damno*. Every injury imparts damage in the nature of it.”¹⁷

§ 57. **Inquiry of damages; writ of.**—A writ of inquiry of damages was a process issued after interlocutory judgment in cases where the defendant did not confess the whole damages laid in the declaration, commanding the sheriff to inquire into the damages by a jury of twelve men and return such inquiry into court. The sheriff sat as a judge and tried by jury,

¹⁵ The court specifies three classes: the first being designated as “determinate, pecuniary loss, such as pecuniary loss directly sustained, as by the destruction of property; or consequently sustained, as for instance the pecuniary value of time lost by the plaintiff from injuries inflicted on him, the expenses incurred by him” for medicine, physicians’ bills, etc.; “determinate pecuniary loss is often but inappropriately . . . designated actual loss or remunerative or compensatory damages,” and the court then mentions “indeterminate damages” as distinguished from “determinate damages,” and continuing it says as to the latter that it can be recovered for a tort of any description, and “must always be the natural and proximate consequences of the act complained of by the plaintiff.” “Indeterminate damages” are “such as from their na-

ture cannot be ascertained exactly with any sort of approximation to exactness. . . . Damages of this sort have, I think, been generally but very inappropriately called vindictive damages, exemplary damages or punitive damages,” holding also that compensation only is meant. *Pegram v. Stortz*, 31 W. Va. 220, 230, 237; 6 S. E. S. 485, per Green, J.; *Beck v. Thompson*, 31 W. Va. 459; 7 S. E. 447; 13 Am. St. Rep. 870. These two cases, which allow exemplary damages only under the designation of compensatory damages, are overruled.

¹⁶ See “*Damnum absque injuria*,” *ante*; *Anderson’s Dict. Law* (1893), 310.

¹⁷ *Webb v. Portland Mfg. Co.*, 3 Story (U. S.), 189, per Story, J., quoted in *Blanchard v. Burbank*, 16 Bradw. (16 Ill. App.) 375, 383, per Bailey, J.

subject to nearly the same law and conditions as at trial by jury at nisi prius, and the plaintiff upon return of the inquisition and its entry was entitled to recover the damages assessed which were required to be in some amount, and in like manner, upon demurrer determined for the plaintiff in an action for damages, a writ of inquiry was necessary.¹⁸

§ 58. Proximate or immediate damages.—Proximate damages are those which result from an injury or wrong, as the proximate cause of the damage.¹⁹ Proximate or immediate damages are the ordinary, natural and usual results of an injury which might have been expected.²⁰

§ 59. "Sound in damages."—A term used to designate the character of an action as distinguished from one where the suit is to recover the thing itself instead of a money compensation.²¹

¹⁸ 3 Black. Com. (2 Cooley) *398. As to inquisitions and inquests and the practice as to assessing damages in law or equity, see *Martin v. Price*, Minor (Ala.), 68; *Phillips v. Malone*, Minor (Ala.), 110; *Auditor v. Crise*, 20 Ark. 540; *Smoot v. Schooler* (Ky.), 8 S. W. 202; *Ballard v. Purcell*, 1 Nev. 342; *Love v. Humphrey*, 9 Wend. (N. Y.) 500; *Wright v. Williams*, 2 Wend. (N. Y.) 632; *Wilson v. Darwin*, 1 Hill (N. Y.), 670; *Peck v. Corning*, 2 How. Pr. (N. Y.) 84; *Foster v. Smith*, 10 Wend. (N. Y.) 377; *Abeel v. Wolcott*, *Cole & Caines* (N. Y.), 229; 1 *Caines* (N. Y.), 250; *Kelsey v. Covert*, 15 How. Pr. (N. Y.) 62; 6 Abb. Pr. 336; note 29 Abb. N. C. (N. Y.) 432; *Renner v. Marshall*, 1

Wheat. (U. S.) 215; *Mayhew v. Thatcher*, 6 Wheat. (U. S.) 129; *McCoy v. Elder*, 2 Blackf. (Ind.) 183; *Begg v. Whittier*, 48 Me. 314; *Price v. Dearborn*, 34 N. H. 481; *Warren v. Sheer* (Pa.), 12 Atl. 264; *Miffin v. Comm'rs*, 5 Serg. & R. (Pa.) 69.

¹⁹ See direct, consequential, remote, etc., damages, *ante*, herein, and see proximate cause, *post*, herein.

²⁰ *Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

²¹ Examine *Anderson's Dict. Law* (1893), 959, and see *Bradshaw v. Standard Oil Co.*, 114 Ill. 172, cited *id.* 960.

TITLE II.

GENERAL PRINCIPLES OF LIABILITY AND DAMAGES.

CHAPTER III.

GENERAL PRINCIPLES OF LIABILITY.

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| <p>§ 60. General statement—Distinction between damage and damages, liability and measure of damages.</p> <p>61. Damages generally.</p> <p>62. Fundamental law—<i>Ubi jus ibi remedium</i>.</p> <p>63. Same subject—Violation of statutory duty.</p> <p>64. There must be a breach of some legal duty.</p> <p>65. Same subject—Governmental, judicial, discretionary and police duties and powers—Liability.</p> | <p>66. Moral obligations, duties and wrongs.</p> <p>67. Lawful acts.</p> <p>68. <i>Volenti non fit injuria</i>.</p> <p>69. Accident or casualty.</p> <p>70. Act of God—Inevitable accident.</p> <p>71. <i>Damnum absque injuria</i>—Generally.</p> <p>72. Same subject—Application of the doctrine continued.</p> <p>73. <i>De minimis non curat lex</i>.</p> <p>74. <i>Injuria sine damno</i>.</p> |
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§ 60. General statement—Distinctions between damage and damages, liability and measure of damages.—There are certain underlying principles upon which the right to recover damages in any given case must rest, for damages are the result of or occasioned by certain factors which must exist, else the law does not recognize any legal liability even though there may be an injury. As will be apparent from the preceding definitions, there is a distinction between the terms damage and damages and between liability and measure of damages. The question of liability embraces, if it is not strictly limited to, that of rights and remedies, negligence and contributory negligence and the like. To legally know that a person has caused damage to another is but one step towards determining whether or not he is liable for any damages and if so to what extent. We shall therefore not enter into any extended discussion of

the doctrine of liability alone, considering it only in so far as it is necessary to elucidate the law of damages or measure of damages.

§ 61. Damages generally.—Whenever by virtue of a lawful contract, some right, duty or obligation is created or assumed, or where by common law or by statute some legal duty exists or is imposed with reference to the rights of others, then a legal right of action for damages will accrue from the breach of such contractual obligation, or from the violation by negligence, wilfulness, etc., of such legally imposed duty, having regard to those rules of law which constitute exceptions to the general rule, and which we have fully considered elsewhere in this treatise.¹

¹ See also as to general rule, Joyce on Elec. Law (ed. 1900), sec. 941. "By the common law in all actions, personal and mixt damages were recoverable, 2 Inst. 286, and though the plaintiff recovers the thing itself demanded, yet he also recovers damages; as in detinue. . . . So in all actions upon statutes which give damages to the party grieved, or a certain penalty, the plaintiff recovers damages over and above the penalty, so in an action upon a statute which prohibits anything. But by the common law no damages were recoverable in a real action, 2 Inst. 286; 10 Co. 116a, nor in an assise except against the disseisor himself, 2 Inst. 284, nor in quare impedit, 2 Inst. 362, or partition, 1 Rol. 575, l. 14 . . . nor in disceit upon a recovery by default, 1 Rol. 575, l. 23, nor in account, 1 Rol. 575, l. 8, 11, nor in warrantia chartae . . . nor in scire facias or other writ of execution . . . In personal actions, damages are allowed only to the time of the action commenced . . . and it is now settled as a general rule that when a new action may be brought and a new satisfaction obtained on that for duties

or demands arisen since the commencement of the depending suit; these shall not be included in the judgment on the former actions. . . . But on real actions the demandant shall not count of damages: For he shall recover till the time of the verdict." Comyn's Dig. "Damages." "Sir Edward Coke in his Commentary on the Stat. of Gloucester, 2 Inst. 286, observes that regularly in personal and mixed actions, damages were to be recovered at the common law, but that in real actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demanded no damages either by writ or count." Coke Litt. (Butler & Hargraves' Notes, 1853) 355 (1). In personal actions plaintiff recovers no more damages than he counts for but in real actions he recovers damages pending the suit, and therefore never counts to his damage. Bacon's Abr. (Bouv. 1854) "Damages" (D) 2. pp. 66-68. "By the common law a man could not recover damages in a real action. But in mixed and per-

§ 62. Fundamental law—*Ubi jus ibi remedium*.—It is a well known and constantly asserted maxim of the law that "There is no wrong without a remedy." This is a fundamental legal principle,² which runs through all the decisions wherein damages are sought.³ But this maxim is limited

sonal actions he might." Viner's Abr. "Damages" (P) 44, 45. "At the common law no damages were recoverable in any real action; for the detention of the possession, etc., being the cause of damages, till the right to the land was determined, the party could not be said to suffer any wrong; also the burden of the feudal duties lay upon the tenant in possession, and consequently, he was to receive the *meane profits* until some other made out a better right, who after recovery might have maintained the action of trespass." 3 Bacon's Abr. "Damages" (A).

² Broom's Leg. Maxims (7th Am. ed. 1874), 191. "Jus in the sense in which it is here used signifies 'the legal authority to do or to demand something.' Remedium may be defined to be the right of action or the means given by law for the recovery of a right, and according to the above elementary maxim, whenever the law gives anything, it gives a remedy for the same: *lex semper dabit remedium*. If a man has a right, he must, it has been observed in a celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal (per Holt, C. J., *Ashby v. White*, 2 Ld. Raym. 963; per Willes, C. J.; *Winsore v. Greenbank*, Willes, 577; *Vaugh. R.* 47, 253). It appears then that remedium, although sometimes

used as synonymous with *actio*, has . . . a more extended signification than the word 'action' in its modern sense." Id. 191. See sec. 76 herein.

³ "Every wrong imports a damage." *Adams v. Robinson*, 65 Ala. 586, 591, per Somerville, J. Some damages are always presumed to flow from the violation of any right. *Barlow v. Lowder*, 35 Ark. 492, 493, per English, C. J. A violation of a right is attended with some legal damage of course. *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 210, per Ellsworth, J. The law infers damage from every infringement of a right. The right infringed is property. *McConnell v. Kibbe*, 33 Ill. 174, 179; 85 Am. Dec. 265. The indignity suffered by reason of the unlawful act of another is a proper subject of compensation, whether the act was wanton, malicious or wilful, or whether it was merely negligent or mistaken. *Lake Erie & W. R. Co. v. Christison*, 39 Ill. App. 496. Damages may be recovered where a right is invaded or a wrong done, even though no actual damage be proved. *Foster v. Elliott*, 33 Iowa, 216, 223. Wherever a right is invaded the law presumes damage. *Munroe v. Stickney*, 48 Me. 462. "The plaintiff first proving the defendant to be in fault, or a wrongdoer, then it legitimately follows that it should be held liable for the natural, proximate and direct consequences of its default." *Woodman v. Nottingham*, 49 N. H. 387, 392; 6 Am. Rep. 526, per Nesmith, J. "In

to legal rights and wrongs,⁴ although it applies to common law and statutory rights,⁵ and as in cases relating to the use of electricity, there may be many instances where the wrong is new in character, nevertheless, the remedy is by the adaptation of old or analogous principles in enforcing the right or in obtaining redress for the wrong.⁶ Again the fact that there was no injury, but a benefit conferred, does not operate against the maxim's application.⁷ It is also a general and sound rule of law that where the law gives a remedy for an injury, such remedy shall be commensurate to the damage sustained.⁸

§ 63. Same subject—Violation of statutory duty.—The above rule has also been extended to a violation of a statutory duty to the extent at least of a *prima facie* liability.⁹ There is, however, a doubt as to this rule in so far as it relates to *prima facie* liability, for upon this point the question of burden of

law for every wrong there is a remedy. 3 Black. Com. 123; *Ashby v. White*, 1 Salk. 21. Whenever the law creates or recognizes a private right, it also gives a remedy for the violation of it. 1 Chit. Pl. 83; *Yates v. Joyce*, 11 Johns. (N. Y.) 140; "Lamb v. Stone, 11 Pick. (Mass.) 527, 532, per Morton, J. "Every infraction of legal right causes injury. . . . If the infraction is established, the conclusion of damage inevitably follows." *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293; 44 N. Y. St. R. 557; 30 N. E. 841; rev'g 62 N. Y. St. R. 905; 10 N. Y. Supp. 609. For every infraction of a man's legal rights, the law gives a remedy. *Champion v. Vincent*, 20 Tex. 811, 815. See also *Dudley v. Tilton*, 14 La. Ann. 283, 285; *Holmes v. Barclay*, 4 La. Ann. 64; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S. C. D. Me.) 189; 3 Law Rep. 374; *Fed. Cas. No. 17,322*, per Story, J.; *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S. C. C. D. Me.), 661; *Fed. Cas. No. 17,516*, per Story, J.; *But-*

man v. Hussey, 3 Fairf. (12 Me.) 407; *Hooten v. Barnard*, 137 Mass. 36; *Lund v. New Bedford*, 121 Mass. 286; *Appleton v. Fullerton*, 1 Gray (Mass.), 186, 194; *Londsdale Co. v. Moles*, 2 Cliff. (U. S. C. C. D. R. I.) 538; *Fed. Cas. No. 8,497*, per Clifford, Cir. J.; *Paul v. Slason*, 22 Vt. 231, 238; 54 Am. Dec. 75, per Poland, J.; *Murphy v. Fond du Lac*, 23 Wis. 305, and see secs. 8, 9, herein as to nominal damages.

⁴ See *Wyatt v. Williams*, 43 N. H. 102; *Donovan v. New Orleans*, 11 La. Ann. 711.

⁵ *Stearns v. Atlantic, etc., R. Co.*, 46 Me. 95.

⁶ See *Joyce on Elec. Law* (ed. 1900), "Preface"; examine sec. 14, note 14, et seq. See also *Gosling v. Veley*, 4 H. L. Cas. 679, 768, per Coleridge, J.; *Pasley v. Freeman*, 3 T. R. 51, per Ashhurst, J.

⁷ *Murphy v. Fond du Lac*, 23 Wis. 365.

⁸ *Rockwood v. Allen*, 7 Mass. 254, 256, per Sedgwick, J.

⁹ *Fahey v. Jephcote*, 2 Ont. L. R.

proof rests. To say that for every violation of a statutory duty there is a remedy is in general as true in relation to statutes as at common law; nevertheless there may be a violation of a statutory obligation for which no right of action can be maintained, as where contributory negligence is of a character to preclude any recovery even to the extent that there is no ground of action. Again, the violation of duty imposed by statute may be per se negligence or merely evidence thereof; it may constitute prima facie evidence and not be conclusive, or it may operate to merely shift the burden of proof; it may be a legal wrong and the proximate cause of injury, and yet not of necessity constitute an actionable ground for damages to the extent that some damages must be given by reason alone of the noncompliance with the statute and the consequent injury. In other words a person cannot rely entirely upon another's violation of a statutory duty as a ground of damages for an injury and ignore the legal duties imposed upon himself with reference to avoiding the injury. If, however, a person is injured without any act of omission or commission of his contributing in any degree to the injury and such injury is a legal result of the wrong, then a different question is presented and the rule of liability would probably apply. The above distinctions will be apparent from the appended citations. What we have said is, however, to be qualified to the extent that the statute imposing the duty may also provide expressly for liability.¹⁰

449; violation of sec. 14 of Ont. Factories Act, R. S. O. 1897, ch. 256, rev'g 1 Ont. L. R. 18, overruling *Roberts v. Taylor* (1899), 31 Ont. R. 10.

¹⁰ See *Western Ry. v. Sistrunk*, 85 Ala. 352; 5 So. 79. Contributory negligence defeats recovery for violation by railroad of Arkansas Act, April 8, 1891, sec. 1, as to keeping lookout, etc. *St. Louis, I. M. & S. R. Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *St. Louis & S. W. R. Co. v. Dingman*, 62 Ark. 245; 35 S. W. 219. As to defective sidewalk under Conn. Gen. Stat. sec. 2673, see *Hoyt v. Danbury*, 60 Conn. 341; 37 Atl. 1051. That there is a liability for violation of

statute, see *Knopf v. Philadelphia, W. & B. R. Co.* (Del. Super. 1900), 2 Penn. 392; 46 Atl. 747. See further *Robinson v. Simpson*, 8 Houst. (Del.) 398. Violation of statutory duty is negligence per se. *Central Ga. R. Co. v. Bond*, 111 Ga. 13; 36 S. E. 299; *Barfield v. Southern R. Co.*, 108 Ga. 744; 33 S. E. 988. Only liable to "owner of land" for failure of railroad to maintain cattle guards, etc. See *Florida C. & P. R. Co. v. Judge*, 100 Ga. 600; 28 S. E. 379. As to liability under Ga. Code, sec. 3033, for personal injuries, see *Smith v. Savannah F. & W. R. Co.*, 100 Ga. 96; 27 S. E. 725. Railroad company liable for noncom-

§ 64. There must be a breach of some legal duty.—To recover damages there must be a breach of some legal duty owing

pliance with Ga. Code, sec. 708, requiring signals at highway crossing. *Bowen v. Gainesville J. & S. R. Co.*, 95 Ga. 688; 22 S. E. 695. As to care and diligence required of railroad company under Ga. Code, secs. 2067, 3033, see *East Tennessee V. & G. R. Co. v. Miller*, 95 Ga. 738; 22 S. E. 660; 2 Am. & Eng. R. Cas. N. S. 216. Violation of statutory duty is negligence per se. *Western, etc., R. Co. v. Young*, 81 Ga. 397; 7 S. E. 912. Municipal corporation is not deprived of defense of contributory negligence for injury from defective sidewalk because of charter provision making it liable. *Griffen v. Lewiston (Ida.)*, 55 Pac. 545. Owner is liable for failure to comply with ordinance respecting elevator doors. *Siddall v. Jansen*, 160 Ill. 43; 48 N. E. 191; 39 L. R. A. 112; rev'g 67 Ill. App. 102. See further as to principle, *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Bartlett v. Roach*, 68 Ill. 174. Railroad company is liable for death of engineer through failure to maintain cattle guards as required by statute. *Terre Haute & I. R. Co. v. Williams*, 69 Ill. App. 392. As to violation by railroad company for violation, Ind. Rev. Stat. 189, sec. 2293, and sec. 5156; as to crossings, etc., see *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266; 46 N. E. 75; 8 Am. & Eng. R. Cas. N. S. 48. Railroad company not liable for failure to signal where one driving on tracks is negligent. *Miller v. Terre Haute & I. R. Co.*, 144 Ind. 323; 43 N. E. 257. As to requirement of *Horner's Ind. Rev. Stat. 1897*, sec. 5087, requiring passage to the right by vehicles on streets, see *Decatur v. Stoops*, 21 Ind. App. 397; 1 Repr. 516; 52 N. E.

623. Violation of statute requiring signals, etc., at railway crossing is negligence per se. Ind. Rev. Stat. 1894, secs. 5307, 5308; *Pittsburgh, C. C. & St. L. R. Co. v. Shaw*, 15 Ind. App. 173; 43 N. E. 957. See further *Pennsylvania Co. v. Horton*, 132 Ind. 189. Violation of statutory duty is negligence per se. *Ives v. Walden (Iowa, 1901)*, 87 N. W. 408; 10 Am. Neg. Rep. 590. Railroad company is liable under Iowa Code, 1873, sec. 1289, for live stock killed on unclosed right of way. *Sarver v. Chicago, B. & Q. R. Co.*, 104 Iowa, 59; 73 N. W. 498, dist'g *Soward v. Chicago & N. W. R. Co.*, 33 Iowa, 386. Failure of driver to turn to right on public highway as required by Code, 1873, sec. 1000, is prima facie evidence of negligence. *Cook v. Fogerty*, 103 Iowa, 500; 72 N. W. 677; 39 L. R. A. 488; County is only bound to exercise reasonable and ordinary care and diligence under Laws, 1887, ch. 237, as to defects, etc., in bridges. *Murray v. Woodson Co.*, 58 Kan. 1; 48 Pac. 554. As to defective highways under Gen. Stat. 1889, par. 7134, and liability for injuries, see *Reading Twp. v. Telfer*, 57 Kan. 798; 48 Pac. 134; 2 Am. Neg. Rep. 138. Statutory duty does not change the burden of proof. Id. As to measure of damages to owner of inclosed lands for neglect of railroad company to build cattle guards under Kan. Gen. Stat. 1889, par. 1259, see *Atchison, T. & S. F. R. Co. v. Billings*, 7 Kan. App. 399; 10 Am. & Eng. R. Cas. N. S. 740; 52 Pac. 61. Driver not chargeable with contributory negligence for driving to left on highway. *Loyacano v. Jurgens*, 50 La. Ann. 441; 23 So. 717. Not obligated to strictly

from defendant to the plaintiff," although "while it is true in general that where no duty is owed no liability arises, this rule

comply with statute requiring to drive to right on highway. (Rev. Stat. ch. 26); *Kennard v. Burton*, 25 Me. 39. See *Palmer v. Barker*, 2 Fairf. (11 Me.) 338. As to liability for violation of statute, see *Baltimore R. Co. v. McDonnell*, 43 Md. 552. That street railway company is not liable for neglect to repair between tracks as required by Pub. Stat. ch. 52, sec. 19, and that notice is a prerequisite to an action (Pub. Stat. ch. 52, secs. 19, 18), see *Dobbins v. West End St. R. Co.*, 168 Mass. 556; 47 N. E. 428. This case qualifies the general proposition as to a violation of a statutory duty in that if there is a statutory wrong, the right to an action may be qualified by a statutory condition precedent. A violation of a statute, Rev. Stat. ch. 51, secs. 2, 3, requiring sleighs to have bells, does not render one liable unless his negligence contributed to the injury. *Kidder v. Dunstable*, 11 Gray (Mass.), 342. See further as to liability for violation of statute, *Lane v. Atlantic Works*, 111 Mass. 136; *Saulsbury v. Hirschneider*, 106 Mass. 458. That township is liable under the statute for failure to repair highway, see *Handy v. Meriden Twp.*, 114 Mich. 454; 72 N. W. 251; 4 Det. L. N. 628. Under a statute, Annot. Stat. secs. 9110, 9113, to prevent the careless use of firearms, one is per se guilty of negligence, and is liable when he points a loaded gun towards another and wounds him. *Bahel v. Manning*, 112 Mich. 24; 3 Det. L. N. 619; 70 N. W. 327; 36 L. R. A. 523. That one who violates statutory duty is liable, see *Grand v. Mich-*

igan, etc., R. Co., 83 Mich. 564. Under Code, 1892, sec. 3548, the right to damages for personal injuries caused by railroad company's making flying switch is not precluded by contributory negligence but only by wilful and wanton or reckless conduct. *Pulliman v. Illinois C. R. Co.*, 75 Miss. 627; 1 Miss. Dec. (No. 19) 165; 23 So. 359. As to liability for noncompliance with statute, see also *Illinois C. R. Co. v. McCulip*, 76 Miss. 360; 25 So. 166. Negligence per se not to observe ordinance. *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 157 Mo. 621; 58 S. W. 32. Liability attaches where statute provides for liability for nonobservance. *Kingsbury v. Missouri, K. & T. R. Co.*, 156 Mo. 379; 57 S. W. 547; *Boggs v. Missouri, K. & T. R. Co.*, 156 Mo. 389; 57 S. W. 550. City is not liable to a citizen for permitting building of a character prohibited by ordinance to be erected. *Harman v. St. Louis*, 137 Mo. 494; 38 S. W. 1102. Railroad company is not liable for running at prohibited rate of speed through city where injured person guilty of contributory negligence. *Payne v. Chicago & A. R. Co.*, 136 Mo. 562; 38 S. W. 308. See further as to liability for nonobservance of statute, *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439; 18 S. W. 1103; *Keim v. Union R. Co.*, 90 Mo. 314; 2 S. W. 427; *Schafer v. St. Louis & H. R. Co.*, 65 Mo. App. 201. Violation of statute is evidence of negligence but not conclusive. *Oddie v. Mendenhall* (Minn. 1901), 86 N. W. 881; 10 Am. Neg. Rep. 297. Failure to give statutory signals at county crossing is negligence per se, but

¹¹ For note 11 see page 32.

varies with circumstances," and the question of duty may become one for the jury "to be determined upon all its facts of

company not liable where there is contributory negligence. *Judson v. Great Northern R. Co.*, 63 Minn. 248; 65 N. W. 447. Noncompliance with statute is negligence. *Hunter v. Montana C. R. Co.*, 22 Mont. 525; 57 Pac. 140; 16 Am. & Eng. R. Cas. N. S. 615. Nebraska statute providing for liability of railroad companies for injuries inflicted on passengers does not apply to street railroads or to one whose injury was in part due to his own negligence. (Neb. Comp. Stat. 1897, ch. 72, sec. 3); *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672; 74 N. W. 1074. Neb. Comp. Stat. ch. 16, sec. 104, makes railroad company liable for failure to give statutory signals for penalty or for damages. *Missouri P. R. Co. v. Geist*, 49 Neb. 489; 68 N. W. 640; 5 Am. & Eng. R. Cas. N. S. 421. But the failure must be the proximate cause of the injury. *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627; 67 N. W. 599. Presumption of negligence arises under Comp. Stat. ch. 72, art. 1, sec. 3, making railroad companies liable. *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97; 66 N. W. 1000, 4 Am. & Eng. R. Cas. N. S. 476. Town liable for defective highways under Laws, 1893, ch. 59, sec. 1; *Gale v. Town of Dover* (N. H. 1896), 44 Atl. 535. Noncompliance with statute may constitute actionable negligence and is negligence per se. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; 56 N. E. 548, rev'g 32 App. Div. 627; 53 N. Y. Supp. 1107. See further as to liability for noncompliance with statutory requirement, *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90; 42 N. Y. St. R. 636; 29 N. E. 999; 30 N. E. 865; rev'g 61 Hun, 254; 40 N. Y. St. R. 855; 16 N. Y. Supp. 820; *McReckard v. Flint*, 114 N. Y. 222; 23 N. Y. St. R. 100; 21 N. E. 153; aff'g 13 Daly, 541; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; 22 N. Y. St. R. 675; 21 N. E. 101; aff'g 8 N. Y. St. R. 901; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, rev'g 23 Hun, 159; *Lambert v. Staten Island R. Co.*, 70 N. Y. 104; *Carroll v. Staten Island R. Co.*, 58 N. Y. 128. Imputes negligence, but not conclusive. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282, aff'g 56 Barb. 425; *Hoffman v. Union Ferry Co.*, 47 N. Y. 176. Violation of ordinance does not prove negligence, but is a circumstance to be considered. *Schaffer v. Baker Transfer Co.*, 29 App. Div. (N. Y.) 459; 51 N. Y. Supp. 1092. See further. *Rohling v. Eich*, 23 App. Div. 179; 48 N. Y. Supp. 892; *Riley v. Eastchester*, 18 App. Div. 94; 45 N. Y. Supp. 448; under N. Y. Laws, 1890, ch. 568, secs. 16, 17; *Hanrahan v. Cochran*, 12 App. Div. (N. Y.) 91; *Waller v. Hebron*, 5 App. Div. 577; 39 N. Y. Supp. 381, under N. Y. Laws, 1890, ch. 568, sec. 16; *Schwander v. Birge*, 33 Hun (N. Y.), 186; *Moody v. Osgood*, 60 Barb. (N. Y.) 644. Violation of statute is negligence: *Bradley v. Ohio, R. & C. R. Co.*, 126 N. C. 735; 36 S. E. 181. City liable for omission to keep streets free from nuisance after notice as required by Rev. Stat. secs. 1878, 2640. *Zanesville v. Fannan*, 53 Ohio St. 605; 35 Ohio L. J. 51; 42 N. E. 703. Violation by street car company of statute (Ohio Act, May 4, 1891; 88 Ohio Laws, 582), as to care, caution and signals at railroad crossing is negligence at least in the absence of extraordinary circumstances, and company is liable. *Cincinnati St. R. Co. v. Murray*, 53 Ohio St. 570, 35 Ohio L. J. 22; 42

the probability of danger or the grossness of the acts complained of,"¹² and in a Georgia case it is held that the owner of land

N. E. 596; 30 L. R. A. 508. Failure to maintain statutory sign does not render company liable where injured person knew that crossing existed. *New York C. & St. L. R. Co. v. Kistler*, 16 Ohio C. C. 316. City liable for neglect to comply with statute (Rev. Stat. sec. 2640), as to bridges. *Mooney v. St. Marys*, 15 Ohio C. C. 446. The duty to keep highways free from impediments under Pa. Act, June 13, 1836, does not extend to those upon lands of abutting owners. *Haines v. Barclay Twp.*, 181 Pa. 521; 40 W. N. C. 564; 37 Atl. 560. See further as to liability for non-compliance with statute, *Johnson v. Brown*, 61 Pa. St. 58; *O'Grady v. Baltimore & O. R. Co.* (Pa. C. P.), 28 Pitta. L. J. N. S. 110. Liable for violation of statute, Gen. Laws, ch. 74, sec. 1; providing for driving to the right over highway, *Angell v. St. Louis*, 20 R. I. 391; 39 Atl. 521; 46 Cent. L. J. 287. Cause of action is not given to one injured by violation of Pub. Laws, 1878, ch. 688, sec. 25, providing for protection of elevators. *Behler v. Daniels* (R. I.), 31 Atl. 582. Violation of statute is negligence per se. *Bowen v. Southern R. Co.* (S. C. 1900), 36 S. E. 590. Failure to give statutory signals contributes to injury, even though not the efficient cause thereof (Rev. Stat. 1893, sec. 1892), *Wragge v. South Carolina & G. R. Co.*, 74 S. C. 105; 25 S. E. 76; 33 L. R. A. 191; 4 Am. & Eng. R. Cas. N. S. 639; and company is liable for collisions to which such neglect contributed even though not the proximate cause (id.) unless the person injured was guilty of "gross or wilful negligence." *Strother v. South Carolina & G. R. Co.*, 47 S. C. 375; 25 S. E. 272; 5 Am. & Eng. R. Cas. N. S. 430. Right of action is absolute for statute is imperative. *Illinois C. R. Co. v. Davis*, 104 Tenn. 442; 58 S. W. 296. When no liability for violation of. *Shannon's Code*, secs. 1601, 1603, 1605. Providing for driving to the right on highway. *Young v. Conden*, 98 Tenn. 577; 40 S. W. 1088. Violation of statute is negligence. *Texas & P. R. Co. v. Moore* (Tex. Civ. App. 1900), 56 S. W. 248. Violation of statute is actionable when it occasioned the injury. *Missouri, K. & T. R. Co. of Tex. v. Cardena* (Tex. Civ. App. 1899), 54 S. W. 312. Is liable. *Houston & T. C. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114; 53 S. W. 834. Railroad company liable for failure to construct cattle guard (Rev. Stat. 1895, art. 4527). *Southern Kan. R. Co. v. Isaacs*, 20 Tex. Civ. App. 197; 49 S. W. 690. See further, *Central Tex. & N. W. R. Co. v. Bush*, 12 Tex. Civ. App. 291; 34 S. W. 133; 3 Am. & Eng. R. Cas. N. S. 264. Company liable for failure to construct fences and cattle guards even though contributory negligence (R. L. sec. 3412). *Harwood v. Bennington & R. R. Co.*, 67 Vt. 664; 32 Atl. 721. Negligence per se but not necessarily actionable negligence. *Brown v. Chicago & N. W. R. Co.* (Wis. 1901), 85 N. W. 271; 9 Am. Neg. Rep. 403. Not liable when failure to construct fence in no way contributed to injury. *Sutton v. Chicago, St. P. M. & O. R. Co.*, 98 Wis. 157; 73 N. W. 993; 10 Am. & Eng. R. Cas. N. S. 100. Liable. *Morton v. Smith*, 48 Wis. 265. City

¹² For note 12 see page 32.

owes no legal duty to trespassing children to so guard an excavation on said land as to prevent injury to them when they come thereupon without his invitation, express or implied, and the court, per Fish, J., in the course of an exhaustive opinion says: "Under the facts stated was the defendant company liable in damages to the plaintiff for the death of his child? This question turns upon another; that is, whether or not the company owed the child any legal duty which it neglected to perform, for there can be no actionable negligence without breach of a legal duty."¹² So a person incurs no duties towards others by not warning or driving them from his premises, and they go there, if mere volunteers, at their own risk; and tacit permission to go upon premises is not sufficient as a ground for dam-

liable in Florida for neglect to repair streets as required by statute (U. S. C. C. A. 5th C.), 24 C. C. A. 97; 41 U. S. App. 657; 78 Fed. 292, citing several Florida cases. Company not liable to trespasser for its noncompliance with ordinance regulating rate of speed. *Sheehan v. St. Paul & D. R. Co.* (U. S. C. C. A. 7th C.), 22 C. C. A. 121; 46 U. S. App. 498; 76 Fed. 201; *Felton v. Aubrey* (U. S. C. C. A. 8th C.), 20 C. C. A. 436; 43 U. S. App. 278; 74 Fed. 350. Violation of Va. Code, sec. 1258, as to erection of fences, does not make company liable for death of employee resulting therefrom. *Newsom v. Norfolk & W. R. Co.* (U. S. C. C. W. D. Va.), 81 Fed. 133, *aff'd* 23 C. C. A. 669; 42 U. S. App. 282; 78 Fed. 94; 2 Va. L. Reg. 882. See *The Pennsylvania*, 19 Wall. (U. S.) 136. Although a statute provides for daily forfeiture against gas companies for failure to restore street, yet a gas company is liable for injury resulting from negligently filling up a trench where the statute also provides that nothing shall prevent said company's liability to legal proceedings in consequence of making or supplying gas

(English Gas Works Clauses, Acts 1847, secs. 11, 29); *Goodson v. Sunbury Gas Consumers' Co.* (Q. B.), 75 Law T. Rep. 251. When much traveled highway is not in state of repair within the fatal accidents act. R. S. O. ch. 166; *Foley v. East Flamborough Twp.* (Can.), 26 Ont. App. 43. City is liable for loss of revenues from failure to perform statutory duty of widening and prolonging a street. *Montreal v. Gauthier*, Rap. Jud. Quebec, 7 B. R., 100. See generally *Chaplin v. Hawes*, 3 Car & P. 554; *Cruden v. Fentham*, 2 Esp. 685; *White v. Gnaedinger*, Rap. Jud. Quebec, 7 B. R. 156. See further as to acts done in violation of law or ordinance, note, 53 Am. Rep. 52-55.

¹¹ *Healey v. Ballantine & Sons* (N. J. 1901), 49 Atl. 511; 10 Am. Neg. Rep. 155, 159, per Depue, Ch. J., quoting Erle, Ch. J., in *Cox v. Burbridge*, 13 C. B. (N. S.) 430. As to duty as essential element of negligence, see note 12, L. R. A. 323.

¹² *Tucker v. Draper* (Neb. 1901), 86 N. W. 917; 10 Am. Neg. Rep. 307, 313, per Sedgwick, C.

¹³ *Savannah, Fla. & W. R. Co. v. Beavers* (Ga. 1901), 39 S. E. 82; 10 Am. Neg. Rep. 8, 12, 13.

ages for injuries to children occasioned by the negligent condition of such premises.¹⁴ But if one expressly or impliedly invites another upon his land and such person is injured by failure of the owner's duty to keep the premises in a reasonably safe condition, the owner is liable in damages.¹⁵

¹⁴ *Formall v. Standard Oil Co.* (Mich. 1901), 86 N. W. 946; 10 Am. Neg. Rep. 402. See also *Cleveland, C. C. & St. L. R. Co. v. Ballantine* (U. S. C. C. A. 7th C.), 56 U. S. App. 266; 28 C. C. A. 572; 84 Fed. 935; 4 Am. Neg. Rep. 735.

¹⁵ *Tucker v. Draper* (Neb. 1901), 86 N. W. 917; 10 Am. Neg. Rep. 307, case of death of child from falling into well. See *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554; 75 N. W. 919; 41 L. R. A. 677; 4 Am. Neg. Rep. 451. As to liability of railroad companies for accidents to children on turntables, see note 9 Am. Neg. Rep. 611, 616; note 14 L. R. A. 781. As to duty to trespassers and liability to children trespassing on railroad tracks, see *Alabama G. S. R. Co. v. Moorer*, 116 Ala. 642; 22 So. 900; 9 Am. & Eng. R. Cas. N. S. 742; 3 Am. Neg. Rep. 317, and note. See further as to duty as to trespassers, licensees and invited persons, *Baltimore & P. R. Co. v. Cumberland* (U. S. Sup. D. C.), 176 U. S. 232; 20 S. Ct. 380, aff'g 12 App. D. C. 598; *Chicago & A. R. Co. v. Kelly*, 182 Ill. 267; 54 N. E. 979, aff'g 80 Ill. App. 675; *John Spry Lumber Co. v. Duggan*, 182 Ill. 218; 54 N. E. 102, aff'g 80 Ill. App. 392; *Jelinaki v. Belt R. Co.*, 86 Ill. App. 535; *Robards v. Wabash R. Co.*, 84 Ill. App. 477; *Cleveland, C. C. & St. L. R. Co. v. Tartt* (U. S. C. C. A. 111.), 39 C. C. A. 568; 99 Fed. 369; *Biggs v. Barb Wire Co.*, 60 Kan. 217; 44 L. R. A. 655; *Gunn v. Felton* (Ky. 1900), 57 S. W. 15; *Moffatt v. Kenney*, 174 Mass. 311; 54 N. E. 850; 6 Am. Neg. Rep. 564; *McCarvel v. Sawyer*, 173

Mass. 540; *Stevens v. Nichols*, 155 Mass. 472; 29 N. E. 1150; 15 L. R. A. 459; *Herrick v. Wixom*, 121 Mich. 384, 389; *Alabama & V. R. Co. v. Carter*, 77 Miss. 511; 27 So. 993; *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 157 Mo. 621; 58 S. W. 32; *Hamilton v. Minneapolis Desk Mfg. Co.* (Minn. 1899), 80 N. W. 693; *Kayserv. Lindell*, 73 Minn. 123; *Buck v. Mfg. Co.*, 69 N. H. 257; *O'Leary v. Erie R. Co.*, 64 N. Y. Supp. 511; 51 App. Div. 25; *Quirk v. Siegel-Cooper Co.*, 60 N. Y. St. R. 228; 43 App. Div. 464, aff'g 56 N. Y. Supp. 49; 26 Misc. 244; *Fogarty v. Bogart*, 60 N. St. R. 81; 43 App. Div. 430; *Arro-wood v. South Carolina & G. E. R. Co.*, 126 N. C. 629; 36 S. E. 151; *Toledo Real Estate & Inv. Co. v. Putney*, 44 Ohio Cir. Ct. R. 486; 10 O. C. D. 698; *Ludden v. Columbus & C. M. R. Co.*, 7 Ohio, N. P. 106; 9 Ohio S. & C. P. Dec. 793; *Smith v. New-ark Ice & C. S. Co.*, 8 Ohio S. & C. P. Dec. 283; *Brady v. Prettyman*, 193 Pa. St. 628; 44 Atl. 919; *Brague v. Ry. Co.*, 192 Pa. St. 242; *Texas & P. R. Co. v. Barrett* (Tex. Civ. App. 1900), 57 S. W. 602; *International & G. N. R. Co. v. Brooks* (Tex. Civ. App. 1899), 54 S. W. 1056; *Huff v. Chesapeake & O. R. Co.* (W. Va. 1900), 35 S. E. 866; *Ritz v. City of Wheeling*, 45 W. Va. 262; *Schug v. Ry. Co.*, 102 Wis. 515. See also as to liability of owner of premises for defective condition, notes, 5 L. R. A. 580; 7 id. 620; as to trespasser or licensee, note, 9 L. R. A. 640; as to dangerous condition of private grounds, etc., note, 26 L. R. A. 686.

§ 65. Same subject—Governmental, judicial, discretionary and police duties and powers—Liability.—It may be generally stated that there must be some breach of a duty imposed upon a municipal corporation by law to render it liable for a mere non-feasance,¹⁶ and where a city is under no duty to keep up a bridge, its failure to do so is not negligence entitling one injured by its being defective to damages.¹⁷ In considering, however, what duties are imposed upon a municipality with reference to a right of action, both statutory obligations and implied liability are important factors; the next division is that of liability upon contracts and of liability in actions of tort; while next in order

¹⁶ *Montreal v. Mulcair*, 28 Can. S. C. 458.

¹⁷ *Crawford v. Mayor, etc.*, of Griffin (Ga. 1901), 10 Am. Neg. Rep. 26, 28; 38 S. E. 988. As to liability of cities, counties, etc., for defective bridges, see, *Lee Co. v. Yarbrough*, 85 Ala. 590; *El Paso Co. v. Bish*, 18 Colo. 474; *Daly v. New Haven*, 60 Conn. 644; 38 Atl. 397; *City of Sandersville v. Hurst*, 111 Ga. 453; 36 S. E. 757; *Cook v. De Kalb Co.*, 95 Ga. 218; *Grays v. Bibb Co.*, 94 Ga. 698; *Arnold v. Henry Co.*, 81 Ga. 780; *Arline v. Laurens Co.*, 77 Ga. 249; *Gwinnett Co. v. Dunn*, 74 Ga. 358; *People, Corey v. Dover & O. H. Commrs.*, 153 Ill. 197; 41 N. E. 1105; *Johnson Co. v. Hemphill* (Ind. App.), 41 N. E. 965, rev'd 14 Ind. App. 219; 42 N. E. 760; *Bonebrake v. Huntington Co.*, 141 Ind. 62; *Allen Co. Commrs. v. Creviston*, 133 Ind. 39; *Wabash v. Carver*, 129 Ind. 453; 13 L. R. A. 851; *Fulton Co. v. Rickell*, 106 Ind. 501; *Walrod v. Webster Co.* (Iowa, 1900), 81 N. W. 598; 47 L. R. A. 480; *Faulk v. Iowa Co.*, 103 Iowa, 442; *Weirs v. Jones Co.*, 80 Iowa, 351; *Cooper v. Mills Co.*, 69 Iowa, 350; *Commrs. of Worcester Co. v. Ryckman*, 91 Md. 36; 46 Atl. 317; *Pearl v. Benton Twp.* (Mich. 1900), 82 N. W. 226; *White v. Riley*

Twp. (Mich. 1899), 80 N. W. 124; *Travis v. Skinner*, 72 Mich. 152; *Anderson v. City of St. Cloud* (Minn. 1900), 81 N. W. 746; *State v. Vaughn*, 77 Miss. 681; 27 So. 999; *Cohea v. Coffeeville*, 69 Miss. 561; *Pundman v. St. Charles Co.*, 110 Mo. 594; *Duncan v. State*, 42 Neb. 804; *Hollingsworth v. Saunders Co.*, 36 Neb. 141; *Jernee v. Monmouth Co.*, 52 N. S. L. 553; 11 L. R. A. 416; *Markey v. Queens Co.*, 154 N. Y. 675; 49 N. E. 71; 39 L. R. A. 46, aff'g 9 App. Div. 627; *Reiss v. Town of Pelham*, 65 N. Y. Supp. 1033, aff'g 62 N. Y. Supp. 607; *Cooley v. Trustees of N. Y. & B. Bridge*, 45 App. Div. (N. Y.) 243; 61 N. Y. Supp. 1; *Allen v. Queens Co.*, 84 Hun (N. Y.), 399; *Smith v. Wright*, 27 Barb. (N. Y.) 621; *Board of Commrs. of Hardin Co. v. Coffman*, 60 Ohio St. 527; 54 N. E. 1054; 48 L. R. A. 455; 18 Ohio Cir. Ct. R. 254; 10 O. C. D. 91; *Templeton v. Linn Co.*, 22 Or. 313; 15 L. R. A. 730; *Riddle v. Delaware Co.*, 156 Pa. 643; *Cope v. Hampton Co.*, 42 S. C. 17; *Brown v. Laurens Co.*, 38 S. C. 282; *Bailey v. Lawrence Co.*, 5 S. D. 393; *Heigel v. Wichita Co.*, 84 Tex. 392; *City of Marshall v. McAllister*, 22 Tex. Civ. App. 214; 54 S. W. 1068; *Rohrbough v. Barber Co.*, 39 W. Va. 472.

is the distinction between municipal corporations strictly existing as such and which are organized under special charter or the general law and those which exist under the general designation of counties, towns, school districts, etc., and which are designated as quasi corporations. These questions, however, are only briefly noticed here as they are not within the scope of this treatise except in a general way.¹⁸ Again municipal corporations may become liable for the acts or omissions of others, which it may be helpless to prevent, and their responsibility is not to be measured by that rule which applied to individuals in regard to their own acts,¹⁹ and while they are not liable for the manner in which they exercise their discretionary powers of a public, legislative or quasi judicial nature, nevertheless where their powers become ministerial duties, and there is a negligent performance thereof, there is a remedy in an action for damages.²⁰

¹⁸ See as to civil actions and liabilities and as to the general divisions above, note, 2 Dillon on Munic. Corp. (4th ed.) secs. 935 et seq., 948 et seq., 961 et seq., 980 et seq.; Tiedeman on Munic. Corp. (ed. 1900) secs. 324, 325 et seq.

¹⁹ Greer v. New York, 4 Rob. (N. Y.) 675; 1 Abb. Pr. N. S. (N. Y.) 206, and see Wallace v. New York, 2 Hilt. (N. Y.) 440; 18 How. Pr. (N. Y.) 169.

²⁰ Chicago v. Seben, 165 Ill. 371; 46 N. E. 244, aff'g 62 Ill. App. 248. "A municipal corporation is not impliedly liable to an action for damages, either for the nonexercise of, or for the manner in which in good faith it exercises discretionary powers of a public or legislative character . . . There may be however . . . an implied liability for the negligent or unskilful manner in which strictly corporate powers, as distinguished from public powers, are carried into execution, although there was no perfect duty resting on the corporation to enter upon the works, or undertakings involving the exercise of

such powers. But the liability in such cases attaches only when the duties cease to be judicial in their nature and become ministerial. This is the principle; its application, as will be hereafter seen, is oftentimes extremely difficult." 2 Dillon on Munic. Corp. (4th ed.) sec. 949. See also Tiedeman on Munic. Corp. (ed. 1900) secs. 327 et seq. The powers with which municipal corporations are generally invested, within the scope of their charter, are "generally regarded as discretionary, because in their nature they are legislative, and although it is the duty of such corporations to carry out the powers so granted, and to make them beneficial, it has never been held that an action would lie against the corporation at the suit of an individual for a failure on their part to perform such duty. But where a duty of general interest is enjoined, and it appears that the burden was imposed in consideration of the privileges granted and enjoined, and the means to perform the duty are placed at the disposition of the corporation,

So the construction of a sewer has been decided to be a ministerial work for which a liability arises, if in the construction there is carelessness or negligence and an injury is caused thereby,²¹ and if injury results to plaintiff through defective construction of a sewer, and consequent flooding of his land, it constitutes a taking of his property without compensation within the meaning of the constitution.²² So one is not estopped from a recovery for the reduction of a grade, the necessity of which she should have foreseen, as where she places her house on the top of a ridge,²³ and although a municipal corporation acts judicially when it selects and adopts a plan for public improvement, yet it acts ministerially in executing the work, and must carry it on in a reasonably safe and skillful manner.²⁴ Again where an injury results to a person by reason of negligence of contractors in executing a work under contract with a city which has solely to do with the business functions of the municipality, but which is in no sense in furtherance of a public duty, the city is liable;²⁵ although in so far as a city discharges a governmental function in causing arrests to be made by its police officers, it is not liable therefor,²⁶ nor is a municipality liable for the negligence of officers of the board of health in performing their duty, inasmuch as it is a function of the municipality, by reason of being a political division of the state.²⁷

they are clearly liable to the public if they unreasonably neglect to comply with the requirements of the charter, and where all the foregoing conditions concur, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence or unskillfulness in its performance." 4 Wait's Act. and Def. 631, 632 et seq.

²¹ *Donahew v. Kansas City*, 136 Mo. 657; 38 S. W. 571.

²² *Thurston v. St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463.

²³ *McGar v. Bristol*, 71 Conn. 652; 42 Atl. 1,000 (Conn. Gen. Stat. sec. 2703).

²⁴ *Chicago v. Seben*, 165 Ill. 371; 46 N. E. 244, aff'g 62 Ill. App. 248.

²⁵ *Twist v. Rochester*, 37 App. Div. (N. Y.) 307; 55 N. Y. Supp. 850.

²⁶ *Colely v. Statesville*, 121 N. C. 301; 28 S. E. 482, and see note, 15 L. R. A. 283.

²⁷ *Gilboy v. Detroit*, 115 Mich. 121; 73 N. W. 128; 4 Dict. L. N. 841, citing numerous cases. See further as to general principles involved in the above text as to liability of municipal, etc., corporations, and as to governmental, judicial, discretionary and police duties and powers, *Melvin v. State*, 121 Cal. 16; 53 Pac. 416; *Platt v. City of Waterbury*, 72 Conn. 531; 45 Atl. 154; *Carswell v. Wilmington*, 2 Marv. (Del.) 360; 43 Atl. 169; *Gray v. City of Griffin*, 111 Ga. 361; 36 S. E. 792; *Tarbutton v. Town*

Again matters which come within the police powers or police regulations of a municipality may operate to relieve such cor-

of Tennille, 110 Ga. 90; 35 S. E. 282; Wyatt v. Rome, 105 Ga. 312; 31 S. E. 188; 42 L. R. A. 180; Estes v. Macon, 103 Ga. 780; 30 S. E. 246; Love v. Atlanta, 95 Ga. 129; Brinkmeyer v. Evansville, 29 Ind. 187; Vanhorn v. Des Moines, 63 Iowa, 447; 19 N. W. 293; Planters' Oil Mill v. Monroe Waterworks & L. Co., 52 La. Ann. 1243; 27 So. 684; Yule v. City of New Orleans, 25 La. Ann. 394; Commissioners v. Duckett, 20 Md. 468; Bent v. Emery, 173 Mass. 495; 53 N. E. 910; McGowan v. Boston, 170 Mass. 384; 49 N. E. 633; Tainter v. Worcester, 123 Mass. 311; Monge v. City of Grand Rapids (Mich. 1900), 81 N. W. 574; Burrledge v. City of Detroit, 117 Mich. 557; Schuett v. Sullwater (Minn. 1900), 83 N. W. 180; Boye v. City of Albert Lea, 74 Minn. 230; Rives v. City of Columbia, 80 Mo. App. 173; 2 Mo. App. Rep. 537; Downend v. City of Kansas City, 156 Mo. 60; 56 S. W. 902; Smith v. City of Sedalia, 152 Mo. 283; 53 S. W. 907; Young v. Webb City, 150 Mo. 333; Ogle v. City of Cumberland, 90 Mo. 59; 44 Atl. 1015; Bowman v. City of Omaha, 59 Neb. 84; 80 N. W. 259; City of Lincoln v. O'Brien, 56 Neb. 761; Clark v. Elizabeth, 61 N. J. L. 565; 49 Atl. 616, 737; Jansen v. Jersey City, 61 N. J. L. 243; 39 Atl. 1025; Re Greer, 39 App. Div. (N. Y.) 22; 56 N. Y. Supp. 938; Quill v. New York, 36 App. Div. 476; 55 N. Y. Supp. 889; 5 Am. Neg. Rep. 423; Springfield F. & M. Ins. Co. v. Village of Keeseville, 148 N. Y. 56; 42 N. E. 405, *rev'g* 80 Hun, 162; 61 N. Y. St. R. 711; 29 N. Y. Supp. 1130; Barton v. Syracuse, 37 Barb. (N. Y.) 292, *aff'd* 36 N. Y. 54; Hickok v. Plattsburgh, 16 N. Y. 161, note; Betham v. Philadelphia, 196 Pa. St. 302; 46 Atl. 448; Irving's Exrs. v. Borough of Media, 194 Pa. St. 648; 45 Atl. 482; Barksdale v. City of Laurens, 58 S. C. 413; 36 S. E. 661; Garraux v. Greenville, 53 S. C. 575; 31 S. E. 597; Connelly v. Nashville, 100 Tenn. 262; 46 S. W. 566; City of Dallas v. Webb, 22 Tex. Civ. App. 48; 54 S. W. 398; Jones v. City of Williamsburg, 97 Va. 722; 34 S. E. 883; Wood v. City of Hinton (W. Va. 1900), 35 S. E. 824; Mendel v. Wheeling, 28 W. Va. 233; Whilty v. City of Oshkosh (Wis. 1900), 81 N. W. 992; Weightman v. Washington, 1 Black (U. S.), 39; Dent v. Bournemouth Corp., 66 L. J. Q. B. N. S. 395. As to judicial and ministerial powers of such corporations, see note, 79 Am. Dec. 475-477. As to their liability for neglect of contractor, see note to 22 Am. Rep. 510, 511. As to liability where damages are occasioned in execution of sovereign powers, see note, 66 Am. Dec. 434-442. As to their liability for negligence or unskillfulness of agents, see note, 53 Am. Dec. 320-322. As to their liability for grading and regrading streets, see note, 43 Am. Dec. 723-725. As to their liability for injuries through want of repair or defects in public buildings, see note, 5 Am. Dec. 43-45; for insufficient system of drainage, see note, 54 Am. Rep. 671, 672; for neglect to repair streets, see note, 63 Am. Dec. 350-357; for injuries caused by horses becoming frightened in streets, see note, 98 Am. Dec. 608-612; for property destroyed by mobs, see note, 56 Am. Dec. 580-590; as affected by employment of contractors, 74 Am. Dec. 761, 762; for unauthorized acts of offi-

§ 66. **Moral obligations, duties and wrongs.**—Legal obligations should not be confounded with those sentiments which are independent of the law and rest merely on grounds of feeling or moral considerations.³⁵ For, as has been declared in a Massachusetts case, "It is very clear that there may be many moral wrongs for which there can be no legal remedy, and there may be legal torts in which the damage to individuals may be very great, and yet so remote, contingent or indefinite as to furnish no good ground of action."³⁶ Again, rights have been classified into natural, moral and legal, but a practical definition which may be applied with certainty is most difficult, if not impossible, to formulate. It is certain, however, that there exist many moral rights, claims or duties, for the nonperformance of which there can be no legal redress. "Many duties are by nature or by circumstances imposed upon human beings, which the state never attempts to enforce," while "by legal rights are intended those to which the state gives its sanction," which "is the sanction of remedies. So that a legal right may be said to be a claim which can be enforced by legal means against the persons or the community whose duty it is to respect it. . . . There is no necessary identity or even relation of legal right and moral right . . . many moral claims, as we have seen, cannot be converted into legal demands."³⁷ It is also a maxim that *ex nudo pacto non*

against the state, see *Fitts v. McGhee*, 172 U. S. 516; 19 Sup. Ct. Rep. 269; 43 L. Ed. 535; 31 Chic. L. News, 207. When action against state officer is not suit against the state, see *Tindal v. Wesley*, 167 U. S. 264; 17 Sup. Ct. Rep. 770; 29 Chic. L. News, 337; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 420; 14 Sup. Ct. Rep. 1047, 1082; 38 L. Ed. 1014, 1031; 4 Inters. Com. R. 560, 578; *Yale College v. Sanger* (U. S. C. C. D. Conn.), 62 Fed. 177. For illustration of suit where state strips herself of sovereignty and acts in capacity of a private person, see *Southern R. Co. v. North Carolina R. Co.* (U. S. C. C. W. D. N. C.), 81 Fed. 595.

³⁵ *Formall v. Standard Oil Co.* (Mich. 1901), 86 N. W. 946; 10 Am.

Neg. Rep. 402, 413, per Grant, J., quoting from *Hargreaves v. Deacon*, 25 Mich. 1.

³⁶ *Lamb v. Stone*, 11 Pick. (Mass.) 527, 532, per Morton, J. See *Roman Catholic Church v. Martin*, 4 Rob. (La.) 62; *Raudlette v. Judkins*, 77 Me. 114; 52 Am. Rep. 747; *Commonwealth v. McDuffy*, 126 Mass. 469; *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.), 507; 49 Am. Rep. 666; *McGuire v. Kiveland*, 56 Vt. 62; *Ohio, etc., R. Co. v. Kasson*, 37 N. Y. 218, 224; 1 "Cyc." L. & P. 645.

³⁷ 1 Blackstone's Comm. (1 Cooley's Black. 4th ed.) * 122-* 124, note 2. See also 1 Wait's Act. & Def. (1877) p. 12 et seq.; *Edes v. Boardman*, 58 N. H. 580, per Doe, C. J.

oritur actio, that is, that no cause of action arises from a bare promise, and even though such gratuitous promise may constitute a moral obligation, no legal responsibility is created, for a contract must, as a rule, be based upon some consideration in law other than a merely moral one in the ethical sense.³

§ 67. **Lawful acts.**—It is a maxim of the law that one should enjoy his own property in such a manner as not to injure that of another person—*Sic utere tuo ut alienum non laedas*³—and the cases to which this maxim is applicable are very numerous, and it is said that the exceptions are few.⁴ In its application this maxim is not, however, intended to take away from any person the right to improve his own property in a lawful manner, but the law requires that when he shall attempt to do so he must use it with a due regard for the rights of other people and in every way, legally possible, he must avoid injury to those rights. If he goes beyond, he makes himself liable to respond to his neighbor in damages.⁴ Again it is a general principle of law that a person is entitled to the reasonable exercise of a legal

³ Broom's Leg. Max. (7th Am. ed. 1874) 745-751, * 752 et seq. See as to moral obligations and exceptions to rule, Anson's Law of Contracts (8th ed. 1895), 89, * 75; 2 Blackstone's Comm. (1 Cooley's Black. 4th ed.) * 445; 1 Wait's Act. & Def. (1877) 104; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527. "Nor is a mere moral obligation in the ethical sense of the term, without any pecuniary benefit to the party or previous request, a sufficient consideration to support even an express promise; unless where a legal obligation once existed, which is barred by positive statute or rule of law, such as the statute of limitations, or of bankruptcy, or the law of infancy, coverture or the like. 2 Greenl. on Ev. (16th ed.) sec. 107. As to distinction between "moral obligation" in the "broad, ethical sense," and when "used merely to denote those duties which would be

enforced at law through the medium of an implied promise," see note, id.

³ Broom's Leg. Max. (7th Am. ed. 1874) 364. "The maxim that a man must so make use of his own property as not to injure his neighbor is undoubtedly to be so limited in its application as not to restrain the owner of property from a prudent and reasonable exercise of his right of dominion. If in such an exercise of his right, another sustains damage, it is *damnum absque injuria*." *Gardner v. Heartt*, 2 Barb. (N. Y.) 165, 168, per Harris, J.

⁴ *Hill v. Schneider*, 13 App. Div. (N. Y.) 299; 42 N. Y. Supp. 1; 1 Am. Neg. Rep. 141, per Rumsey, J.

⁴ *Hill v. Schneider*, 13 App. Div. (N. Y.) 299; 42 N. Y. Supp. 1; 1 Am. Neg. Rep. 141, per Rumsey, J., citing *Morgan v. Bowes*, 62 Hun (N. Y.), 623; 17 N. Y. Supp. 22; 42 N. Y. St. R. 791; *Booth v. Rome*, W. & O. T.

right and is not answerable in damages therefor in the absence of negligence or malice.⁴² So a man is entitled to do any lawful act upon his own land, and to lawfully use the same in the manner most advantageous to himself, provided he violates no duty owing to others or to the state, and that he is not guilty of negligence, recklessness or wantonness; this includes the paramount right of others to the use and undisturbed possession of their own property, and by rights of others is understood generally their rights under the law. So the use of one's own, means a reasonable and ordinary use. This principle further extends to persons legally designated as such, and it includes municipal corporations, the state, etc.⁴³

R. Co., 140 N. Y. 267; 55 N. Y. St. R. 656; 35 N. E. 592, which rev'd 44 N. Y. St. R. 9; 17 N. Y. Supp. 336.

⁴² *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Calkins v. Barger*, 44 Barb. (N. Y.) 424; *Stuart v. Hawley*, 22 Barb. (N. Y.) 619; *Livingston v. Adams*, 8 Cow. (N. Y.) 175.

⁴³ "It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another, without any legal wrong." *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 146; 6 Atl. 453; 57 Am. Rep. 445, per Clark, J. "The maxim *sic utere tuo ut alienum non laedas* is not of universal application; for as a general rule, a man who exercises proper care and skill may do what he will with his own property. He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property . . . There is another class of cases . . . where a man

must answer for the consequences of an act lawful in itself, because it was done in so negligent or unskillful a manner as to cause an injury to another . . . But a man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow: nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part." *Radcliff v. Mayor, etc., of Brooklyn*, 4 N. Y. (Comstock) 195, 198-200; 53 Am. Dec. 357n, per Bronson, Ch. J. See also *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554; 75 N. W. 919; 41 L. R. A. 877; 4 Am. Neg. Rep. 451, 457. "The defendant did a lawful act on his own premises and we cannot hold him responsible for injurious consequences that may have arisen by reason of it, unless it was so done as to constitute actionable negligence," but an act may be lawful but so neg-

§ 68. Volenti non fit injuria.—It is a legal maxim that that to which a person assents is not esteemed in law an injury, for

ligently done that an injury immediately follows to the property or person of another and so render him liable. *Howland v. Vincent*, 10 Metc. (Mass.) 371, 373, 374; 43 Am. Dec. 442, per Hubbard, J. In this case the injury was to a person by falling into an excavation made by one on his own land near to a public street. Where the vibrations from the working of the engines of an electric light company rendered the plaintiff's house almost uninhabitable and created a nuisance, even though no actual, structural injury was done, the right to an injunction and to have damages assessed exists, although no statutory compensation was provided for injuries of such character, and the company had no compulsory power to take lands. *Hopkin v. Hamilton Elec. L. & C. Co.*, 2 Ont. L. R. 240. The plaintiff had had no opportunity of objecting to the location of defendant's works. The company was incorporated under Ont. Cos. Act, R. S. Ont. 1897, ch. 200. See generally as to the maxim and as to the principles stated in the text and the modifications thereof, *Weil v. St. Louis S. W. R. Co.*, 64 Ark. 535; 43 S. W. 967; 9 Am. & Eng. R. Cas. N. S. 721. *Briscoe v. Alfrey*, 61 Ark. 196; 32 S. W. 505; 30 L. R. A. 607; *The Maling*; *The S. A. McCaulley* (U. S. D. C. D. Cal.), 110 Fed. 227; 10 Am. Neg. Rep. 357, 367, per Bradford, Dist. J.; *Joseph v. Ager*, 108 Cal. 517; 41 Pac. 422; *Suffolk G. M. & M. Co. v. San Miguel Con. M. & M. Co.*, 9 Colo. App. 407; 48 Pac. 828; *Ockerhausen v. Tyson*, 71 Conn. 31; 40 Atl. 104; *Whitney v. Bartholomew*, 21 Conn. 213; *Bailey v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 389; 44

Am. Dec. 593; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586; 20 So. 780; 33 L. R. A. 376; *Smith v. Clarke Hardware Co.*, 100 Ga. 163; 28 S. E. 73; 39 L. R. A. 607; *Arave v. Idaho Canal Co. (Id.)*, 46 Pac. 1024; *Pepin v. McMahon*, 154 Ill. 141; 39 N. E. 484; 27 L. R. A. 286, aff'g 53 Ill. App. 189; *Stumps v. Kelly*, 22 Ill. 140; *Durham v. Musselman*, 2 Blackf. (Ind.) 96; 18 Am. Dec. 133; *Humpton v. Unterkircher*, 97 Iowa, 509; 66 N. W. 776; *Herr v. Central Ky. L. Asy.*, 17 Ky. L. Rep. 320; 30 S. W. 971; 41 Cent. L. J. 37; 28 L. R. A. 394; *Scott v. Bay*, 3 Md. 431; *Gildersleeve v. Hammond*, 100 Mich. 431; 67 N. W. 519; 3 Det. L. N. 117; 43 Cent. L. J. 97; 33 L. R. A. 46; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 533; *Jacobson v. Van Boening*, 48 Neb. 80; 66 N. W. 993; 58 Am. St. Rep. 684; 32 L. R. A. 229; *Union Mill & M. Co. v. Daughberg* (U. S. C. C. D. Nev.), 81 Fed. 73; *State v. Griffin*, 69 N. H. 1; 39 Atl. 260; 41 L. R. A. 177; *Ladd v. Granite State Brick Co. (N. H.)*, 37 Atl. 1041; *Sterling Iron & Z. Co. v. Sparks Mfg. Co. (N. J.)*, 38 Atl. 426; *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233; 23 Atl. 810; *Forbell v. New York*, 47 App. Div. (N. Y.) 371; 6 N. Y. Supp. 1005; aff'd 164 N. Y. 522; 58 N. E. 644; *Smith v. Brooklyn*, 18 App. Div. (N. Y.) 340; 46 N. Y. Supp. 141; *Newell v. Woolfolk*, 91 Hun (N. Y.), 211; 71 N. Y. St. R. 129; 36 N. Y. Supp. 327; *Mairs v. Manhattan Real Est. Assoc.*, 80 N. Y. 498; 15 J. & S. (N. Y.) 31; *Phelps v. Nowlen*, 72 N. Y. 39; *Victory v. Baker*, 67 N. Y. 366; *Bellinger v. New York C. R. Co.*, 23 N. Y. 42; *Van Pelt v. McGraw*, 4 N. Y. 110; *Pick-*

if a man consents to the act which occasions his loss, he can maintain no action for the wrong committed, and this maxim has been applied to the doctrine of contributory negligence." So in a case which has been the subject of much discussion, it is said that "the maxim, *volenti non fit injuria*, is applicable in actions for negligence, as in other cases. The doctrine of the assumption of risk is merely a formal statement of this maxim in its application to concrete cases."⁴⁵ And where a person went upon the premises of a railroad company to witness a conflagration upon its grounds, in the face of an obvious danger of ex-

ard v. Collins, 23 Barb. (N. Y.) 444; Farrand v. Marshall, 21 Barb. (N. Y.) 400; Gardner v. Heartt, 2 Barb. (N. Y.) 165; Mark v. Hudson R. B. Co., 56 How. Pr. (N. Y.) 108, *aff'd* 103 N. Y. 29; Norton v. North Carolina R. Co., 122 N. C. 910; 29 S. E. 886; Staton v. Norfolk & C. C. R. Co., 111 N. C. 278; 16 S. E. 181; 52 Am. & Eng. R. Cas. 686; Robertson v. Youghiogheny Riv. C. Co., 172 Pa. 566; 27 Pitta. L. J. N. S. 67; 33 Atl. 706; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126; 6 Atl. 453; Woodring v. Forks Twp., 28 Pa. St. 355; 70 Am. Dec. 134; Troth v. Wills, 8 Pa. Super. Ct. 1; 42 W. N. C. 504; Taylor v. Granger, 19 R. I. 410; 37 Atl. 13; Frost v. Berkely Phos. Co., 42 S. C. 402; 20 S. E. 280; 26 L. R. A. 693; McLauchlin v. Charlotte, etc., R. Co., 5 Rich. (S. C.) 583; Cumberland Teleph. & Tel. Co. v. United Elec. R. Co., 93 Tenn. 492; 29 S. W. 104; 27 L. R. A. 236; 10 Am. R. & Corp. Rep. 549; Payne v. Western, etc., R. Co., 13 Lea (Tenn.), 507; 49 Am. Rep. 666; Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1; 44 S. W. 936; People v. Burtleson, 14 Utah, 258; 47 Pac. 87; Willett v. St. Albans, 69 Vt. 330; 38 Atl. 72; State v. Harrington, 68 Vt. 622; 35 Atl. 515; 34 L. R. A. 100; Chatfield v. Wilson, 28 Vt. 49; South Royalton Bk. v. Suffolk Bk., 27 Vt. 505; Ka-

rasek v. Peier, 22 Wash. 419; 61 Pac. 33; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169; 41 L. Ed. 118; 16 Sup. Ct. Rep. 1002; 75 Off. Gaz. 1703; Montana Co. v. Gehring (U. S. C. C. A. 9th C.), 44 U. S. App. 629; 75 Fed. 384; Lake Erie & W. R. Co. v. Fremont (U. S. C. C. A. 6th C.), 34 C. C. A. 625; 92 Fed. 721, *rev'g* 5 Ohio L. R. 140; West Cumberland Iron, etc., Co. v. Kenyon, 11 Ch. D. 782, *rev'g* 6 Ch. D. 773; Rex v. Sewer Commrs., 8 B. & C. 355; Deane v. Clayton, 7 Taunt. 490, 529; St. John Young Men's C. A. v. Hutchison, 18 N. B. 523. See also note, 9 L. R. A. 910; 1 "Cyc." L. & P. 647 *et seq.* and note, *id.*, "Strictures upon common law maxim." See also *secs. post*, herein, "*Damnun absque injuria*."

⁴⁴ Broom's Leg. Max. (7th Am. ed. 1874) 267, citing Gould v. Oliver, 4 B. N. C. 142 (33 E. C. L. R.), per Tindal, J.; Haddon v. Ayres, 1 E. & E. 148 (102 E. C. L. R.); Byam v. Bul-lard, 1 Curt. (U. S.) 101, per Curtis, J.; Caswell v. Worth, 6 E. & B. 849 (85 E. C. L. R.); Senior v. Ward, 1 E. & E. 385, 393 (102 E. C. L. R.).

⁴⁵ Davis v. Forbes, 171 Mass. 548; 51 N. E. 20; 4 Am. Neg. Rep. 289, 298, per Knowles, J., in dissenting opinion. See 32 Am. L. Rev. 57. See as to assumption of risk, 1 Bailey's Pers. Inj., Master & Servant (ed. 1897), *secs. 455 et seq.*

plosion, it was decided that he assumed the risks of the situation. "He went without inducement or invitation, and without legal right, and assumed the perils of the situation. He voluntarily and negligently exposed his person to danger,—'Volenti non fit injuria.' The railway company owed him no active duty—only the duty to abstain, during his presence on the premises, from positive, wrongful act which might result in an injury to him."⁴⁵ The cases, however, are numerous wherein this maxim is involved, and as it is not the purpose of this treatise to consider other than general principles of liability underlying the law of damages, we shall only cite certain decisions wherein the rule *volenti non fit injuria* has been applied.⁴⁶

⁴⁵ *Cleveland, C. C. & St. L. R. Co. v. Ballentine* (U. S. C. C. A. 7th C.), 56 U. S. App. 266; 28 C. C. A. 572; 84 Fed. 935; 4 Am. Neg. Rep. 735, 739, per Jenkins, Cir. J.

⁴⁶ *Bridges v. Tennessee Coal I. & R. Co.*, 109 Ala. 287; 19 So. 495; *Churchill v. Baumann*, 95 Cal. 541; 10 Pac. 770; *Higgins v. Lansingh*, 154 Ill. 301; 40 N. E. 362; *Pope v. Lake Co.* (U. S. C. C. D. Ind.), 51 Fed. 769; 40 Am. & Eng. Corp. Cas. 646; *Anderson Foundry & M. Works v. Meyer*, 15 Ind. App. 385; 44 N. E. 193; *Snyder v. Lexington*, 20 Ky. L. Rep. 1562; 49 S. W. 765; *Board of Admrs. v. McKowen*, 48 La. Ann. 251; 19 So. 328, 553; *Kansas City, S. & G. R. Co. v. Roberts*, 9 La. Ann. 859; 21 So. 630; *Mundle v. Hill Mfg. Co.*, 86 Me. 400; 30 Atl. 16; *O'Maley v. South Boston Gas-light Co.*, 158 Mass. 135; 32 N. E. 1119; *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 626; 21 So. 748; *Coxwell v. Prince* (Miss.), 19 So. 237; *Baker v. Barber Asphalt P. Co.* (U. S. C. C. W. D. Mo.), 92 Fed. 117; *Aufdenberg v. St. Louis, I. M. & S. R. Co.*, 132 Mo. 565; 34 S. W. 485; 3 Am. & Eng. R. Cas. N. S. 323; *Schwartzschild & S. Co. v. Savannah, F. & W. R. Co.*, 76 Mo. App. 623; 1 Mo. A.

Repr. 588; *Wright v. Wright* (N. J.), 43 Atl. 447; *Knisley v. Pratt*, 148 N. Y. 372; 42 N. E. 986; 32 L. R. A. 367; rev'g 75 Hun (N. Y.), 323; 31 Abb. N. C. (N. Y.) 289; 58 N. Y. St. R. 213; 26 N. Y. Supp. 1010; *Hagen-aers v. Herbst*, 30 App. Div. (N. Y.) 546; 52 N. Y. Supp. 360; *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544; 26 N. E. 922; *Scarlett v. Norwood*, 115 N. C. 284; 20 S. E. 459; *Allegheny Co. v. Grier*, 179 Pa. 639; 27 Pitts. L. J. N. S. 427; 36 Atl. 353; *Houseman v. Grossman*, 177 Pa. 453; 39 W. N. C. 276; 35 Atl. 736; *Manford v. McVeigh*, 92 Va. 446; 23 S. E. 857; 1 Va. Law Reg. 734; *Wagner v. National L. Ins. Co.* (U. S. C. C. A. 6th C.), 61 U. S. App. 691; 33 C. C. A. 121; 90 Fed. 395; *Kingman & Co. v. Stoddard* (U. S. C. C. A. 7th C.), 57 U. S. App. 379; 29 C. C. A. 413; 85 Fed. 740; *West v. Southern P. R. Co.* (U. S. C. C. A. 8th C.), 56 U. S. App. 323; 29 C. C. A. 219; 85 Fed. 392; *Cleveland, C. C. & St. L. R. Co. v. Ballentine* (U. S. C. C. A. 7th C.), 56 U. S. App. 266; 28 C. C. A. 572; 84 Fed. 935; *Carolan v. Southern P. R. Co.* (U. S. C. C. N. D. Cal.), 84 Fed. 84; *Southern Pac. R. Co. v. Johnson* (U. S. C. C. A. 9th C.), 44 U. S. A. 1; 16 C. C.

§ 69. **Accident or casualty.**—An accident or casualty which results from the doing of a lawful act in a lawful manner and which could not by the exercise of ordinary human care or foresight have been foreseen or prevented, constitutes as a rule no ground of liability, although it has also been determined that there must be an extraordinary degree of care to have prevented the accident. These distinctions, however, as to the degree of care imposed, ought to depend upon the circumstances, having in view the use of the thing or property and its dangerous or harmless character.* Thus one may become responsible for the results of an accidental explosion where he has knowledge of the dangerous character of the explosives, and by reason thereof his acts are held to be reckless and careless.* But where servants of the defendant opened a box of nitroglycerine and

A. 317; 69 Fed. 559; *New Orleans & N. E. R. Co. v. Thomas* (U. S. C. C. A. 5th C.), 60 Fed. 379; *Williams v. Birmingham, B. & M. Co.*, 68 L. J. Q. B. N. S. 918 (C. A. 1899), 2 Q. B. 338; *Smith v. Baker* (H. of L. 1891), L. R. 1 App. Cas. 325; *Thruswell v. Handyside* (Q. B. D. 1888), L. R. 20 Q. B. D. 359; *Yarmouth v. France*, 19 Q. B. D. 647 L. R.; *Pritchett v. Poole* (Q. B.), 76 Law T. Rep. 472; *Canada A. R. Co. v. Hurdman*, 25 Can. S. C. 205; *Price v. Roy*, 29 Can. S. C. 494, rev'g in part Rep. Jud. Queb. 8 B. R. 170.

* Where plaintiff and his helper, a fellow-servant, were working together and the plaintiff sustained a personal injury which was the result of a mere accident, it was held error to refuse to charge that for such an accident there could be no recovery. *Webster Mfg. Co. v. Nisbett*, 87 Ill. App. 551. Where an accident to an employee could not have been foreseen by the master, the latter is not liable. *Independent Tug Line v. Jacobson*, 84 Ill. App. 684. An injury occasioned by a slight inequality in a sidewalk, which is not defective, and which is the result of a simple

accident, may not be the ground of an action. *Haggerty v. City of Lewiston* (Me. 1901), 50 Atl. 55; 10 Am. Neg. Rep. 394. Where bacteria, germinated from animal matter in a beef packing house, lodged in an employee's eye and destroyed his sight, the master was held not liable. *Hysell v. Swift & Co.*, 78 Mo. App. 39; 2 Mo. App. Repr. 124. But the injury cannot be attributed to inevitable accident, as in case of a collision between vessels where there was nothing in the action of the elements which contributed to produce the same. *The Chicago* (U. S. C. C. A. N. Y.), 40 C. C. A. 680; 100 Fed. 999, aff'd 71 Fed. 537. If accident could not have been foreseen by the exercise of ordinary human care and foresight, no action lies. *Harvey v. Dunlop, Lalor* (N. Y.), 193. That an extraordinary degree of care is required, see *Vincent v. Steinhauer*, 7 Vt. 62; 29 Am. Dec. 45. For definition of "accident," "accidental" see 3 Joyce on Ins. (ed. 1897) sec. 2863, note. See further sec. 70 *post*, herein.

* *Evans v. Hoggart* (Kan. App. 1899), 59 Pac. 381.

it exploded, injuring certain person, including the plaintiffs, and defendant had no knowledge of or reason to suspect the dangerous character of the contents of said box, it was decided that they were not liable for the accident;⁵⁰ and it was determined in the same case that the measure of care against accidents which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own. Again, while a person is not generally liable for damages for an injury, which is the result of an accident, yet if one has threatened another with a loaded gun in a controversy about a disputed boundary and injury results by the discharge of the gun, either by reason of the careless handling and without intention or on purpose, the injured one would be entitled to recover at least compensatory damages.⁵¹

§ 70. Act of God—Inevitable accident.—It is a constantly asserted maxim that the act of God is so treated in law as to affect no one injuriously,—*actus Dei nemini facit injuriam*. The act of God signifies any inevitable accident occurring without the intervention of man.⁵² Again, accidents are divided into those which occur without any human agency and those which are the result thereof.⁵³ This term has been variously defined, but the principal elements of the definitions are that the thing which happens is inevitable, and that which man's foresight, industry or care could not have prevented, something independent of and

⁵⁰ The Nitro Glycerine Case, 15 Wall. (U. S.) 524.

⁵¹ James v. Hayes (Kan. 1901), 65 Pac. 241; 10 Am. Neg. Rep. 56, 58. "Where one is engaged in a lawful act, an act not mischievous, rash, reckless or foolish, or naturally liable to result in injury to others, he is not responsible for damages due to unavoidable accident or casualty. 1 "Cyc." L. & P. 652, citing Bizell v. Booker, 16 Ark. 306; Morris v. Platt, 32 Conn. 75; Durham v. Musselman, 8 Blackf. (Ind.) 96; 18 Am. Dec. 133; Brown v. Kendall, 6 Cush. (Mass.) 292, and other decisions. English

Fatal Accidents Acts 1846, 1864, do not apply for benefit of aliens abroad. Adam v. British & F. S. Co. (1898), 2 Q. B. 430; 67 L. J. Q. B. N. S. 844. Party not liable for accident, etc., if without fault under La. Rev. Civ. Code, art. 2754; New Orleans & N. E. R. Co. v. McEwen, 49 La. Ann. 1184; 2 So. 675; 38 L. R. A. 134; 7 Am. & Eng. R. Cas. N. S. 742.

⁵² Broom's Leg. Max. (7th Am. ed. 1874) 229.

⁵³ 3 Joyce on Ins. (ed. 1897) sec. 2863, note, p. 2811, where definitions of "accident" are considered.

opposed to the act of man. A distinction has also been made between "act of God" and inevitable accident,⁵⁴ and there must be no negligence or want of skill, diligence or judgment, for in an act of God no amount of skill, judgment or wisdom can prevent the damage or injury.⁵⁵ So it is declared that the injury must not be such as could have been prevented by human foresight, care or skill, but must have been exclusively occasioned by natural causes. Nor in case of carriers must the property have been unnecessarily exposed to the destructive force, nor have been brought in contact therewith through any previous negligence or act of the carrier, which his foresight or industry and skill could have prevented, as in case of unnecessary and negligent delay.⁵⁶ Thus a landslide in a railway cut, caused by an ordinary fall of rain, is not an "act of God" which exempts a railway company from liability for injuries to passengers caused thereby,⁵⁷ and the sickness of a tenant is not an "act of God" excusing his legal obligations under a lease.⁵⁸ Nor is a heavy dew which delays a railway train an "act of God."⁵⁹ But fire may be,⁶⁰ or a sudden snowstorm,⁶¹ or storms of such unusual violence as to surprise cautious and reasonable men,⁶² or a sudden

⁵⁴ Broom's Leg. Max. (7th Am. ed. 1874) 230; 1 "Cyc." of L. & P. 758, where numerous cases are cited with their application to the various subjects. Anderson's Dict. of L. (1893) 23. See also Anson on Contracts (8th ed.), top. pp. 339, 340; Desty's Shipp. & Admr. (ed. 1879) secs. 250, 259; Elliott on Rds. (ed. 1897) secs. 941, 1455-1457, 1481, 1534, 1651, 1695; Hutchinson on Carriers (2d ed.), secs. 174-178 et seq.; 1 Shearman & Redf. on Neg. (5th ed.) secs. 16, 39; Thomas on Neg. (ed. 1895) 129-134; notes, 11 L. R. A. 615; 30 id. 820; notes, 97 Am. Dec. 408-411; 46 id. 592. As to act of God or accident being an excuse for nonpayment of premium of insurance, see 2 Joyce on Ins. (ed. 1897) sec. 135.

⁵⁵ Smith v. North American Tr. Co., 20 Wash. 580; 56 Pac. 372; 44 L. R. A. 557; 5 Am. Neg. Rep. 738, 740.

⁵⁶ Wald v. Pittsburgh, C. C. & St. L. R. Co., 162 Ill. 545; 44 N. E. 888; 43 Cent. L. J. 423; 5 Am. & Eng. R. Cas. N. S. 70; 35 L. R. A. 356.

⁵⁷ Gleeson v. Virginia Midland R. Co., 140 U. S. 435. See Southwestern Tel. & T. Co. v. Robinson, 50 Fed. 813.

⁵⁸ Mason v. Wierengo, 113 Mich. 151; 71 N. W. 489; 4 Det. L. N. 250.

⁵⁹ Missouri, K. & T. R. Co. v. Truskett (Ind. T. 1899), 53 S. W. 444.

⁶⁰ Farley v. Lavary (Ky. 1900), 54 S. W. 840. But see Spencer v. Murphy, 6 Ill. App. 453; 41 Pac. 841.

⁶¹ Cunningham v. Wabash R. Co., 79 Mo. App. 524; 2 Mo. App. Rep. 465.

⁶² Lisonbee v. Monroe Irrig. Co., 18 Utah, 343; 54 Pac. 1009. But see Grant v. Armour (C. P.), 25 Ont. 7.

and severe whirlwind, the like of which had never before occurred in that locality.⁶³ Again it is not necessary, in order to escape liability for nonperformance occasioned by an act of God, to provide against such a contingency,⁶⁴ and if a contract provides for its fulfillment, "wind, tide and other acts of God permitting," nevertheless, if such act of God does not prevent the execution of such contract by other reasonable and available means, performance is not excused thereby.⁶⁵

§ 71. *Damnum absque injuria*—Generally.—This doctrine is extensive in its application. It lies in reality at the basis of liability to the extent that damage without an injury precludes liability; no right has been invaded in law and there is no remedy, and thus, even though a loss or damage has actually been sustained for the act occasioning the same, is neither unjust nor illegal.⁶⁶ Thus the maxim applies to the use of streets by two electric companies, since the one necessarily inflicts some incidental damage upon the other,⁶⁷ and where there is a diversion of business by the laying of tracks of a rival company in the street, the maxim is applicable.⁶⁸ It has also been applied to the case

⁶³ *Gulf C. & S. F. R. Co. v. Compton* (Tex. Civ. App.), 38 S. W. 220. See as to flood, *Smith v. Western R. Co. of Ala.*, 91 Ala. 455; 11 L. R. A. 619; *Winters v. State* (Id.), 47 Pac. 855; *Wald v. Pittsburgh, C. C. & St. L. R. Co.*, 162 Ill. 545; 44 N. E. 688; 43 Cent. L. J. 423; 5 Am. & Eng. R. Cas. N. S. 70; 35 L. R. A. 356; *Illinois C. R. Co. v. Heisner*, 45 Ill. App. 143; *Long v. Pennsylvania R. Co.*, 147 Pa. 343; 14 L. R. A. 341; *Satterlee v. United States*, 30 Ct. Cl. 31. As to rights of riparian proprietor where water course diverted by act of God, see *Wholey v. Caldwell*, 108 Cal. 95; 41 Pac. 31; 49 Am. St. Rep. 64; 30 L. R. A. 820.

⁶⁴ So held in *Gleason v. United States*, 33 Ct. Cl. 65. See *Allen v. Quann*, 80 Ill. App. 547. But examine *Mississippi Logging Co. v. Robson* (U. S. C. C. A. 8th C.), 16

C. C. A. 400; 32 U. S. A. 520; 69 Fed. 773.

⁶⁵ *Adams v. Ames*, 19 Wash. 425; 53 Pac. 546. See *Mississippi Logging Co. v. Robson* (U. S. C. C. A. 8th C.), 16 C. C. A. 400; 32 U. S. App. 520; 69 Fed. 773.

⁶⁶ See *Kennet & A. N. Co. v. Witherington*, 18 Q. B. 531; *Backhouse v. Bononie*, 9 H. L. Cas. 503; *Rogers v. Dutt*, 13 Moore P. C. C. 209, 237, 241; *Blaymire v. Healey*, 6 Mees. & W. 55. See sec. 76, herein.

⁶⁷ *Birmingham Tract. Co. v. Southern Bell Teleph. & Teleg. Co.*, 119 Ala. 114; 24 So. 731. See *Consolidated Tract. Co. v. South Orange & M. Tract. Co.*, 36 N. J. Eq. 569; 40 Atl. 15, cited in *Joyce on Electric Law* (ed. 1900), sec. 405, and see *id.* secs. 295-321.

⁶⁸ *Grand Ave. R. Co. v. Citizens R. Co.*, 148 Mo. 665; 50 S. W. 305.

of a grade crossing of a railroad and electric road;⁶⁶ to consequential damages caused to one tract of land by taking another for public purposes;⁶⁷ to the building of railroad bridges over streets and liability to the fee-owner;⁶⁸ to electric street railroads and telephone companies and injury to business of the one by electric currents;⁶⁹ to riparian owners' rights;⁷⁰ to the obstruction of a public street by an elevated railway structure;⁷¹ to lateral support;⁷² and in numerous other cases.⁷³

⁶⁶ *New York, N. H. & H. R. Co. v. Bridgeport Tract. Co.*, 65 Conn. 416; 32 Atl. 953; 29 L. R. A. 367, cited in *Joyce on Electric Law* (ed. 1900), secs. 348, 409, 414, as to the rights of the different parties in such case.

⁶⁷ *Kuhl v. Chicago & N. W. R. Co.*, 101 Wis. 42; 77 N. W. 155.

⁶⁸ *Jones v. Erie & W. V. R. Co.*, 151 Pa. St. 30; 25 Atl. 134; 31 W. N. C. 1; 17 L. R. A. 758; 31 Am. St. Rep. 722; 46 Alb. L. J. 467; 6 Am. R. & Corp. Rep. 563.

⁶⁹ *Hudson R. Teleph. Co. v. Water-vliet T. & R. Co.*, 61 Hun (N. Y.), 140; 21 C. P. 204; 39 N. Y. St. Rep. 952; 15 N. Y. Supp. 752; 10 Ry. & Corp. L. J. 364, case rev'd 135 N. Y. 393; 48 N. Y. St. R. 417; 82 N. E. 148. See citations of this case in *Joyce on Elect. Law* (ed. 1900), where it is considered fully.

⁷⁰ *Mesnager v. Englehardt*, 108 Cal. 68; 41 Pac. 20.

⁷¹ *Lake St. El. Ry. Co. v. Brooks*, 90 Ill. App. 173.

⁷² *Gildersleeve v. Hammond*, 109 Mich. 431; 67 N. W. 519; 3 Del. L. N. 117; 43 Cent. L. J. 97; 33 L. R. A. 46.

⁷³ *Graham v. Reno* (Colo. App.), 38 Pac. 835, a case of invalid levy of attachment. *Selden v. Jacksonville*, 28 Fla. 558; 10 So. 457; 14 L. R. A. 370, eminent domain; change of grade of street and right of ingress, egress of abutting owner. *Albany v. Sikes*, 94 Ga. 30; 28 L. R. A. 653, maxim ap-

plicable to property damaged by prosecution of public work before adoption of present constitution of state. *Burrows v. Sycamore*, 150 Ill. 588; 37 N. E. 1096; 25 L. R. A. 535, rev'g 49 Ill. App. 590, erection of stand-pipe in city street. *Chicago, M. & St. P. R. Co. v. Durke*, 148 Ill. 226; 35 N. E. 750; 57 Am. & Eng. R. Cas. 577; *Barnard v. Shirley*, 151 Ind. 160; 47 N. E. 671; 41 L. R. A. 737, a case of sinking an artesian well on one's own land and flowing into another stream on other land. *Hirth v. Indianapolis*, 18 Ind. App. 673; 48 N. E. 876, change of street grade, *Kinney v. Kinney*, 104 Iowa, 703; 74 N. W. 688; 40 L. R. A. 626, not liable for natural growth of partition hedge. *Clemens v. Speed*, 93 Ky. 284; 19 S. W. 660; 19 L. R. A. 240, a case of party walls and injury to building; no recovery. *Kinnard v. Standard Oil Co.*, 11 Ky. L. Rep. 692; 12 S. W. 937; 7 L. R. A. 451; 41 Alb. L. J. 227; 30 Cent. L. J. 267, springs of water were injured by percolating oil and recovery had. *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214; 16 So. 806; 27 L. R. A. 416, injury to plaintiff's business by influencing others to cease relations. *Shanfelter v. Baltimore*, 80 Md. 483; 31 Atl. 439; 27 L. R. A. 648, delay or failure to purchase or condemn land for courthouse site gives no right of action. *Lincoln v. Com.*, 164 Mass. 368; 41 N. E. 489, land

§ 72. Same subject—Application of doctrine continued.—

Damage done to a neighbor's house by the jarring of the ground or concussion of the air, due to blasting carefully done upon adjoining premises, is a case of *damnum absque injuria*,⁷⁷ and if, in the legitimate and proper use of a machine or appliance which is a necessary means to a lawful end, or the performance of a duty imposed by law, such as a steam roller to keep streets in repair, an injury is occasioned to one of the public, and there is reasonable notice to the public of such use, such injury is *damnum absque injuria*.⁷⁸ So a technical breach of trust may

taken for sewer. *Beck v. Railway*, T. P. U., 118 Mich. 497; 77 N. W. 13; 5 Det. L. N. 599; 42 L. R. A. 407, may interfere with employer's business by peaceable means without coercion but may not boycott. *Davis v. Shaefer* (U. S. C. C. W. D. Mo.), 50 Fed. 764; *Jacobson v. Van Boening*, 48 Neb. 80; 66 N. W. 993; 32 L. R. A. 229, a case of surface waters. *Andrews v. Bay Creek R. Co.*, 60 N. J. L. 610; 36 Atl. 826, expenses of litigation incident to condemnation proceedings not recoverable. *New York Health Dept. v. Trinity Church*, 145 N. Y. 32; 64 N. Y. St. R. 507, 512; 39 N. E. 833; 27 L. R. A. 710, police regulations regulating improvement or use of property for public health and benefit. *Taylor v. New York & H. R. Co.*, 27 App. Div. (N. Y.) 190; 50 N. Y. Supp. 697, a case of eminent domain, railroads and use of street. *Reining v. New York, L. & W. R. Co.*, 123 N. Y. 157; 40 N. Y. St. R. 392, 401; 28 N. E. 640; 14 L. R. A. 133; 10 Ry. & Corp. L. J. 462 (40 N. Y. St. R. 401, affirms 27 N. Y. St. R. 39; 7 N. Y. Supp. 516); a case of railroads and change of grade and appropriation of street. *Smawley v. Rutherford Co.*, 122 N. C. 607; 29 S. E. 904, constitutional law; minorities must submit to a majority, and there is no wrong done. *Columbus & H. C. & I. Co.*

v. Tucker, 48 Ohio St. 41; 26 N. E. 630; 25 Ohio L. J. 105; 12 L. R. A. 577; 43 Alb. L. J. 289, a case of pollution of water and riparian rights. *Henderson v. Phila. & R. R. Co.*, 144 Pa. St. 461; 28 W. N. C. 479; 22 Atl. 851; 44 Alb. L. J. 479; 48 Am. & Eng. R. Cas. 16, setting fires by sparks from locomotive engine. *Paris Mountain W. Co. v. Greenville*, 53 S. C. 82; 30 S. E. 699, alteration of streets; statutory remedy is not within maxim. *Chattanooga v. Neely*, 97 Tenn. 527; 37 S. W. 281, alteration of streets. *Wootters v. Crockett*, 11 Tex. Civ. App. 474; 33 S. W. 391, alteration of highways. *Raycroft v. Tayntor*, 68 Vt. 219; 35 Atl. 53; 33 L. R. A. 225; 43 Cent. L. J. 222, no liability for causing servant's discharge. *Home Bldg. & C. Co. v. Roanoke*, 91 Va. 52; 20 S. E. 895; 27 L. R. A. 551, change of street grade; no damage to abutters. See further *Meyer v. Richmond*, 172 U. S. 582; 19 Sup. Ct. Rep. 106; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57; 18 Sup. Ct. Rep. 513; 42 L. Ed. 948.

⁷⁷ *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; 45 N. Y. St. R. 774; 31 N. E. 328; and see note, 10 Am. Neg. Rep. 94 et seq. as to blasting, etc. See sec. 67, *ante*, herein.

⁷⁸ *District of Columbia v. Moulton* (U. S. Supr. Ct. 1901), 21 Sup. Ct.

come within the doctrine,⁷⁹ and it includes injuries resulting from the frightening of horses by the sight of moving cars, trains or locomotives, or the usual noises and incidents of their ordinary operation.⁸⁰ So acts lawful in themselves, even though done with malicious motives, are covered,⁸¹ and what the law authorizes to be done cannot be considered either illegal or wrongful. So damage or loss resulting from the making with proper care and prudence of a public improvement pursuant to law is *damnum absque injuria*. But contractors for such an improvement to avoid liability for resultant damage must, as far as practicable, employ reasonably safe means and methods. The doctrine of *damnum absque injuria* is wholly inapplicable where loss results to third persons from the negligent employment of unsafe methods unnecessary to the conduct of the work.⁸² Again one may, where he uses the legal care required, lawfully sink the foundation of his house below that of adjacent owners,⁸³ and he may in certain cases obstruct his neighbor's lights or prospect,⁸⁴ or exercise his lawful rights under legislative authority.⁸⁵ So the value of property in a building lost through its destruction to prevent the spreading of a conflagration could not be recovered at the common law in an action against the city, since the only remedy was by an assessment under the statute.⁸⁶

840; 10 Am. Neg. Rep. 220, 222. rev'g 15 App. D. C. 363, per Mr. Justice White, citing *Lane v. Lewiston*, 91 Me. 292, 294; 39 Atl. 999; *Morton v. Frankfort*, 55 Me. 46; *Cairncross v. Pewaukee*, 78 Wis. 66; 47 N. W. 13, commenting upon and explaining *Hughes v. Fond du Lac*, 73 Wis. 380; 41 N. W. 407.

⁷⁹ *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282.

⁸⁰ *Dewey v. Chicago*, M. & St. P. R. Co., 99 Wis. 455; 75 N. W. 74; 11 Am. & Eng. R. Cas. N. S. 275; 4 Am. Neg. Rep. 92.

⁸¹ *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467.

⁸² *The Maling*; *The S. A. McCaulley* (U. S. D. C. Del.), 110 Fed. 227; 10 Am. Neg. Rep. 357, 367, per *Bradford*, Dist. J., collision of

steamer with dredge employed by United States government.

⁸³ *Panton v. Holland*, 17 Johns. (N. Y.) 92. See also *Stansell v. Jollard*, Selw. N. P. 435; *Brown v. Robins*, 4 H. & N. 186.

⁸⁴ *Re Penny*, 7 E. & B. 660, 671.

⁸⁵ *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352. See sec. 67, *ante*, herein.

⁸⁶ *Russell v. New York*, 2 Denio (N. Y.), 461. See also *Struve v. Droge*, 62 How. Pr. (N. Y.) 233; 10 Abb. N. C. (N. Y.) 142; *People v. Buffalo*, 76 N. Y. 558. But see *New York v. Stone*, 20 Wend. (N. Y.) 139; *New York v. Lloyd*, 17 Wend. (N. Y.) 285; 18 id. 126. As to fires set by a railway locomotive without negligence, being no ground of action, see *Gaudy v. Railroad*, 30 Iowa,

Again in admiralty, where parties litigate and there is probable ground for the suit or defense, and the proceedings are in the ordinary course to vindicate a supposed legal title, and there is no pretense to say that the suit was conducted in a malicious or oppressive manner, the court considers the only compensation to which the party is entitled is costs and expenses, and if he has suffered any loss beyond that it is *damnum absque injuria*.⁸⁷ Another instance is that of opening a street by reason of which the landowner may sustain a heavy loss for which no compensation in the law may be had within the doctrine here being discussed.⁸⁸ But *damnum absque injuria* does not apply to the contract of sale.⁸⁹ Nor in connection with the use by the owner of his land is it applicable to the damming of the waters of a stream so as to set them back upon the lands of another and so overflowing them.⁹⁰ But one has the right to offer property for sale and to fix the price therefor, since it is an incident to ownership, and it cannot be construed into an actionable wrong by an averment that such offer was made with the intention of depreciating the market value of another's property, and if a loss is suffered by a third person by such lawful exercise of said right, it constitutes *damnum absque injuria*.⁹¹

§ 73. *De minimis non curat lex*.—This maxim relates to matters of such trifling importance that no action lies therefor.⁹² It applies where no permanent right is involved and the action would only entitle plaintiff to recover nominal damages without costs;⁹³ to slight imperfections in the performance of a contract;⁹⁴ to a reservation of a small excess of interest above the

⁸⁷0, and cases considered under this section, *post*, herein.

⁸⁸ *Canter v. American Ins. Co.*, 3 Pet. (U. S.) 307.

⁸⁹ *Radcliff v. Mayor*, 4 Comst. (4 N. Y.) 195, 203, 206, and numerous citations of this case in Silvernail's New York citations.

⁹⁰ *Irwin v. Askew*, 74 Ga. 581.

⁹¹ *Coloney v. Farrow*, 91 Hun (N. Y.), 82; 71 N. Y. St. R. 100; 36 N. Y. Supp. 164. See 4 Thompson on Corp. sec. 5432; Kentucky Lum-

ber Co. v. Miracle, 101 Ky. 364; 19 Ky. L. Rep. 508; 41 S. W. 25; *Monroe v. Connecticut River L. Co.* (N. H.), 39 Atl. 1019. See sec. 76, herein.

⁹² *Passaic Print Works v. Ely & Walker D. G. Co.* (U. S. C. C. A. Mo.), 44 C. C. A. 426; 105 Fed. 163.

⁹³ *Broom's Leg. Max.* (7th Am. ed.)* 143. See sec. 76, herein.

⁹⁴ *Kenyon v. Western Un. Teleg. Co.*, 100 Cal. 454; 35 Pac. 75.

⁹⁵ *Franklin v. Schultz*, 23 Mont.

regular rate;⁹⁵ to an unimportant irregularity in posting notice of a foreclosure sale;⁹⁶ to an appeal where the damages are slight; and a common illustration is the right of riparian owners to the use of waters of a stream, for a right of action does not necessarily arise to the proprietor, below or above, where there has been a reasonable use thereof by the other owners, and the water has not thereby been rendered useless, or materially affected in its flow, or otherwise.⁹⁷ But even though the damage is small to the right of a mill-owner by the acts of another on the same stream, it is decided that an action will lie;⁹⁸ and although damage done to personal property is slight, yet, if it is capable of estimation, there can be a recovery.¹⁰⁰ Nor does the maxim apply to the positive and wrongful invasion of another's property, even though the actual injury is not great.¹

165; 57 Pac. 1037; *Van Clief v. Van Vechten*, 130 N. Y. 571; 42 N. Y. St. R. 736; 29 N. E. 1017.

⁹⁵ *Slaughter v. First Nat. Bk.*, 109 Ala. 157; 19 So. 430.

⁹⁶ *Farnsworth v. Hoover*, 66 Ark. 367; 50 S. W. 865.

⁹⁷ *Chicago, W. & V. Coal Co. v. Streater*, 172 Ill. 435; 50 N. E. 167; *Sloggy v. Crescent Creamery Co.*, 72 Minn. 516; 75 N. W. 225. See 2 "Cyc." L. & P. p. 542.

⁹⁸ *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367; 41 Atl. 385; *Blanchard v. Baker*, 8 Greenlf. (Me.) 253, 266. *Broom's Leg. Max.* (7th Am. ed.)* 144, 145; *Weeks' Damnum Absque Injuria* (ed. 1879), sec. 11. See sec. 76, herein.

⁹⁹ *Thompson v. Crocker*, 9 Pick. (Mass.) 59. See sec. 76, herein.

¹⁰⁰ *Fullam v. Stearns*, 30 Vt. 443.

¹ *Wartman v. Swindell*, 54 N. J. L. (25 Vr.) 589; 25 Atl. 356; 18 L. R. A. 44. See further as to the application of the maxim, *Kullman v. Greenebaum*, 92 Cal. 403; 28 Pac. 674, a case of conversion of stock, and that small item of interest was not paid or tendered, held of no importance. *Stevenson v.*

Lord, 15 Colo. 131; 25 Pac. 313, replevin, slight difference in value of property as found by jury and amount of note of no importance. *Manheim v. Carlton College*, 68 Minn. 531; 71 N. W. 705, amount of mortgage tendered in full except small sum and new trial refused. *Re Oneida Street*, 37 App. Div. 266; 55 N. Y. Supp. 959, rev'g 22 Misc. 235; 49 N. Y. Supp. 828, proceedings to open streets; notices which are not legally defective as to substantial matters are sufficient. *Athens v. Carmer*, 169 Pa. St. 426; 32 Atl. 422, a case of public improvements and sidewalk. *Carpenter v. Franklin*, 89 Tenn. 142; 14 S. W. 484, conveyance by husband to wife, entire purchase money paid by wife except trifling amount. Examine also as to the maxim, *Sharp v. Hull*, 81 Ill. App. 400; *Hilgendorf v. Ostrom*, 46 Ill. App. 465; *Kent v. Kent*, 1 Mo. App. Repr. 124; *Hilson v. Foster* (U. S. C. S. D. N. Y.), 80 Fed. 896; *The France* (U. S. D. C. D. N. Y.), 50 Fed. 125; *York v. Stiles*, 21 R. I. 225; *Adler v. Cloud*, 42 S. C. 272; 22 S. E. 393; *Kennedy v. Gramling*, 33 S. C. 367; 11 S. E. 1061;

§ 74. *Injuria sine damno*.—An injury to a right is actionable even though the damage is inappreciable, for an invasion of a right may import damage although pecuniary loss results therefrom. This is well settled, especially where the doing of the wrongful act may by time become an enforceable claim; or where the act is a continuing tortious one, which may by its doing ripen into a right,² as where grass is cut and appropriated under a claim of right.³ But the rule does not extend to a merely theoretical injury,⁴ although it is sufficient if only practical inconvenience is suffered;⁵ for it is only necessary to show a violation of a right to sustain an action, since actual, perceptible damage is not necessary therefor, the presumption being that some damage has accrued.⁶ These principles apply to the unauthorized use of another's land over which he has a right of way.⁷ So if a water course is unlawfully diverted, there is a right to recover without proof of actual damage.⁸ But the mere backing up of water in a channel does not constitute a legal injury where there is no appreciable damage.⁹ The rule applies, however, to acts which might in the future be favorable evi-

Wilson v. Vick (Tex. Civ. App.), 51 S. W. 45, rev'd 53 S. W. 576; *Bragg v. Laraway*, 65 Vt. 673; 27 Atl. 492; *Ramsburg v. Kline*, 96 Va. 465; 31 S. E. 608; 4 Va. L. Reg. 584; *South-west Va. M. L. Co. v. Chase*, 95 Va. 50; 27 S. E. 826; *Lovett v. Thomas*, 81 Va. 245; *Randall v. Dailey*, 66 Wis. 288; *Middleton v. Jerdee*, 73 Wis. 39; 40 N. W. 629; *Maish v. Arizona*, 164 U. S. 599; 41 L. Ed. 567; 17 Sup. Ct. Rep. 193; *Frisbie v. United States*, 157 U. S. 160; 39 L. Ed. 657; 15 Sup. Ct. Rep. 586; *Park Bros. & Co. v. Bushnell* (U. S. C. C. A. 2d C.), 60 Fed. 583; *Mackay v. McGuire* (1891), 1 Q. B. 250.

² *Cole v. Drew*, 44 Vt. 49, 53; *Delaware & Hudson C. Co. v. Torrey*, 33 Pa. St. 143, 149, citing and considering *Mellor v. Spateman*, 1 Wms. Saunders, 346, note by Mr. Sergeant Williams; *Young v. Spencer*, 10 B. &

C. 145, per Lord Tenderden; *Blanchard v. Baker*, 8 Greenlf. (Me.) 253; *Angell on Water Courses*, sec. 135, note 4, sec. 428 et seq. See sec. 76, herein.

³ *Cole v. Drew*, 44 Vt. 49, 53.

⁴ *Dorman v. Ames*, Gil. (Minn.) 347. See *Hutchins v. Hutchins*, 7 Hill (N. Y.), 104; *Minter v. Swain*, 52 Miss. 174; *Hutchinson v. Snider*, 187 Pa. St. 1; 20 Atl. 510; 26 W. N. C. 531.

⁵ *Delaware & Hudson C. Co. v. Torrey*, 33 Pa. St. 143, 149, 150.

⁶ *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; Fed. Cas. No. 17,322.

⁷ *Appleton v. Fullerton*, 1 Gray (Mass.), 186.

⁸ *Blanchard v. Baker*, 8 Greenlf. (Me.) 256. See sec. 76, herein.

⁹ *Chalk v. McAlilly*, 11 Rich. L. (S. C.) 153. See sec. 76, herein.

dence for the wrongdoer,¹⁰ or to the violation of right in using wrongfully another's property.¹¹ So the unlawful detention of a deed may give a right of action.¹² And where there is a wrong, it is said that it is no answer to say that it will inflict no injury upon the plaintiff, or that it will even be beneficial to him, and equity will give the remedy to prevent its being referred to *injuria absque damno* or some other maxim which may defeat a recovery at law.¹³ But it is decided that it is of the very essence of an action of fraud or deceit that the same should be accompanied by damage and that neither *damnum absque injuria* nor *injuria absque damnum* by themselves establish a good cause of action.¹⁴ It is also declared that the principle that for every wrong there is a remedy is not of universal prevalence, but is qualified by those other maxims, *De minimis non curat lex* and *Injuria sine damno*.¹⁵

¹⁰ *Searles v. Cronk*, 38 How. Pr. (N. Y.) 320.

¹¹ *Dudley v. Tilton*, 14 La. Ann. 283.

¹² *McCown v. Wheeler*, 20 Tex. 372.

¹³ So held in *United States Trust Co. v. O'Brien*, 46 N. Y. St. Rep. 238; 18 N. Y. Supp. 798, a case of injunction to prevent interference with covenant rights. That the text statement is somewhat too broad except in its application to the particular case, see *Purdy v. Manhat-*

tan El. R. Co., 36 N. Y. St. R. 43; 13 N. Y. Supp. 265; *Birmingham Tract. Co. v. Southern Bell Teleph. & Teleg. Co.*, 119 Ala. 144; 24 So. 731, 734, per Haralson, J.

¹⁴ *Deobold v. Oppermann*, 111 N. Y. 531; 20 N. Y. St. Rep. 81, 89; 19 N. E. 94; 2 L. R. A. 644; 7 Am. St. Rep. 760, aff'g 4 N. Y. St. R. 512; 26 Wkly. D. 157.

¹⁵ *Purdy v. Manhattan El. R. Co.*, 36 N. Y. St. R. 43; 13 N. Y. Supp. 265.

CHAPTER IV.

GENERAL PRINCIPLES OF DAMAGES.

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| <p>§ 75. Certainty as a requisite.</p> <p>76. Nominal damages—Generally.</p> <p>77. Nominal damages—Breach of contract.</p> <p>78. Nominal damages only, unless substantial damage proved.</p> <p>79. Nominal damages—New trial and reversal.</p> <p>80. General damages.</p> <p>81. Special damages.</p> <p>82. Direct damages.</p> <p>83. Consequential damages.</p> <p>84. Proximate cause.</p> <p>85. Proximate cause continued.</p> <p>86. Proximate cause for jury.</p> <p>87. Natural and proximate result of act complained of.</p> <p>88. Proximate consequences illustrated.</p> <p>89. Natural and probable consequences—Those in contemplation of parties—Contracts.</p> <p>90. Natural and probable consequences—Torts.</p> <p>91. Remote, contingent and speculative damages.</p> <p>92. Application of rule as to remote or speculative damages.</p> | <p>93. Same subject continued.</p> <p>94. Actual, compensatory and substantial damages.</p> <p>95. Double, triple or treble, or other increased damages.</p> <p>96. Same subject—How fixed.</p> <p>97. Liquidated damages—Penalty.</p> <p>98. Unliquidated damages.</p> <p>99. Continuing damage and damages—Entirety of damages.</p> <p>100. Excessive or unreasonable damages.</p> <p>101. Same subject continued.</p> <p>102. Voluntarily remitting excess—Remittitur by court.</p> <p>103. Where excess is small.</p> <p>104. Evidence as a factor.</p> <p>105. Two or more excessive verdicts.</p> <p>106. In excess of amount claimed or of ad damnum clause.</p> <p>107. Inadequate damages.</p> <p>108. Excessive and inadequate damages—Power of court.</p> <p>109. Excessive and inadequate damages—Trial court.</p> <p>110. Jury and instructions—Generally.</p> |
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§ 75. Certainty as a requisite.—This principle is so fully considered in this treatise under the particular subjects to which it belongs that it will only be briefly noticed here. It may be generally stated, however, that even though the elements are uncertain and problematic from which the jury are to admeasure the damages, nevertheless, they may be sufficient to constitute the

basis of a verdict.¹ Therefore, the want of certainty is of itself not sufficient to warrant a refusal of damages.² But the jury should consider only such elements thereof as they believe are established by the evidence, and it is also true that the damages should ordinarily be such as are reasonably or necessarily certain to result from the alleged injury;³ and evidence which is too vague to furnish any basis for assessment thereof should not be considered.⁴ So an instruction should not be given as to elements of compensation where there is no evidence to warrant it.⁵ Again, certainty as to the amount may be a determining factor, upon the question whether the damages are liquidated or a penalty,⁶ and in case of a claim for profits they ought to be proved with reasonable certainty to warrant a recovery therefor.⁷ It is apparent, therefore, from the preceding statements that proof must be given, not only of the injury or loss sustained, but that the extent thereof must also be proven with reasonable certainty, and this is the general rule.⁸ It is declared, however, that damages must be capable of definite ascertainment, and must be certain and definite in character.⁹ This last assertion is, however, open to criticism.¹⁰ Some cases,

¹ *Dickinson v. Hart*, 142 N. Y. 183; 58 N. Y. St. R. 645; 36 N. E. 801, aff'g 50 N. Y. St. R. 504; 21 S. E. 307.

² *Omaha H. R. Co. v. Cable T. Co.* (U. S. C. C. D. Neb.), 32 Fed. 727, 733, 734.

³ *Lake Shore & M. S. R. Co. v. Conway*, 169 Ill. 505; 48 N. E. 483, aff'g 67 Ill. App. 155. See also *Lee v. City of Burlington*, 113 Iowa, 356; 85 N. W. 618; *Hausberger v. Sedalia, E. R. L. & P. Co.*, 82 Mo. App. 566; *Streng v. Frank Ibert Brewing Co.*, 64 N. Y. St. R. 34; 50 App. Div. 542.

⁴ *Locke v. International & G. N. R. Co.* (Tex. Civ. App. 1901), 60 S. W. 314. See *Satchwell v. Williams*, 40 Conn. 371.

⁵ *Georgia Cotton-Oil Co. v. Jackson*, 112 Ga. 620; 37 S. E. 873.

⁶ *Tobler v. Austin*, 22 Tex. Civ. App. 99; 53 S. W. 706. This question is, however, more fully considered

under the discussion herein as to liquidated damages and penalty.

⁷ *Wells v. National L. Assn.* (U. S. C. C. A. Tex. 1900), 39 C. C. A. 476; 99 Fed. 222. This point is, however, more fully considered elsewhere herein.

⁸ *Mergenthaler Linotype Co. v. Kansas State P. Co.* (Kan. 1900), 59 Pac. 1066. See *Wolcott v. Mount*, 36 N. J. L. 262, 271; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487.

⁹ *Connelly v. Western Un. Tel. Co.* (Va. 1902), 2 No. Car. L. Jour. 294; 7 Va. L. Reg. 704, per Cardwell, J.

¹⁰ It is open to criticism in that it states the rule too broadly. Generally and substantially it is correct to a certain degree, but it is misleading, especially so if it should be applied to causes of action for damages for personal injuries, and to those to recover for loss from death

it is true, furnish in themselves, by reason of their nature and circumstances, an obvious rule for ascertaining what constitutes an adequate compensation for the actual loss or injury sustained, whether the action be in contract or tort. But to deny the injured party the right to recover any actual damages in cases of torts because they are of such a nature as cannot be thus certainly measured, would be to enable parties to profit by and speculate upon their own wrongs; such is not the law.¹¹ Such criticism as we have made does not, however, exclude the rule that necessitates proof of actual damages, in cases other than of nominal recovery, by some data upon which to base the same, being shown with some reasonable certainty where the damage is susceptible of proof,¹² for where it is clear that damages have resulted to the property of plaintiffs they are entitled to be reimbursed; but in ascertaining the extent thereof they should

through the negligent or wrongful act of another, for in a large majority of these latter causes it is impossible to approximate in proof to a "definite ascertainment," or to produce evidence of damage or injury which is "certain" or "definite" in character. This is clearly evident from the numerous decisions considered by us under the chapter herein covering those subjects. This criticism also applies to other actions for damages than those above stated as appears from the following citations: *Drum v. Harrison*, 83 Ala. 384; 3 So. 715; *Bagby v. Harris*, 9 Ala. 173; *City of Greensboro v. McGibbony*, 93 Ga. 672; 20 S. E. 37; *Brent v. Kimball*, 60 Ill. 211; 14 Am. Rep. 35; *Fox v. Wray*, 56 Ind. 423; *Weber v. Squier*, 51 Mo. App. 601; *Goldman v. Wolf*, 6 Mo. App. 490; *Niendorf v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46; 38 N. Y. Supp. 690. See also *Burkitt v. Lanata*, 15 La. Ann. 337; *Allen v. Conrad*, 51 Pa. St. (1 P. F. Smith) 487.

¹¹*Gilbert v. Kennedy*, 22 Mich. 117, 129, 130, per *Christianity*, J.

Again, it is said concerning an action for personal injuries: "In cases of this character there can be no direct evidence of the amount of damages sustained or the amount of money which will be a compensation for the injury, but it is sufficient to show to the jury the extent of the injury." *Clare v. Sacramento Elec. Power & L. Co.*, 122 Cal. 504; 55 Pac. 326.

¹²*Howard v. Taylor*, 99 Ala. 450; 13 So. 121; *Patrick v. Colorado Smelting Co.*, 20 Colo. 268; 38 Pac. 236; *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 48; 41 N. E. 640; *Peoria & Pa. R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110; *Hair v. Barnes*, 26 Ill. App. 580; *Williams v. Brown*, 76 Iowa, 643; 41 N. W. 377; *Wilde v. New Orleans*, 12 La. Ann. 15; *Barrie v. Seidel*, 30 Mo. App. 559; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Taylor v. Bradley*, 39 N. Y. 129; 100 Am. Dec. 415; *Gill v. N. Y. Cab Co.*, 48 Hun (N. Y.), 524; 1 N. Y. Supp. 202; *Hudson v. Archer*, 9 S. D. 240; 68 N. W. 541.

produce the best evidence in their power as to the amount of the loss sustained by them.¹³ Nor does the above criticism apply to the general rule that damages must, in breaches of contract, be capable of certain ascertainment as distinguished from remote, speculative or contingent damages.¹⁴ But this reasonable certainty above stated does not mean a mathematical exactness or accuracy, for this distinction is clearly made in numerous decisions as will be apparent throughout this treatise, especially so in those cases which cover personal injuries and death by accident, neglect or default. Thus the impossibility of definitely measuring damages for personal injuries by a money standard, constitutes no reason for denying relief.¹⁵ Another point of value in connection with this element of certainty is illustrated by a comparatively recent decision which determines that, in an action for breach of contract to sell and deliver certain timber on land, no such difficulty in ascertaining the damages for said breach exists as to preclude maintenance of said suit.¹⁶

§ 76. Nominal damages—Generally.—The consideration of the general principles covering this subject necessarily involves others heretofore discussed under other headings.¹⁷ Thus it is well settled that whenever a legal right is clearly shown to have been invaded, nominal damages will be allowed, and the failure to perform a duty or contract constitutes a legal wrong independent of actual damage done to the party injured, and the rule applies even though no actual or special damages be proven.¹⁸

¹³ *Holmes v. Barclay*, 4 La. Ann. 64.

¹⁴ *Western Un. Tel. Co. v. Hall*, 124 U. S. 444; 31 L. Ed. 479.

¹⁵ *Mayor, etc., of Birmingham v. Lewis*, 92 Ala. 352, 357; 9 So. 243, and see the chapters herein covering personal injuries and death by accident.

¹⁶ *Dorris v. King* (Tenn. Ch. App. 1899), 54 S. W. 683.

¹⁷ See secs. 62, 71-74, herein.

¹⁸ Every wrong imputes a damage, and when none other is proved and the evidence shows a clear breach of duty, nominal damages are always recoverable. *Adams v. Robinson*,

65 Ala. 586, 591, per Somerville, J. Some damages are always presumed to follow from the violation of any right, and therefore the law will, in such cases, award nominal damages if none greater be proved. *Barlow v. Lowder*, 35 Ark. 492, 493, per English, C. J. Whenever there is a clear violation of a right, it is not necessary to show actual damages, and if none other be proved, the plaintiff is entitled to nominal damages. *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, per Ellsworth, J., quoting Story, J., in *Webb v. Portland Mfg. Co.*, 3 Sumner (U. S.), 196.

So the fact that plaintiff has been benefited does not of itself preclude nominal damages,¹⁹ and if the evidence shows that any

When a right is invaded or a wrong done and no particular damage is proved, the law implies or infers nominal damage. *Foster v. Elliott*, 33 Iowa, 216, 223. Whenever a right is invaded the law presumes damage, and though no actual injury be sustained, an action may be maintained for the wrongful diversion of water from the plaintiff's mill, and nominal damages may be recovered. *Munroe v. Stickney*, 48 Me. 462. "It is a principle that for the violation of every legal right, nominal damages at least will be allowed, and the failure to perform a duty or contract is a legal wrong, independent of actual damage done to the party for whose benefit the performance of such duty or contract is due." *Fulkerson v. Eads*, 19 Mo. App. 620, 623, per *Ellison, J.*, citing 2 *Sutherland on Dam.* 11, 13. Proof of invasion of rights entitles to recover at least nominal damages. *Hooten v. Barnard*, 137 Mass. 36, citing *Lund v. New Bedford*, 121 Mass. 286. Where a wrongful act is charged and confessed in the pleadings, complainants are entitled to at least nominal damages. *Lonsdale Co. v. Moies*, 2 Cliff. (U. S. C. C. D. R. I.) 538; *Fed. Cas. No. 8,497*, per *Clifford, Cir. J.* Whenever an invasion of a legal right is established though no actual damage be shown, the law infers a damage to the owner of property and gives nominal damages. This goes upon the ground either that some damage is the probable result of the defendant's act or that his act would have the effect to injure the other's right and would be evidence in future in favor of the wrongdoer. This last applies more particularly to unlawful entries upon real property and to disturbances of incorporeal rights when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrongdoer if his right ever came in question. In these cases an action may be supported though there be no actual damage done, because otherwise the party might lose his right. So, too, whenever anyone wantonly invades another's rights for the purpose of injury, an action will lie though no actual damage be done. The law presumes damage on account of the unlawful intent. But it is believed that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent or disturbance of a right or possession is shown, and when not only all probable but all possible damage is expressly disproved. *Paul v. Slason*, 22 Vt. 231, 238; 54 Am. Dec. 75, per *Poland, J.* "Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so the party injured is entitled to maintain his action for nominal damages in vindication of his right if no other damages are fit and proper to remunerate him. . . . Lord Holt says: 'It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it,' S. P. 2 *Ld. Raym.* 955, and he cites many cases in support of his position. . . . In the same case of *Ashby v. White* (2 *Ld. Raym.* 938; 6

¹⁹ For note 19 see page 62.

property was damaged to any extent while in defendant's possession, it should not be dismissed on motion.²⁰ So where in any view of the case the plaintiff is entitled to recover nominal damages, it is error to limit, by instructions to the jury, the right to recover at all.²¹ And contributory negligence does not of necessity limit the amount of recovery to a nominal sum.²² It is also decided that the jury are not limited to such damages of necessity, because there is no evidence of particular damage.²³ The same rule has also been applied to an action for not entering satisfaction of a judgment.²⁴ But damages will be nominal as to a passenger on a train stopped by quarantine officers before entering a city.²⁵ So the taking of a private way for a public

Mod. 45; Holt, 524), as reported by Lord Raymond, 2 Ld. Raym. 953, Lord Holt said: 'If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.' S. P. 6 Mod. 53. The principles laid down by Lord Holt . . . seem absolutely in a judicial view incontrovertible, and they have been fully recognized in many other cases . . . I am aware that some of the old cases inculcate a different doctrine and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary . . . upon the whole . . . my judgment is that wherever there is a clear violation of a right, it is not necessary in an action of this sort (diversion of a water course) to show actual damage; that every violation imports damage and if no claim be proved, the plaintiff is entitled to a verdict for nominal damages, and a fortiori this doctrine applies whenever the act done is of such a nature as that, by its repetition or continu-

ance, it may become the foundation or evidence of an adverse right. See also *Mason v. Hill*, 3 Barn. & Ad. 304; 5 Barn. & Ad. 1." *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S. C. C. D. Me.) 189; 3 Law. Rep. 374; Fed. Cas. No. 17,322, per Story, Cir. J. See also *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S. C. C. D. Me), 661; Fed. Cas. No. 17,516, per Story, Cir. J., citing *Butman v. Hussey*, 3 Fairf. (12 Me.) 407.

¹⁹ *Excelsior Needle Co. v. Smith*, 61 Conn. 56; 23 Atl. 693; *Mize v. Glenn*, 38 Mo. App. 98; *Johnson v. Conant*, 64 N. H. 109; 7 Atl. 716; *Murphy v. Fond du Lac*, 23 Wis. 365; 99 Am. Dec. 181. See also *Jewett v. Whitney*, 43 Me. 242; *Pond v. Merrifield*, 12 Cush. (Mass.) 181.

²⁰ *Leber v. Stores*, 64 N. Y. St. R. 464; 31 Misc. Rep. 474, aff'g 62 N. Y. St. R. 1124. Examine as the motion, *First Nat. Bk. v. First Nat. Bk.*, 116 Ala. 520; 22 So. 976.

²¹ *O'Horo v. Kelsey*, 60 App. Div. (N. Y.) 604; 70 N. Y. Supp. 14.

²² *Felton v. Newport* (U. S. C. C. A. Tenn.), 44 C. C. A. 530; 105 Fed. 332.

²³ *Burgett v. Lanata*, 15 La. Ann. 337.

²⁴ *Allen v. Conrad*, 51 Pa. St. (1 P. F. Smith) 487.

²⁵ So held in *St. Louis, I. M. & S.*

street will, where such way has the characteristics of the latter, only justify the recovery of such damages by the landowner,²⁶ and the return of property during trial of a suit for conversion is no defense to the whole cause of action, so as to preclude recovery of a nominal sum, even though no special damage is proven.²⁷ Again, any unauthorized interference with an easement, so as to diminish the full enjoyment of it, is a wrong which may be redressed by action. Thus the law implies damage from flowing water back upon the land of another, not only for the present injury, but also to preserve the rights of property.²⁸ The same rule applies to the diversion of water from a mill,²⁹ and also to injuries to riparian rights. Nor in any of these cases need actual damage be proved in order to recover nominal damages.³⁰ Again, a violation of an owner's right by a

R. Co. v. Linam (Ark. 1901), 60 S. W. 951. But examine *Wilson v. Alabama, G. S. H. Co.*, 77 Miss. 714; 28 So. 567; 52 L. R. A. 357, citing, *Hurst v. Warner*, 102 Mich. 238; 26 L. R. A. 484; *Town of Kosciusko v. Slomberg*, 68 Miss. 469; 9 So. 297; 12 L. R. A. 528; *Matter of Smith*, 146 N. Y. 68, 74; 40 N. E. 497, 498; 28 L. R. A. 820, 823; *State v. Burdge*, 95 Wis. 390; 70 N. W. 347; 37 L. R. A. 157, 162.

²⁶ *In re Opening of North Fifth St.*, 71 N. Y. Supp. 644.

²⁷ *Cernahan v. Chrysler*, 107 Wis. 645; 83 N. W. 778.

²⁸ *Graver v. Sholl*, 6 Wright (Pa.), 58, 67. See generally as to the rights of riparian owners and the nature of such rights and extent thereof, *Cave v. Tyler* (Cal. 1901), 65 Pa. 1089; *Indianapolis Water Co. v. Kingan & Co.*, 155 Ind. 476; 58 N. E. 715; *Meek v. Carlettsburg & P. P. Co.*, 22 Ky. L. Rep. 1318; 60 S. W. 484; *Sowers v. Shiff*, 15 La. Ann. 30; *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61; 58 N. E. 181; *Crawford Co. v. Hathaway*, 60 Neb. 734; 84 N. W. 271, rehearing denied, 85 N. W. 303; *Spink v. Corn-*

ing, 61 App. Div. (N. Y.) 84; 70 N. Y. Supp. 143; *Gallagher v. Kingston Water Co.*, 164 N. Y. 602; 58 N. E. 1087, aff'g 49 N. Y. Supp. 250; 25 App. Div. 82; *Pine v. New York (U. S. C. C. N. Y.)*, 103 Fed. 337; *Geer v. Durham Water Co.*, 127 N. C. 349; 37 S. E. 474; *Mizell v. McGowan*, 120 N. C. 134; 26 S. E. 783; *Winona Point S. Club v. Bodi*, 10 Ohio C. D. 544; 20 Ohio C. Ct. R. 637; *Beech v. Kuder*, 15 Pa. Super. Ct. 89; *Dyer v. Cranston Print Works Co.*, 22 R. I. 506; 48 Atl. 791; *City of New Whatcom v. Fairhaven Land Co.* (Wash. 1901), 64 Pac. 735.

²⁹ *Stein v. Burden*, 24 Ala. 130; 60 Am. Dec. 453.

³⁰ *Eagle & P. Mfg. Co. v. Gibson*, 62 Ala. 369; *Creighton v. Evans*, 53 Cal. 55; *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 739; *Plumleigh v. Dawson*, 1 Gilm. (Ill.) 544; 41 Am. Dec. 196; *Munroe v. Stickney*, 48 Me. 462; *Peck v. Clark*, 142 Mass. 436; 8 N. E. 335; *Dorman v. Ames, Gil.* (12 Minn.) 451; *Jones v. Hannovan*, 55 Mo. 462, 468; *Blodgett v. Stone*, 60 N. H. 167; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *New York Rubber Co. v. Rothery*,

trespass warrants nominal damages, even though no actual or appreciable damage is sustained, since the presumption attaches that however inconsiderable the injury, some damages have necessarily been occasioned thereby, and if rights of property are interfered with, the owner may maintain his action against the trespasser without being obligated to prove actual damage.⁸¹ The same rule applies to the removal of a wall supporting a tenement,⁸² and to the wrongful detention of personal property.⁸³

§ 77. **Nominal damages — Breach of contract.** — Nominal damages can be recovered where a breach of contract is proven, even though it does not appear that actual or substantial damages have been sustained, and there is no proof thereof.⁸⁴ And the rule applies where the breach is well alleged and is admitted as true,⁸⁵ or if the cause of action is admitted by default, at least

132 N. Y. 293; 44 N. Y. St. R. 557; 30 N. E. 841; 28 Am. St. Rep. 575, rev'g 32 N. Y. St. R. 905; Little v. Staubach, 63 N. C. 285; Pastorius v. Fisher, 1 Rawle (Pa.), 27; Chatfield v. Wilson, 1 Will. (Vt.) 670.

⁸¹ *Champion v. Vincent*, 20 Tex. 811, 815; *Appleton v. Fullerton*, 1 Gray (Mass.), 186, 194; *Dudley v. Tilton*, 14 La. Ann. 283, 585. See also *Attwood v. Fricot*, 17 Cal. 38, 44; 76 Am. Dec. 567. *Merrill v. Dibble*, 12 Bradw. (Ill. App.) 85; *Johnson v. Stinger*, 39 Ill. App. 180; *Hefley v. Baker*, 19 Kan. 9; *Brown v. Perkins*, 1 Allen (Mass.), 89; *Keirn v. Warfield*, 60 Miss. 799; *Bruch v. Carter*, 3 Vr. (32 N. J. L.) 554; *Pierce v. Hosmer*, 66 Barb. (N. Y.) 345; *White v. Griffin*, 4 Jones, L. (N. C.) 139; *Few v. Killer* (S. C. 1902), 41 S. E. 85; *Caruth v. Allen*, 2 McCord (S. C.), 226; *Norvell v. Thompson*, 2 Hill, L. (S. C.) 470; *Bradley v. Flewitt*, 6 Rich. L. (S. C.) 69.

⁸² *McConnell v. Kibbe*, 33 Ill. 174, 179; 85 Am. Dec. 265.

⁸³ *Oden v. Stubblefield*, 2 Ala. 684.

⁸⁴ *Adams v. Robinson*, 65 Ala. 586;

Browner v. Davis, 15 Cal. 9, 11; *McCarty v. Beach*, 10 Cal. 461; *Addington v. Western & A. R. Co.*, 93 Ga. 566; 20 S. E. 71; *Stock Quotation Tel. Co. v. Board of Trade*, 44 Ill. App. 358; *Rosenbaum v. McThomas*, 34 Ind. 331; *Howard v. Wilmington & S. R. Co.*, 1 Gill (Md.), 311; *Hagan v. Riley*, 13 Gray (Mass.), 515; *Cowley v. Davidson*, 10 Minn. 302; *Dulaney v. St. Louis Sugar Ref. Co.*, 42 Mo. App. 659; *Middleton v. Moore*, 36 Mo. App. 627; *Uhlig v. Barnum*, 43 Neb. 584; 61 N. W. 749; *Jurnick v. Manhattan Optical Co.* (N. J. 1901), 49 Atl. 681; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Clinton v. Mercer*, 3 Murph. (N. C.) 119; *Bond v. Hilton*, 2 Jones, L. (N. C.) 149; *Hope v. Alley*, 9 Tex. 394; *contra*, see *Chambers v. Walker*, 80 Ga. 642; 6 S. E. 165; *Mansur & Tebbetts Imp. Co. v. Willett* (Okl. 1900), 61 Pac. 1066.

⁸⁵ *Cowley v. Davidson*, 10 Minn. 392. See *Adams v. Robinson*, 65 Ala. 586, 590; *Code*, 1876, sec. 2978; *O'Horo v. Kelsey*, 60 App. Div. (N. Y.) 604; 79 N. Y. St. R. 14; *Oh Chow v. Hallett*; *She At v. Same*

such damages are recoverable.³⁵ Again, the rule applies to a technical breach,³⁷ or such damages may be given merely to carry costs,³⁸ or even though performance would have been a positive injury to plaintiff,³⁹ or notwithstanding special damages are too remote or speculative to be considered,⁴⁰ and so whether or not any actual loss was suffered.⁴¹ And this last rule has been applied to a breach of contract by a telegraph company in negligently failing to promptly deliver a message.⁴² So even though a vendor of land erroneously supposed he could give possession, the purchaser is entitled thereto and to nominal damages.⁴³ But the agreement may, however, be so uncertain and indefinite as not to constitute the basis of admeasurement of damages for the breach thereof.⁴⁴ And if an action is prematurely brought before any actual breach of a contract of employment, not even nominal damages can be recovered.⁴⁵

§ 78. Nominal damages only, unless substantial damages proved.—It is a general rule that for breach of a contract only nominal damages can be recovered unless some substantial damages be shown or there is proof of actual injury or loss, for substantial damages cannot be inferred from the breach alone.⁴⁶

(U. S. C. C. D. Or.), 12 Sawy. 259; 5 Chic. L. News, 109; Fed. Cas. No. 10,469.

³⁵ Grinnell v. Bebb, 126 Mich. 157; 7 Det. L. N. 742; 85 N. W. 46.

³⁷ Seat v. Moreland, 7 Humph. (Tenn.) 575; *contra*, Mansur & Tebbetts Imp. Co. v. Willett (Okla. 1900), 61 Pac. 1066.

³⁸ Hickey v. Baird, 9 Mich. 32.

³⁹ Ellsler v. Brooks, 22 Jones & S. (N. Y.) 73.

⁴⁰ Treadwell v. Tillis, 108 Ala. 262; 18 So. 686.

⁴¹ Hope v. Alley, 9 Tex. 394.

⁴² Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664; 38 S. W. 635; 2 Am. Neg. Rep. 468; Kennon v. Western Un. Teleg. Co., 92 Ala. 399; 3 Am. Elec. Cas. 584. See Joyce on Electric Law (ed. 1900), secs. 832, 943.

⁴³ Irwin v. Askew, 74 Ga. 581.

⁴⁴ Katz v. Wolf, 73 N. Y. St. R. 242; 37 N. Y. Supp. 648; 16 Misc. 82.

⁴⁵ Pellet v. Manufacturers & M. Ins. Co. (U. S. C. C. A. Ill.), 43 C. C. A. 669; 104 Fed. 502.

⁴⁶ Scarborough v. State, 24 Ark. 20; Belfour v. Raney, 3 Eng. (Ark.) 479; Acheson v. Western Un. Teleg. Co., 96 Cal. 641; Turpie v. Lowe, 114 Ind. 37; 15 N. E. 834; Rhine v. Morris, 96 Ind. 81; Jones' Exrs. v. Noe, 71 Ind. 368; Tate v. Booe, 9 Ind. 13; Missouri Valley L. Ins. Co. v. Kelso, 16 Kan. 481; Diers v. Edwards, 23 Ky. L. Rep. 500; 63 S. W. 276; Wilson v. Barnes, 13 B. Mon. (Ky.) 330; Merrill v. Western Un. Tel. Co., 78 Me. 97; 2 Am. Elec. Cas. 600; Tufts v. Bennett, 163 Mass. 398; 40 N. E. 172; Pollard v. Porter, 3 Gray (Mass.), 312; Wilson v. Wagar, 26 Mich. 452; Breen v.

or unless negligence is the proximate cause of the damage sustained,⁴⁷ or the terms of the contract contemplate only actual damages,⁴⁸ or it otherwise furnishes in itself the guide for the admeasurement of damages.⁴⁹ So if the parties have not agreed upon any fixed price as the basis of the contract, but have only specified a maximum sum, and there is a breach, the liability is only that of nominal damages.⁵⁰ Again, gratuitous bailees who have assumed a contract obligation to deliver the goods in question, and who have failed to fulfill the terms of the contract, are liable only for nominal damages for the destruction of the property by fire, as such destruction is not a damage such as might fairly and reasonably be considered as either arising naturally, according to the usual course of things from the breach of such contract, or such as might reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.⁵¹ Again, in case of an actionable wrong, there must be some evidence as to the amount of damages to recover more than a nominal sum,⁵² and damages must be proven to buildings to recover nominal damages as to land where the allegation is of injury to the buildings.⁵³ So the same principles necessitate proof of actual damage in torts generally if more than a nominal award is sought,⁵⁴ and the same is true in actions for the taking and

Fairbank, 35 Mo. App. 554; *Hays v. Dalzell*, 21 Mo. App. 679; *Richardson v. Jones*, 1 Nev. 405; *French v. Bent*, 43 N. H. 448; *Frothingham v. Everton*, 12 N. H. 239; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. (28 Vt.) 432; 31 Atl. 401; 30 L. R. A. 61; *Conger v. Weaver*, 20 N. Y. 140; *Importers' & Traders' Ins. Co. v. Christie*, 5 Rob. (N. Y.) 169; *First Nat. Bk. v. W. U. Tel. Co.*, 30 Ohio St. 555; *Cronin v. Sharp*, 16 Pa. Super. Ct. 76; *Moore v. Anderson*, 30 Tex. 224; *Amer. Bldg. & L. Assn. v. Hart*, 2 Wash. 594; 27 Pac. 468. *Hubbard v. W. U. Tel. Co.*, 33 Wis. 558; *Rosenfield v. Express Co.*, 1 Woods (U. S.), 131; *Fed. Cas. No. 12,060*; *American Surety Co. of N. Y.*

v. Woods (U. S. C. C. A. La.), 45 C. C. A. 282; 106 Fed. 263; 105 Fed. 741.

⁴⁷ *Bodkin v. Western Un. Tel. Co.*, 31 Fed. 134; 2 Am. Elec. Cas. 857.

⁴⁸ *Green v. Weaver*, 63 Ga. 302.

⁴⁹ *Adams Express Co. v. Egbert*, 12 Casey (Pa.), 360; 78 Am. Dec. 382; *State v. Ward*, 9 Heisk. (Tenn.) 100.

⁵⁰ *United Press v. New York Press Co.*, 164 N. Y. 406; 58 N. E. 527, aff'g 54 N. Y. Supp. 807.

⁵¹ *Leggo v. Welland Mfg. Co.*, 2 Ont. R. 45.

⁵² *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196; 19 S. E. 521; 23 L. R. A. 674; 57 Am. & Eng. R. Cas. 694.

⁵³ *McDonnell v. Cambridge R. Co.*, 151 Mass. 159; 23 N. E. 84.

⁵⁴ *Havens v. Hartford & N. H. R.*

detention of personal property, conversion, etc., except there be proof of value.⁵³ So in case of the detention of a vessel through the fault of the consignee an unreasonable length of time at the port of discharge, not only the detention but the damages and their nature must be proved, where there is no express contract to refer to for the purpose of computing the amount to be paid as demurrage. In an action to recover damages of that nature, proof must be given of their existence and amount.⁵⁴ Again, only nominal damages are recoverable in an action for personal injuries where there is no allegation or proof as to earning capacity.⁵⁵

§ 79. **Nominal damages—New trial and reversal.**—Another proposition of importance in connection with this right to nominal damages is that the failure to award them does not constitute a ground of reversal, provided no substantial right is violated thereby,⁵⁶ or a judgment for costs is given in favor of the prevailing party.⁵⁷ Nor will there be a reversal or new trial

Co., 28 Conn. 69; *Webb v. Gross*, 79 Me. 224; 9 Atl. 612; *Hough v. Young*, 1 Ham. (Ohio) 504; *Custard v. Burdett*, 15 Tex. 456.

⁵³ *Miller v. Jones*, 26 Ala. 247; *Rose v. Gallup*, 33 Conn. 338; *Brady v. Whitney*, 24 Mich. 154. *Phoenix v. Clark*, 2 Mich. 328; *Whitmark v. Lorton*, 8 N. Y. Supp. 480; 15 Daly (N. Y.), 548; *Lay v. Bayles*, 4 Cold. (Tenn.) 246; *Rutland & W. R. Co. v. B'k of Middlebury*, 32 Vt. 639.

⁵⁴ *Dayton v. Parke*, 142 N. Y. 391, 399; 59 N. Y. St. Rep. 788; 37 N. E. 642.

⁵⁵ *Pickett v. West Monroe*, 47 App. Div. (N. Y.) 629; 63 N. Y. Supp. 30. See chapters *post*, herein, as to personal injuries and death by accident.

⁵⁶ *Cahuzac v. Samini*, 29 Ala. 288; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147; *Ringlehaupt v. Young*, 35 Ark. 128; 17 S. W. 710; *McGann v. Hamilton*, 58 Conn. 69; 19 Atl. 376; *Eiswald v. Southern Exp. Co.*, 60 Ga.

496; *Wadhams v. Swan*, 109 Ill. 46; *Thialer v. Hopkins*, 85 Ill. App. 207; *Smith v. Parker*, 148 Ind. 127; 45 N. E. 770; *Boardman v. Marshalltown G. Co.*, 105 Iowa, 445; 75 N. W. 343; *Stewart v. Lapsley*, 7 La. Ann. 456; *Boyden v. Moore*, 5 Mass. 365; *Stevens v. Yale*, 113 Mich. 680; *English v. Caldwell*, 30 Mich. 362; *State v. Rayburn*, 22 Mo. App. 303; *Sloggy v. Crescent Creamery Co.*, 72 Minn. 316; 75 N. W. 225; *Sess v. Richey*, 58 N. Y. Supp. 1148; 27 Misc. 843; *Rambant v. Irving Nat. Bk.*, 42 App. Div. (N. Y.) 143; 58 N. Y. Supp. 1056; *Throckmorton v. Evening Post Pub. Co.*, 35 App. Div. (N. Y.) 396; 54 N. Y. Supp. 887; *Chambers v. Frazier*, 29 Ohio St. 362; *Bilgrien v. Dowe*, 91 Wis. 393; 64 N. W. 1025; *Riess v. Delles*, 45 Wis. 662; *Kelly v. Fahrney* (U. S. C. C. A.), 38 C. C. A. 103; 97 Fed. 176; *Fisher v. Meyer*, 20 Blatchf. (U. S.) 512; 12 Fed. 842.

⁵⁷ *East Moline Co. v. Weir Flow Co.* (U. S. C. C. A. 7th C.), 37 C. C.

granted where plaintiffs could have recovered no more than nominal damages,⁶⁰ although a verdict for such damages will be set aside where there is clear evidence of actual damage, capable of being classified and determined by a legal measure.⁶¹ Nor can a verdict for nominal damages be considered as a finding for defendant, because upon the case as tried the plaintiff is entitled to a substantial award.⁶² And where it appears that plaintiff mistook the basis on which damages should be ascertained, and such as have been suffered are substantial, the denial of nominal damages is a ground of reversal, since the plaintiff would have been entitled thereto in any event.⁶³

§ 80. General damages.—Damages necessarily and naturally resulting from breach of contract may be recovered under averments setting forth the contract and its breach,⁶⁴ and where they are the proximate result of the injury and reasonably certain to ensue therefrom, they may be recovered under a general allegation without being specially pleaded.⁶⁵ So also, where they follow as a necessary result of the unlawful detention of property, they need not be specially averred,⁶⁶ but they

A. 62; 95 Fed. 250, citing *Mahoney v. Robbins*, 49 Ind. 146; *Palmer v. Degan*, 58 Minn. 505; *Heator v. Pearce*, 59 Neb. 583; 81 N. W. 615; *Smith v. Weed Sew. Mach. Co.*, 26 Ohio St. 562; *Enos v. Cole*, 53 Wis. 235; 10 N. W. 377; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

⁶⁰ *Schwartz v. Davis* (Iowa), 57 N. W. 849; *Stuart v. Trotter* (Iowa), 39 N. W. 212.

⁶¹ *Paul v. Leydenberger*, 17 Bradw. (Ill. App.) 167; and see *Foreman's Ins. Co. v. McMillan*, 29 Ala. 147; *Chapin v. Babcock*, 67 Conn. 255; 34 Atl. 1039, and citations in first note to this section.

⁶² *Chouquette v. Southern Elec. R. Co.*, 152 Mo. 257; 53 S. W. 897, citing several cases.

⁶³ *Thomson-Houston Elec. Co. v. Durant L. Imp. Co.*, 144 N. Y. 34; 63 N. Y. St. R. 8.

⁶⁴ *Russell v. Corning Mfg. Co.*, 63 N. Y. St. R. 640; 49 App. Div. 610. See also *Laraway v. Perkins*, 10 N. Y. 37. See sec. 88, herein. As to distinction between general and special damage, see *Roberts v. Graham*, 6 Wall. (U. S.) 578.

⁶⁵ *Edgerton v. O'Neil*, 4 Kan. App. 73; 46 Pac. 206. See secs. 83 et seq., herein.

⁶⁶ *Jackson v. Grace*, 3 Okla. 143; 41 Pac. 79, and damages which naturally and necessarily result from the injury may be proven under a general allegation of damages, where a specified amount of damages is averred. *Louisville, St. L. & T. R. Co. v. Neafus*, 13 Ky. L. Rep. 961; 18 S. W. 1030, see also *Russell v. Corning Mfg. Co.*, 49 App. Div. (N. Y.) 610; 63 N. Y. Supp. 640. See also as to distinction between the necessary and natural result of an injury, *Vander-*

must be such as necessarily and naturally result from the act complained of in order to be recovered under a general averment.⁶ Again, in *ex delicto* actions where the claim is for general damages only, a bill of particulars is held unnecessary,⁶ and an averment of special damages is unnecessary to recover the loss of any species of personal property in detinue;⁶ nor is such allegation necessary in an action sounding in tort.⁷ So damages for personal injury may be general and not special so as to be recovered without being specially pleaded.⁷ Again, a declaration alleging damages in general terms warrants a recovery for the real injury, even though there is a claim averring that the injury is to the plaintiff's peace, happiness and feelings.² So where a breach is alleged and damages demanded, it is a sufficient averment of nonpayment,⁷ and a general claim for damages by a landowner on appeal from proceedings to open a street may be sufficient, notwithstanding a provision that the landowner shall state specifically the grounds of his objection in the court below.⁴ So it is only requisite to aver damages generally in a specified amount in an action for negligent injury.³ Again, a claim is for general and not special damages when the averments are for injuries disabling plaintiff permanently.²

§ 81. Special damages.—The partial closing of a street while

slice v. Newton, 4 N. Y. 130; *Bergemann v. Jones*, 94 N. Y. 51; *Bogart v. Burkhalter*, 2 Barb. (N. Y.) 525; 6 N. Y. Leg. Obs. 160; *Solms v. Lias*, 16 Abb. (N. Y.) 311. See also secs. 88, 89, herein.

⁶ *Root v. Butte, A. & P. R. Co.*, 20 Mont. 354; 51 Pac. 153; *Atchison, Topeka & S. F. R. Co. v. Willey*, 57 Kan. 764; 48 Pac. 25; 2 Am. Neg. Rep. 144.

⁷ *Benz v. South Bethlehem (C. P.)*, 5 Northampton Rep. 381.

⁸ *Garden v. Neiley (Can.)*, 31 N. S. 89.

⁹ *Purcell v. Richmond & D. R. Co.*, 108 N. C. 421; 12 S. E. 956.

¹⁰ *West Chicago St. R. Co. v.*

Levy, 182 Ill. 525; 55 N. E. 554, aff'g 82 Ill. App. 202, and cases cited. See also *Ft. Scott, W. & W. R. Co. v. Lightburn* (Kan. App. 1899), 58 Pac. 1033; *San Antonio & A. P. R. Co. v. Weigers*, 22 Tex. Civ. App. 344; 54 S. W. 910.

⁷² *Cox v. Richmond & D. R. Co.*, 87 Ga. 747; 13 S. E. 827.

⁷³ *Belt v. Washington Water-Power Co.*, 24 Wash. 387; 64 Pac. 525.

⁷⁴ *Decatur v. Grand Rapids & I. R. Co.*, 146 Ind. 577; 45 N. E. 793.

⁷⁵ *McFarland v. Roly*, 4 Ohio Dec. 211; 1 Cleve. L. Rep. 118. See *Foerst v. Kelso*, 131 Cal. 376; 63 Pac. 681.

⁷⁶ *Bibb Co. v. Ham*, 110 Ga. 840; 35 S. E. 656.

it is being graded and paved does not constitute such special damage to a street car company as to enable it to recover therefor,⁷⁷ although if special injury has resulted to a person from closing a highway, as where he has been to expense in removing obstructions in order to travel, an action lies.⁷⁸ But the fact that an unlawful obstruction of a street cuts off the only practicable route by which an individual may reach his land is not special damage.⁷⁹ Again, if special damages are relied on because of failure to stop a train at a flag station, they must be averred,⁸⁰ and one who has suffered such damage from a nuisance may maintain an action against an individual or corporation,⁸¹ but the special damage must sufficiently appear from the allegations in such case.⁸² There are also other applications of the doctrine which come within the general principles hereinafter stated. Thus, if special damages are claimed, they must be averred to prevent surprise, and to show that the plaintiff is entitled to them,⁸³ and such damages must be pleaded in replevin.⁸⁴ So, in an action of trespass in case of a wrongful entry and removal of a fence and the deprivation of the use of pasture.⁸⁵ So, unless they are specifically claimed, they cannot be allowed under a general allegation and demand therefor, although there are specific statements in the same pleading of the precise amount and character of the claimed damage.⁸⁶ And the mere conclusion in a pleading that a standpipe or water tower is liable to burst, is not a sufficient allegation of special damages.⁸⁷ If, however, special items, such as counsel fees, loss of time, etc.,

⁷⁷ *Ridge Ave. Pass. R. Co. v. Philadelphia*, 181 Pa. 592; 37 Atl. 910; 40 W. N. C. 453; 28 Pitts. L. J. N. S. 55.

⁷⁸ *Lansing v. Wiswall*, 5 Den. (N. Y.) 213.

⁷⁹ *Baier v. Schermierhorn*, 96 Wis. 372; 71 N. W. 600.

⁸⁰ *Illinois C. R. Co. v. Siddons*, 58 Ill. App. 607.

⁸¹ *Mehrof Bros. B. M. Co. v. Delaware, L. & W. B. Co.* (N. J.), 16 Atl. 12. But the special damages which one sustains from the obstruction of an alley must be only such as are different from those sustained by the

general public. *Advance Elevator & W. Co. v. Eddy*, 23 Ill. App. 352.

⁸² *Clark v. Chicago & N. W. R. Co.* (Wis.), 36 N. W. 326.

⁸³ See *Fitch v. Fitch*, 35 N. Y. Super. (3 J. & S.) 302, 303; *Alfaro v. Davidson*, 40 N. Y. Super. (8 J. & S.) 87, 89, per Freedman, J.

⁸⁴ *Rosecrans v. Osay*, 49 Neb. 512; 68 N. W. 627.

⁸⁵ *May v. Carter*, 67 Mo. App. 323.

⁸⁶ *Dennison v. Lewis* (D. C. App.), 23 Wash. L. Rep. 138.

⁸⁷ *Barrows v. Sycamore*, 150 Ill. 588; 49 Ill. App. 590; 37 N. E. 1096; 25 L. R. A. 535.

have been proven, the jury should not be instructed that "No measure of damages can be prescribed except the enlightened conscience of impartial jurors."⁸⁸ Again, if such damages do not necessarily result from the injury, they must be particularly averred to be recovered,⁸⁹ although it is decided that an averment thereof is only necessary where the right of action itself depends upon the special injury received.⁹⁰ In case of contracts the plaintiff is not always limited to the recovery of general damages. There may be such special circumstances as will enable him to recover special damages, such as are the natural and proximate cause of the breach, although not in general, following as its immediate effects. But the pleading must particularize or set out the special damage or loss.⁹¹ It is also determined that in an action to recover such damages for breach of contract, the party in fault must have had knowledge, at the time of entering into the agreement, of the fact, making probable the special damages.⁹² It has, however, been said: "The test has been put in another form, namely, that they must be such as a court or jury may reasonably consider to be those which the parties would reasonably contemplate. I do not believe that to be the true test for those who make contracts mean to fulfill them."⁹³ But loss of profits must be particularly pleaded in an action for the price of goods where the defense is that they were not according to contract,⁹⁴ although it need not be specifically alleged that plaintiff has sustained special damages in order to recover them in an action by an abutting property owner for injury occasioned in the grade of

⁸⁸ *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204.

⁸⁹ *Atchison, T. & S. F. R. Co. v. Willey*, 57 Kan. 764; 48 Pac. 25; 2 Am. Neg. Rep. 344; *Solms v. Lias*, 16 Abb. Pr. (N. Y.) 311; *Squires v. Gould*, 14 Wend. (N. Y.) 159; *Castanos v. Ritter*, 3 Duer (N. Y.), 310; *Baldwin v. N. Y. & H. S. N. Co.*, 4 Daly (N. Y.), 314; *Williams v. Frasier*, 41 How. Pr. (N. Y.) 428; and see last preceding section herein, and secs. 88, 89, herein.

⁹⁰ *McCarty v. Beach*, 10 Cal. 462, 464.

⁹¹ *Lawrence v. Porter* (U. S. C. C. A. 6th C.), 93 Fed. 62, 64, per Lurton, Cir. J.; 11 U. S. C. C. A. 27; 22 U. S. A. 483; 26 L. R. A. 167.

⁹² *Ligon v. Missouri Pac. R. Co.*, 3 Willson, Civ. Cas. Ct. App. sec. 2.

⁹³ *Prehn v. Royal Bk. of Liverpool* L. R., 5 Exch. Cas. 92, 99, per Martin, B.; *Bank of Commerce v. Goos*, 39 Neb. 437; 23 L. R. A. 190, 193, per Ryan, C.

⁹⁴ *Stevens v. Sonto*, 18 N. Y. St. R. 929; 2 N. Y. Supp. 484.

a street.⁶⁵ If, however, legal damages are recoverable under a complaint setting forth a cause of action, an error in alleging special damages does not invalidate the complaint.⁶⁶ So an allegation of general damages does not preclude an averment of special damages.⁶⁷

§ 82. Direct damages.—It is a general principle that there should, in cases of injury from a tort, be an indemnity to compensate the party injured for the loss which is the immediate result of the wrongful act.⁶⁸ So one who does a malicious or illegal act, calculated to prove injurious to others, is responsible for the direct consequences resulting therefrom, even though the particular damage which followed was not intended or anticipated,⁶⁹ or was not known, or could not have been fore-

⁶⁵ *Cook v. Ansonia*, 66 Conn. 413; 34 Atl. 183.

⁶⁶ *Hoosier Stone Co. v. Louisville, N. A. & C. R. Co.* (Ind.) 31 N. E. 365.

⁶⁷ *Hill v. Anderson* (Ohio Supr. Ct. Cin. 1899), 9 Ohio S. & C. P. Dec. 480.

When averment of special damages is sufficient as to loss of business, etc., of wife in action by husband and wife for injuries to her, see *Healey v. Ballantine & Sons* (N. J. 1901), 49 Atl. 511; 10 Am. Neg. Rep. 155.

See further that special damages must be averred, *Donnell v. Jones*, 17 Ala. 689; *Tucker v. Parks*, 7 Colo. 62; *Colorado M. R. Co. v. Trevarthen*, 1 Colo. App. 152; 27 Pac. 1012; *Bristol, etc., Co. v. Gridley*, 28 Conn. 201; *Olmstead v. Burke*, 25 Ill. 86; *Chicago, W. D. R. Co. v. Klauber*, 9 Ill. App. 613; *Reid v. Johnson*, 132 Ind. 416; 31 N. E. 1107; *Rothschild v. Williamson*, 83 Ind. 387; *Teagarden v. Hetfield*, 11 Ind. 522; *Reeves v. Andrews*, 7 Ind. 207; *Hanna v. Pegg*, 1 Blatchf. (Ind.) 181; *Wilson v. Dean*, 10 Iowa, 432; *Wilson v. Barnes*, 13 B. Mon. (Ky.) 380; *Hunter v. Stewart*,

47 Me. 419; *Hemineway v. Woods*, 1 Pick. (Mass.) 524; *Burrill v. New York, etc., R. Co.*, 14 Mich. 34; *Brown v. Chicago, etc., R. Co.*, 80 Mo. 457; *Burlington & Q. R. Co. v. Emmert*, 53 Neb. 237; 73 N. W. 540; *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554; *Kraft v. Rice*, 61 N. Y. Supp. 368; 45 App. Div. (N. Y.) 569; *Hoffman v. Rudiman*, 5 Misc. (N. Y.) 326; 55 N. Y. Supp. 214; *Schmit v. Dry Dock E. B. R. Co.*, 3 N. Y. St. Rep. 257; *Uertz v. Singer Mfg. Co.*, 35 Hun (N. Y.), 116; *Hyatt & S. Mfg. Co. v. Gray*, 111 N. C. 92; 15 S. E. 940; *Hart v. Evans*, 8 Pa. St. 13; *Alstin v. Huggins*, 3 Brev. (S. C.) 185; *Oh Chow v. Hallett*; *She At v. Same* (U. S. C. C. D. Ore.), 12 Sawy. (U. S.) 259; 5 Chic. Leg. News, 109; *Fed. Cas. No. 10,469*; *Boyden v. Burke*, 14 How. (U. S.) 575.

⁶⁸ *Overpeek v. Rapid City* (S. D. 1901), 85 N. W. 990; 10 Am. Neg. Rep. 489, 492, per *Corson, J.*; *Chicago & I. C. R. Co. v. Hunter* (Ind.), 27 N. E. 477.

⁶⁹ *Vanderburg v. Truax*, 4 Den. (N. Y.) 464. "A person is entitled to recover for all consequences which are the natural and probable result

seen;¹⁰ for, as it has been declared, "the direct and immediate consequences of the injurious act are to be regarded,"¹ and they must naturally and reasonably result from defendant's acts or omission.² They also, in cases of personal injuries, include all consequences thereof, future, as well as past, even though serious results have ensued.³ Again, in cases of breach of contract, if the losses resulting therefrom are not the direct and natural consequences thereof, by reason of special circumstances known to both parties when the contract was made, they must, in order to justify a recovery, be such as could, in view of the circumstances, have been foreseen and estimated with reasonable certainty;⁴ and if the damages arise from circumstances peculiar to the particular case, and are not the natural result thereof, such circumstances must be known to the party who broke the contract.⁵ This question, however, of direct damages and of natural and probable consequences, is so closely involved with that of proximate, remote, uncertain, speculative, contingent and consequential damages,⁶ that the reader is referred to the subsequent sections of this chapter, wherein these questions are fully considered.

of injuries negligently inflicted upon him by another, that is, for those consequences which the common experience of men justify us in believing will result from an injury." *Atchison, T. & S. F. R. Co. v. Willey*, 57 Kan. 764; 48 Pac. 25, per *Doster*, Ch. J.; *Watson v. Rhinderknecht* (Minn. 1901), 84 N. W. 708; *McAllen v. Western Un. Teleg. Co.*, 79 Tex. 243; 7 S. W. 715. See sec. 69, herein.

¹⁰ *Louisville, N. A. & C. R. Co. v. Wood* (Ind.), 14 N. E. 572.

¹ *Galveston, H. & S. A. R. Co. v. Zantlinger* (Tex. 1898), 48 S. W. 363; 5 Am. Neg. Rep. 477, 483, per *Gaina*, Ch. J.

² *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. Cas. 222; *The Notting Hill*, L. R. 9 Prob. Div. 105 (Eng. C. A.); *Jex v. Strauss*, 122 N. Y. 293; 33 N. Y. St. R. 448; 29 N. E. 478,

aff'g 22 J. & S. 52. See secs. 88, 89, herein.

³ *Gainard v. Rochester, C. & B. R. Co.*, 50 Hun (N. Y.), 22; S. C., 121 N. Y. 660; 2 N. Y. Supp. 470; 18 St. R. 692.

⁴ *Kelley v. Fahrney* (U. S. C. C. A. Ark. 1899), 97 Fed. 176.

⁵ *Brauer v. Oceanic Steam Nav. Co.*, 69 N. Y. St. R. 465; 34 Misc. 127, mod'd 73 N. Y. Supp. 291.

⁶ See generally as to these damages, *Central of Georgia R. Co. v. Edwards*, 111 Ga. 528; 36 S. E. 810; 8 Am. Neg. Rep. 595, 599, 600; Civ. Code, Ga. secs. 3912, 3913; *Kiernan v. Chicago, S. F. & C. R. Co.*, 123 Ill. 188; 14 N. E. 18; 11 W. 632; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308; 15 N. E. 451; 12 W. 910; *Carraher v. Allen* (Iowa, 1900), 83 N. W. 902; *Corrister v. Kansas City, St. J. & C. B. R. Co.*, 25 Mo.

§ 83. Consequential damages.—The question as to the recovery of consequential damages is controlled not only by the form of the action and the pleadings, but also depends upon whether the particular damages claimed to have been sustained can be said to be a proximate and natural result of the original wrongful act.⁷ In this class of damages, for which recovery may be had in some cases, are included those for mental suffering,

App. 619; *Brink v. Wabash R. Co.*, 160 Mo. 87; 60 S. W. 1058; *Brauer v. Oceanic S. N. Co.*, 69 N. Y. Supp. 465; 35 Misc. 127, mod'd 73 N. Y. Supp. 291; *First Nat. Bk. v. Burger*, 9 Ohio S. & C. P. Dec. 824; *Gaar v. Snook*, 1 Ohio C. D. 142; *Sullivan Co. v. Ruth*, 106 Tenn. 85; 59 S. W. 138; *City of Antonio v. Smith* (Tex. 1900), 59 S. W. 1109; *Fowler v. Shook* (Tex. Civ. App. 1900), 59 S. W. 282; *Smith v. City of Antonio* (Tex. 1900), 57 S. W. 881; *Atlantic & D. R. Co. v. Delaware Const. Co.*, 98 Va. 503; 37 S. E. 13; 2 Va. Sup. Co. Rep. 430; *Smith v. Bolles*, 132 U. S. 125; 10 Sup. Ct. Rep. 39; 33 L. Ed. 279; 23 Ohio L. J. 57.

⁷ "We may as well consider here as anywhere what we are to understand by consequential damages; when are they so related to the cause to which they are ascribed as to be in legal view clearly ascribable to it, flowing from it and proximate to it. Every judge will agree that all damages must be the result of the injury complained of, whether it consist in the withholding of a legal right or the breach of a duty legally owed to the plaintiff. If they necessarily result, such as the loss of the value of an article of property which is carried away or destroyed, or of a sum of money which is not paid to the plaintiff according to the contract, or the loss of time and the endurance of pain consequent upon having one's limb fractured, they are called gen-

eral damages and may be shown under the *ad damnum*, or general allegation of damages, for the defendant does not need notice of such consequences for his defense; he knows that they must exist of course and that they are proximate and will be in evidence on the trial. But if certain injuries and losses do not necessarily result from the defendant's wrongful act, but in fact follow it as a natural and proximate consequence, they are called special and must be specially alleged that the defendant may have notice and be prepared to go into the inquiry. . . . In all cases the litigant parties must be confined to the principal transaction complained of and to its attendant circumstances and natural results. These results include all the damages to the plaintiff of which the injurious act of the defendant was the efficient cause, though in point of time such damage did not occur until sometime after the act done. Damages are often recovered down to the time of trial and even after, if the jury are satisfied from the nature of the wrong proved upon the defendant that the consequences are likely to follow in the natural course of things. . . . Speculative and possible losses, such as specific profits in business, do not fall within the rule, for they are too contingent and remote." *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 211, 212, per Ellsworth, J.

indignity, insult or fright,⁸ loss of profits,⁹ expenses¹⁰ and future or prospective losses,¹¹ all of which are more fully treated in this work under the particular actions where their recovery has been sought.

§ 84. **Proximate cause.**—If the loss proceeds inevitably and of absolute necessity from a specified cause, that will be the proximate cause; and where a certain result usually and naturally follows from a certain cause, the one may be deemed to sustain an immediate relation to the other, but neither of these propositions constitutes the sole test whereby the proximate cause of the loss may be ascertained: If there are different agencies, each of which conduces to the loss, the moving effi-

⁸ *Kellyville Coal Co. v. Yehuka*, 94 Ill. App. 74; *Lake Erie & W. R. Co. v. Christison*, 39 Ill. App. 495; *Eders v. Skannal*, 35 La. Ann. 1000; *State v. Weinel*, 13 Mo. App. 583; *Shay v. Camden & S. Ry. Co.* (N. J. 1901), 49 Atl. 547; *Williams v. Underhill*, 63 App. Div. (N. Y.) 223; 71 N. Y. Supp. 291; *O'Flaherty v. Nassau Elec. R. Co.*, 165 N. Y. 624; 59 N. E. 1128; *Ft. Worth & N. O. Ry. Co. v. Smith* (Tex. Civ. App.), 25 S. W. 1032.

⁹ *Borden City Ice & Coal Co. v. Adams*, 69 Ark. 219; 62 S. W. 591; *Nightingale v. Scannell*, 18 Cal. 315; *Gregory v. Brook*, 35 Conn. 437; 95 Am. Dec. 278; *Blood v. Herring*, 22 Ky. Law Rep. 1725; 61 S. W. 273; *Stewart v. Patton*, 65 Mo. App. 21; 2 Mo. App. Rep. 1143; *Cranford v. Parsons*, 63 N. H. 438; *Schile v. Brokhahns*, 80 N. Y. 614; *Kyle v. Ohio River Co.* (W. Va. 1901), 38 S. E. 460. The extent of the loss must, however, be shown with reasonable certainty, *Stewart v. Patton*, 65 Mo. App. 21; 2 Mo. App. Rep. 1143, and must be the natural and proximate result of the act complained of. *Medbury v. N. Y. & E. R. Co.*, 26 Barb. (N. Y.) 564; *Walter v. Post*, 6 Duer (N. Y.), 315; *St. John v. New York*,

6 Duer (N. Y.), 315; 13 How. Pr. 527; *Bennett v. Drew*, 3 Bos. (N. Y.) 355; *Albert v. Bleecker St. & R. R. Co.*, 2 Daly (N. Y.), 389; *Tuttle v. Hannegan*, 4 Daly (N. Y.), 92.

¹⁰ *Brown v. S. W. R. Co.*, 36 Ga. 377; *McPheters v. Moose River L. D. Co.*, 78 Me. 329; 5 Atl. 270; *Benson v. Malden & M. G. Co.*, 6 Allen (Mass), 149; *Ohliger v. Toledo*, 20 Ohio Cir. Ct. R. 142; 10 O. C. D. 762.

¹¹ *Rockland Water Co. v. Tillson*, 69 Me. 255; *Still v. Jenkins*, 15 N. J. L. 302. Damages for prospective loss in action for personal injury are not recoverable in absence of evidence as to permanency of injury. *Noonan v. Obermeyer & Liebman Brew. Co.*, 50 App. Div. (N. Y.) 377; 63 N. Y. Supp. 1066; 7 Am. Neg. Rep. 556. When recoverable for breach of contract. *Fall v. McRee*, 36 Ala. 61; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105; 46 N. W. 314; *Fales v. Hemenway*, 64 Me. 373; *Tiffin v. Ward*, 5 Oreg. 450. When not recoverable, see *Vance v. Towne*, 13 La. 225; *Hunt v. Tibbetts*, 70 Me. 221; *Tucker v. Tucker*, 24 Mich. 426; *Terry v. Beatrice Starch Co.*, 43 Neb. 866; 62 N. W. 255; *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Gordon v. Brewster*, 7 Wis. 355.

cient cause nearest in the point of time may be considered; but if one cause be merely the nearest and another the adequate efficient cause, the efficient cause is the proximate one, for closeness in the order of time in which certain things occur is not necessarily the test. If an efficient adequate cause be found, it is to be considered, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The act may be the primary cause operating through an unbroken successive chain of events, which form a continuous whole, in which case said act is considered the proximate cause, but if the loss may be attributed to a new and controlling influence, an independent event intervening, whereby the chain of successive events is broken, then the act which set in motion the successive causes may become too remote to be considered.¹² So the question whether an original wrongful

¹² 3 Joyce on Insurance, sec. 2834. "The proximate cause is the efficient cause, the one that necessarily sets the other causes in motion. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is of course to be charged with the disaster." *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 130. See also the *G. R. Booth*, 171 U. S. 455, 461; *Phoenix Ins. Co. v. Charleston Bridge Co.*, 65 Fed. 632; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 405; *Mo. Pac. Ry. Co. v. Mosely*, 57 Fed. 925; *Union Pac. Ry. Co. v. Callahan*, 56 Fed. 992; *Scott v. Shepherd*, 2 W. Bl. 892. As sustaining the general principles stated in the text, see the following cases: *Jacobsen v. Dalles P. & A. Nav. Co.*, 93 Fed. 975; *The Joseph B. Thomas*, 86 Fed. 658; 56 U. S. App. 619; 30 C. C. A. 333; *Hunter v. Kansas City & M. R. & B. Co.*, 85 Fed. 379; 54 U. S. App. 653; 29 C. C. A. 206; *Cleveland, C. C. & St. L. R. Co. v. Ballentine*, 84 Fed. 935; 56 U. S. App. 266; 28 C. C. A. 572; *Kowalski v. Chic. G. W. R. Co.*, 84 Fed. 586; *Brisco v. Mimah Consol. Min. Co.*, 82 Fed. 952; *Ross v. Western Un. Teleg. Co.*, 81 Fed. 876; 30 Chic. L. N. 29; 52 U. S. App. 290; 26 C. C. A. 564; *Mayer v. Thompson-Hutchinson Bldg. Co.*, 116 Ala. 634; 22 So. 859, 22 So. 593; *Farmers H. L. C. & R. Co. v. Westlake*, 23 Colo. 26; 46 Pac. 134; *Denver & R. G. R. Co. v. Bedell*, 11 Colo. App. 139; 54 Pac. 280; 12 Am. & Eng. R. Cas. U. S. 141; *District of Cal. v. Dempsey*, 13 App. D. C. 533; 27 Wash. L. Rep. 87; 31 Chic. L. N. 217; *Central of Ga. R. Co. v. Price*, 106 Ga. 176; 43 L. R. A. 402; 32 S. E. 77; 12 Am. & Eng. R. Cas. N. S. 283; *McGregor v. Reid, M. & Co.*, 178 Ill. 464; 53 N. E. 323; 6 Am. Neg. Rep. 28, rev'g 76 Ill. App. 610; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 292; 50 N. E. 988; 11 Am. & Eng. R. Cas. N. S. 382; *Cox v. Chic. & N. W. R. Co.*, 102 Iowa, 711; 72 N. W. 301;

act was the proximate cause of an accident or injury where other agencies intervened, depends upon whether such original act was the antecedent, efficient and dominant cause which put the other causes in operation.¹³

§ 85. Proximate cause continued.—The maxim, “*causa proxima non remota spectatur*,” is not controlled by time or distance, nor by the succession of events.¹⁴ But where an effi-

- 9 Am. & Eng. R. Cas. N. S. 604; *Kansas City Car & F. Co. v. Sechrist*, 59 Kan. 778; 54 Pac. 688; *Illinois C. R. Co. v. Wizell*, 100 Ky. 235; 38 S. W. 5; 6 Am. & Eng. R. Cas. N. S. 337; 18 Ky. L. Rep. 738; *Stone v. Boston & A. R. Co.*, 171 Mass. 536; 41 L. R. A. 794; 51 N. E. 1; 4 Am. Neg. Rep. 490; *Smeizel v. Odanah Iron Co.*, 116 Mich. 149; 74 N. W. 488; 4 Det. L. N. 1111; *Lambeck v. Grand Rap. & I. R. Co.*, 106 Mich. 512; 64 N. W. 479; 2 Det. L. N. 536; *Smithson v. Chic. G. W. R. Co.*, 71 Minn. 216; 73 N. W. 853; 11 Am. & Eng. R. Cas. N. S. 726; *Aldrich v. Concord & M. R. Co.*, 67 N. H. 380; 36 Atl. 252; *McCann v. Newark & S. O. R. Co.*, 58 N. J. L. 642; 33 L. R. A. 127; 34 Atl. 1052; 4 Am. & Eng. R. Cas. N. S. 382; *Laidlaw v. Sage*, 158 N. Y. 73; 52 N. E. 679; 44 L. R. A. 216, rev'g 2 App. Div. 374; 73 N. Y. St. R. 469; 37 N. Y. Supp. 770; *Kennedy v. Mayor*, 73 N. Y. 365; 29 Am. Rep. 169; *Meyer v. Haven*, 37 App. Div. (N. Y.) 194; 55 N. Y. Supp. 864; *Lehman v. Brooklyn*, 30 App. Div. (N. Y.) 305; 51 N. Y. Supp. 524; *Storey v. New York*, 29 App. Div. (3 N. Y.) 316; 51 N. Y. Supp. 580; *Laible v. New York C. & H. R. R. Co.*, 13 App. Div. (N. Y.) 574; 43 N. Y. Supp. 1008; *Crampton v. Irie*, 124 N. C. 591; 32 S. E. 968; *Berry v. Sugar Notch*, 191 Pa. St. 345; 43 Atl. 240; *Card v. Columbia*, 191 Pa. St. 254; 43 Atl. 217; *Heister v. Pawn Twp.*, 189 Pa. St. 253; 42 Atl. 121; 43 W. N. C. 389; 29 Pitts. L. J. N. S. 310; *Cochran v. Phila. & R. T. R. Co.*, 184 Pa. St. 565; 39 Atl. 296; *Willis v. Prov. Teleg. Pub. Co.*, 20 R. I. 285; 38 Atl. 947; *State v. Ruth*, 9 S. D. 84; 68 N. W. 189; *Anderson v. Miller*, 96 Tenn. 35; 33 S. W. 615; 31 L. R. A. 604; *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643; 41 S. W. 190; *Thompson v. Salt Lake Rap. Trans. Co.*, 16 Utah, 281; 40 L. R. A. 172; 52 Pac. 92; 10 Am. & Eng. R. Cas. N. S. 563; *Isham v. Dow's Estate*, 70 Vt. 588; 45 L. R. A. 87; 67 Am. St. Rep. 691; 5 Am. Neg. Rep. 106; 4 Chic. L. J. Wkly. 13; *Fowlks v. Southern R. Co.*, 96 Va. 742; 32 S. E. 464; 14 Am. & Eng. R. Cas. N. S. 250; 1 Va. S. C. Rep. 146; *Crouse v. Chic. & N. W. R. Co.*, 102 Wis. 196; 78 N. W. 446; 14 Am. & Eng. R. Cas. N. S. 780; *Foley v. East Flamborough Twp.*, 26 Ont. App. 43.
- ¹³ *Union P. R. Co. v. Evans*, 52 Neb. 50; 71 N. W. 1062. See also *Alabama, G. S. R. Co. v. Arnold*, 80 Ala. 600; *East Tenn. V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267; *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39; 39 Am. Dec. 490; *Jordan v. Wyatt*, 4 Grat. (Va.) 151; 47 Am. Dec. 720.
- ¹⁴ *Penn. R. R. Co. v. Kerr*, 62 Pa. St. 353; 4 Western Jurist, 254; *Kellogg v. Chic. & N. W. Ry. Co.*, 26 Wis. 223; 7 Am. Rep. 69.

cient adequate cause has been discovered, that is to be deemed the true cause, unless some new cause not incidental to but independent of the first shall be found to intervene between it and the first.¹⁵ And where one of two causes combine to produce an injury, both of which are in their nature proximate, one being culpable negligence of the defendant without which the accident would not have happened, and the other some accident for which neither party is responsible, the defendant is liable in damages.¹⁶

§ 86. Proximate cause for jury.—The question as to the proximate cause of an injury is ordinarily one of fact for the jury,¹⁷ except where the evidence is not contradictory and the case is clear, when it may be for the court.¹⁸ The determination, however, of the jury upon this question may be set aside, where it is clearly against the weight of evidence.¹⁹

§ 87. Natural and proximate result of act complained of.—The object of an action for damages being to recover compensation for the loss or damage sustained, it is a general rule that in the absence of circumstances which would justify an award of punitive damages, only such damages are recoverable as are the natural and proximate result of the act complained of.²⁰

¹⁵ *Marble v. City of Worcester*, 4 Gray (Mass.), 412, per Thomas, J.; *Kellogg v. Chic. & N. W. Ry. Co.*, 26 Wis. 223; 7 Am. Rep. 69.

¹⁶ *Leeds v. New York Teleph. Co.* (N. Y. 1901), 64 App. Div. (N. Y.) 484; 10 Am. Neg. Cas. 435, 438, per Sewell, J., citing *Sawyer v. City of Amsterdam*, 20 Abb. N. C. (N. Y.) 227; *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39; 9 Am. Neg. Cas. 619; *King v. City of Cohoes*, 77 N. Y. 83; *Cohen v. Mayor, etc., of N. Y.*, 113 N. Y. 532; 23 N. Y. St. R. 509; 21 N. E. 700; *Phillips v. New York C. & H. R. Co.*, 127 N. Y. 657; 3 Silv. C. A. 467; 38 N. Y. St. R. 675; 27 N. E. 978.

¹⁷ *Postal Teleg. Cable Co. v. Zopfi*, 43 U. S. App. 141; 19 C. C. A. 605;

73 Fed. 609; *Lake Erie & W. R. Co. v. Craig*, 37 U. S. App. 654; 19 C. C. A. 681; 73 Fed. 642; *St. Louis, I. M. & S. R. Co. v. Needham*, 32 U. S. App. 635; 16 C. C. A. 457; 69 Fed. 823; *Colorado Mortg. & I. Co. (Colo.)*, 42 Pac. 42; *Kitchen v. Carter*, 47 Neb. 776; 66 N. W. 855; *Pickens v. South Carolina & G. R. Co.*, 54 So. C. 498; 32 S. E. 567; *Klatt v. Foster Lumber Co.*, 92 Wis. 622, 628; 66 N. W. 791, 793.

¹⁸ *Schwartz v. Shull*, 45 W. Va. 405; 31 S. E. R. 914; 5 Am. Neg. R. 496; *Klatt v. Foster Lumber Co.*, 92 Wis. 622, 628; 66 N. W. 791, 793.

¹⁹ *Kitchen v. Carter*, 47 Neb. 776; 66 N. W. 855.

²⁰ *The Normannia*, 62 Fed. 469, 481; *Brantley v. Gunn*, 29 Ala. 387;

and this is true whether the damages arise from the withholding of a legal right or the breach of a legal duty,²¹ or whether the action be in contract or tort,²² or whether the damages claimed are general or special.²³ Again, if the damages are the natural and proximate consequences of the wrongful act, the degree of the probability of their occurrence is not to be considered.²⁴ The burden of proof, however, in an action for personal injuries, to show that the injury was the proximate result of the act complained of, rests upon the plaintiff.²⁵ But those damages which

Kelly v. Altemus, 34 Ark. 184; 36 Am. Rep. 36; Anderson v. Taylor, 56 Cal. 131; 38 Am. Rep. 52; Chidester v. Consol. Peoples Ditch Co., 53 Cal. 56; Streeter v. Marshall Silver Min. Co., 4 Colo. 535; Gregory v. Brooks, 35 Conn. 437; 95 Am. Dec. 278; Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Johnson v. Drummond, 16 Ill. App. 641; Bullman v. Ind. C. & L. R. Co., 76 Ind. 166; 40 Am. Rep. 230; Georgia v. Kepford, 45 Iowa, 48; Bosch v. Burlington & Mo. R. Co., 44 Iowa, 402; 24 Am. Rep. 754; City of Topeka v. Tuttle, 5 Kan. 311; Union Pac. Ry. Co. v. Shook, 3 Kan. App. 710; 47 Pac. 685; Thoms v. Dingley, 70 Me. 100; 35 Am. Rep. 310; Noxon v. Hill, 2 Allen (Mass.), 215; Krueger v. Le Blanc, 62 Mich. 70; 28 N. W. 757; Griggs v. Fleckenstein, 14 Minn. 81; 100 Am. Dec. 100; Chamberlain v. Porter, 9 Minn. 260; Fitzgerald v. Fitzgerald & M. C. Co. (Neb. 1895), 62 N. W. 899; Lamb v. Baker, 34 Neb. 485; 52 N. W. 285; Warwick v. Hutchinson, 45 N. J. L. 61; Kuhn v. Nesb, 32 N. J. Eq. 647; Ten Eyck v. Del. & R. Canal Co., 18 N. J. L. 200; 37 Am. Dec. 233; Cuff v. Newark & N. Y. R. R. Co., 35 N. J. L. 17; 10 Am. Rep. 205; Ehr Gott v. New York, 96 N. Y. 264, rev'g 66 How. Pr. 161; Baker v. Drake, 53 N. Y. 211; 13 Am. Rep. 507; Medbury v. N. Y. & E. R. R. Co., 26 N. Y. 564; Knight

v. Wilcox, 14 N. Y. 413, rev'g 18 Barb. 212; Walrath v. Redfield, 11 N. Y. 212; Lawrence v. Wardwell, 6 N. Y. 423; Freeman v. Clute, 3 N. Y. 424; Niles v. N. Y. C. & H. R. R. Co., 14 App. Div. (N. Y.) 58; 43 N. Y. Supp. 751; Foels v. Tonawanda, 59 Hun (N. Y.), 567; 38 N. Y. St. R. 126; 14 N. Y. Supp. 46; Hallock v. Belcher, 42 Barb. (N. Y.) 199; People v. Albany, 5 Lans. (N. Y.) 524; Butler v. Kent, 19 Johns. (N. Y.) 223; Jackson v. Hall, 84 N. C. 489; Adams Exp. Co. v. Egbert, 36 Pa. St. 360; 78 Am. Dec. 382; Harrison v. Berkley, 1 Strob. (S. C.) 525; 47 Am. Dec. 578; Collins v. East Penn. V. & G. R. Co., 56 Tenn. 841; Gulf C. & S. F. R. Co. v. Brown, 16 Tex. Civ. A. 93; 40 S. W. 608; Dem. Pub. Co. v. Jones, 83 Tex. 302; 18 S. W. 652; Victorian Ry. Commrs. v. Coultas, 57 L. J. P. C. 69; 13 App. Cas. 22; 58 L. T. 390; 37 W. R. 129; 52 J. P. 500; Glover v. L. & S. W. Ry., 37 L. J. Q. B. 57; L. R. 3 Q. B. 25; 17 L. T. 139; O'Byrne v. Campbell, 15 Ont. R. 339.

²¹ Warwick v. Hutchinson, 45 N. J. L. 61.

²² Baker v. Drake, 53 N. Y. 211; 13 Am. Rep. 507.

²³ Chamberlain v. Porter, 9 Minn. 260.

²⁴ Harrison v. Berkley, 1 Strob. (S. C.) 525; 47 Am. Dec. 578.

²⁵ McCarty v. Lockport, 13 App.

are the natural and proximate result of the injury need not be specially pleaded by him.²⁶

§ 88. Proximate consequences illustrated.—The payment of a tax charged against a person by an illegal alteration of an assessment list is a consequential injury resulting from the alteration and for which recovery may be had.²⁷ And there may be a recovery for damages caused by horses running away, in consequence of stepping into a hole in the street.²⁸ But damages caused by the ignition of oil negligently allowed to escape where such ignition is caused by the act of a third person are too remote, the negligence in permitting the oil to escape not being the proximate cause of the damage sustained;²⁹ nor is an injury to a crop resulting from the taking of an animal needed in its cultivation, a proximate consequence of such taking;³⁰ nor is deterioration from cultivation of the soil, where damages are claimed for clearing land of timber;³¹ nor is sickness of an opera singer and loss of anticipated receipts in consequence thereof, where the action is for negligence in failing to complete an opera house in time.³²

§ 89. Natural and probable consequences—Those in contemplation of parties—Contracts.—In the application of the rule that the damages to be recovered must be the natural and proximate consequence of the act complained of, those results which the wrongdoer must have contemplated as the probable consequence of his fraud or breach of contract will be considered as proximate.³³ Damages which are the natural and probable consequences of the breach of a contract, that is, such as may be said to have been in the contemplation of the parties at the time of entering into the contract as a natural and prob-

Div. (N. Y.) 494; 43 N. Y. Supp. 693.

²⁶ *Croco v. Oregon Short-Line R. Co.*, 18 Utah, 311; 44 L. R. A. 285; 54 Pac. 985.

²⁷ *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201.

²⁸ *City of Topeka v. Tuttle*, 5 Kan. 311.

²⁹ *Neal v. Atlantic Ref. Co.*, 16 Pa. Co. Ct. R. 241; 4 Pa. Dist. R. 49.

³⁰ *Jackson v. Hall*, 84 N. C. 489.

³¹ *Brantley v. Gunn*, 29 Ala. 387.

³² *New York Academy of Music v. Hilton*, 2 Hilt. (N. Y.) 217.

³³ *Smith v. Bolles*, 132 U. S. 125.

able result of a breach thereof, may be recovered.³⁴ But it has been held that an instruction is erroneous which fixes the damages as such as both parties reasonably contemplated at the time of making the contract, since the facts being ascertained, the law and not the contemplation of the parties fixes the measure of damages.³⁵

§ 90. Natural and probable consequences—Torts.—In actions in tort there may be a recovery of damages for those injuries which may be said to be the natural and probable consequences of the wrongful act complained of and proximately resulting therefrom.³⁶ But in this class of actions the rule is much

³⁴ *Smith v. Bolles*, 132 U. S. 125; *Gunter v. Beard*, 93 Ala. 227; 9 So. 389; *Swift v. Eastern Warehouse*, 86 Ala. 294; 5 So. 505; *Mitchell v. Clarke*, 71 Cal. 163; 60 Am. Rep. 529; *Brock v. Gale*, 14 Fla. 523; 14 Am. Rep. 356; *Stewart v. Lainer*, 75 Ga. 582; *O'Connor v. Nolan*, 64 Ill. App. 357; *Cincinnati & C. Air Line Co. v. Rogers*, 24 Ind. 103; *Graves v. Glass*, 86 Iowa, 261; 53 N. W. 231; *Blood v. Herring*, 22 Ky. Law Rep. 1725; 61 S. W. 273; *Dwyer v. Tulane Ed. F. Adm.*, 47 La. Ann. 1232; 17 So. 796; *La. Rev. Civ. Code*, sec 1934; *Williams v. Barton*, 13 La. 404; *Furstenburg v. Fawcett*, 61 Md. 184; *Abbott v. Galch*, 13 Md. 314; 71 Am. Dec. 635; *Wetmore v. Pattison*, 45 Mich. 439; 8 N. W. 67; *Hopkins v. Sanford*, 38 Mich. 611; *Hutchings v. Ladd*, 16 Mich. 493; *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527; *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo. App. 287; *Skirm v. Hilliker* (N. J. Sup. 1901), 45 Atl. 679; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Hamilton v. McPherson*, 28 N. Y. 72; 84 Am. Dec. 330; *Taylor v. Read*, 4 Paige (N. Y.), 561; *Billmeyer v. Wagner*, 91 Pa. St. 92; *Finch v. Heerman*, 5 Luz. Leg. Reg. (Pa.) 125;

State v. Ward, 9 Heisk. (Tenn.) 100; *Fowler v. Shook* (Tex. Civ. App. 1900), 59 S. W. 282; *Galveston H. & S. A. Ry. Co. v. Stovall*, 3 Willson Civ. Cas. Ct. App. (Tex.) sec. 252; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; 12 N. W. 49; *Hadley v. Baxendale*, 9 Exch. 341; 26 Eng. L. & Eq. R. 398; *Joyce on Elec. Law*, secs. 823, 951, 952.

³⁵ *Collins v. Stephens*, 58 Ala. 543.

³⁶ *McAfee v. Crawford*, 13 How. (U. S.) 447; 14 L. Ed. 217; *Frink v. Schroyer*, 18 Ill. 416; *Billman v. Ind. C. & L. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508; *Johnson v. Courts*, 3 Har. & M. (Md.) 570; *Derry v. Flitner*, 118 Mass. 131; *Watson v. Rheinderknecht* (Minn. 1901), 84 N. W. 798; *Hughes v. McDonough*, 43 N. J. L. 459; 39 Am. Rep. 603; *City of Allegheny v. Zimmerman*, 95 Pa. St. 287. "Ordinarily in actions of torts, the rule of damages is compensation in money for the damage sustained by reason of the natural and obvious consequences of the wrongful act. I believe the doctrine of remote and proximate causes has finally reduced itself to this. The wrongful act is the proximate cause of all the

broader than in the case of contracts.³⁷ Thus it is said that "the universal and cardinal principle in such cases is that the person injured shall receive compensation commensurate with his loss or injury and no more. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited or affected so far as they are compensatory by what was in fact contemplated by the party in fault. He who is responsible for a negligent act must answer 'for all the injurious results which flow therefrom by ordinary, natural consequences, without the interposition of any other negligent act or overpowering force.' Whether the injurious consequences may have been 'reasonably expected' to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. As said in *Stevens v. Dudley*.³⁸ 'It is the unexpected rather than the expected that happens in the great majority of cases of negligence.'"³⁹ Damages are re-

damage, which ought reasonably and naturally to be expected from it. Always, however, the damage must be something which has a money value, and which can be estimated in money. . . . When, however, the element of malice enters into the wrong, the rule of damages is different and more liberal. I think it is equally well settled that in such cases there enters into the question of damages, considerations which cannot be made the subject of exact pecuniary compensation such . . . as mental distress and vexation . . . offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice." *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; 480, 481, per Cushing, C. J.

³⁷ *Mentzer v. Western Un. Teleg. Co.*, 93 Iowa, 372; 62 N. W. 1; 5 Am. Elec. Cas. 709. So it has been said that "Liability for breach of

covenant is less extensive than that for a tort, and involves only such consequences as are the direct and proximate result of the act complained of. There are certain arbitrary rules in regard to such breaches, the principal one of which is to give compensation for what is actually lost, to make the damages correspond with the real injury sustained, but not to permit a recovery where the loss cannot be directly traced to the act done or omitted. It will be sufficient if the injury is the natural or necessary consequence of the act, but remote or merely possible consequences are excluded from consideration." *United States Trust Co. v. O'Brien*, 46 N. Y. St. R. 238; 18 N. Y. Supp. 798, per McAdam, J.

³⁸ 56 Vt. 158.

³⁹ *Mentzer v. Western Un. Teleg. Co.*, 93 Iowa, 752; 62 N. W. 1; 5 Am. Elec. Cas. 716, per Deemer, J.

coverable for the natural and proximate results of an injury, though the precise form in which they resulted could not have been foreseen,³⁹ or though the full extent of the injury could not have been in the contemplation of, or anticipated by, the wrongdoer.⁴⁰ So where a wound is negligently inflicted upon a person, it is not necessary that blood poisoning be the ordinary effect of such a wound to permit a recovery therefor.⁴¹ And this rule has also been applied in the case of the sale of liquor to a person,⁴² of dangerous explosives to a child,⁴³ and where a landlord has broken into his tenant's store and removed the roof.⁴⁴

§ 91. Remote, contingent and speculative damages.—The rule that recovery can only be had for such damages as are the natural and proximate result of the act complained of, excludes recovery for such damages as are too remote and are contingent or speculative in character.⁴⁵ So in actions for breach of a con-

³⁹ *Hill v. Winsor*, 118 Mass. 251.

⁴⁰ *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544; 14 N. E. 572; *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489; 49 N. E. 296; *Sloan v. Edwards*, 61 Md. 90; *McGanahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211; 50 N. E. 610; *Allison v. Chandler*, 11 Mich. 542; *Christianson v. Chic. St. P. M. & O. R. Co.*, 67 Minn. 94; 69 N. W. 640; 2 Chic. L. J. Wkly. 86; *Hoeppe v. Southern Hotel Co.*, 142 Mo. 378; 44 S. W. 257; *Graney v. St. Louis, I. M. & S. R. Co.*, 140 Mo. 39; 41 S. W. 246; 38 L. R. A. 633; 8 Am. & Eng. R. Cas. N. S. 187; *Harrison v. Berkley*, 1 Strob. (S. C.) 525; 47 Am. Dec. 578. But see *Coley v. Statesville*, 121 N. C. 301; 28 S. E. 482; *Miles v. Postal Teleg. Cable Co.*, 55 S. C. 403; 33 S. E. 493; *Wilber v. Follansbee*, 97 Wis. 577; 72 N. W. 741; *The Normannia*, 62 Fed. 469, 481.

⁴¹ *McGanahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211; 50 N. E. 610.

⁴² *Harrison v. Berkley*, 1 Strob. (S. C.) 525; 47 Am. Dec. 578.

⁴³ *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508.

⁴⁴ *Allison v. Chandler*, 11 Mich. 542.

⁴⁵ *N. Y. & C. Min. Sign Co. v. Fraser*, 130 U. S. 611; 32 L. Ed. 1031; 9 Sup. Co. 665; *Cohn v. Western Un. Teleg. Co.*, 46 Fed. 40; *Lehman v. Mo-Quown*, 31 Fed. 138; *Macomber v. Thompson*, Fed. Cas. No. 8,919; 1 Sumn. (U. S.) 384; *Evans v. Cincinnati S. & M. R. Co.*, 78 Ala. 341; *Brigham v. Carlisle*, 78 Ala. 243; 56 Am. Rep. 28; *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203; 21 S. W. 104; *Wallace v. Ali Sam*, 71 Cal. 197; 12 Pac. 46; 60 Am. Rep. 534; *Hysore v. Quigley*, 9 Houst. (Del.) 348; 32 Atl. 960; *Washington & G. R. Co. v. Amer. Car Co.*, 5 App. D. C. 524; *Reed v. Augusta*, 25 Ga. 386; *Consumers Pure Ice Co. v. Jenkins*, 58 Ill. App. 519; *Chapman v. Kirby*, 49 Ill. 211; *Williamson v. Brandenburg*, 133 Ind. 594; 32 N. E. 834; *Montgomery Co. U. A. Soc. v. Har-*

tract, remote or speculative damages should not be considered.* And in actions for personal injuries consequences which are contingent, speculative or merely possible are not proper to be considered in estimating the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring, as

wood, 126 Ind. 440; 10 L. R. A. 532; 26 N. E. 182; *Winne v. Kelly*, 34 Iowa, 330; *Leffingwell v. Gilchrist*, 40 Iowa, 416; *Walrath v. Whittekind*, 26 Kan. 482; *Minneapolis H. W. Co. v. Cummings*, 26 Kan. 367; *Bergen v. New Orleans*, 35 La. Ann. 523; *Bohm v. Cleaver*, 25 La. Ann. 419; *Bridges v. Stickney*, 38 Me. 361; *Lannahan v. Heaver*, 79 Md. 413; 29 Atl. 1086; *Allis v. McLean*, 48 Mich. 428; 12 N. W. 640; *Mizner v. Frazier*, 40 Mich. 592; 20 Am. Rep. 562; *Connoble v. Clark*, 38 Mo. App. 476; *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Loeb v. Kamak*, 1 Mont. 152; *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb. 572; 48 N. W. 398; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154; 44 Pac. 423; *Clark v. Nev. L. & M. Co.*, 6 Nev. 203; *Bernstein v. Meech*, 130 N. Y. 354; 29 N. E. 255, aff'g 54 Hun 634; 8 N. Y. Supp. 914; *Medbury v. N. Y. & E. R. R. Co.*, 26 Barb. (N. Y.) 564; *N. Y. Smelting & R. Co. v. Lieb*, 48 N. Y. Super. Ct. 508; *Boyle v. Reeder*, 1 Ired. (N. C.) 607; *Rhodes v. Baird*, 16 Ohio St. 573; *Gaar Scott & Co. v. Snook*, 1 Ohio Cir. Ct. R. 259; *In re Yohe's Estate*, 6 Phila. (Pa.) 293; *Haak v. Wise*, 33 Leg. Int. (Pa.) 322; *Tappan v. Harwood*, 2 Speer (S. C.), 536; *Post v. Orndoff*, 7 Heisk. (Tenn.) 167; *San Antonio Gas Co. v. Harber*, 1 White & W. Cir. Cas. Ct. App. (Tex.) sec. 1125; *Connelly v. Western*

Un. Teleg. Co. (Va. 1902), 7 Va. Law Reg. 704; *Burton v. Pinkerton*, 36 L. J. Ex. 187; L. R. 2 Ex. 340; 17 L. T. 15; 15 W. 1139; *Woodger & G. W. Ry. Co.*, 36 L. J. C. P. 177; L. R. 2 C. P. 318; 15 L. T. 795; *Scholes v. North London Ry.*, 21 L. T. 835; *Hobbs v. L. & S. Ry.*, 44 L. J. Q. B. 49; L. R. 10 Q. B. 111; 32 L. T. 352; 23 W. 520; *Cobb v. G. W. Ry. Co.*, 62 L. J. Q. B. 335; 1 Q. B. 459; 4 R. 283; 68 L. T. 483; 41 W. 275; 57 J. P. 437; C. A.; *Lynch v. Knight*, 9 H. L. Cas. 577; 8 Jur. (N. S.) 724; 5 L. T. 291; *Sharp v. Powell*, 41 L. J. C. P. 95; L. R. 7 C. P. 253; 26 L. T. 436; 20 W. 584; *Nicosia v. Vallone*, 37 L. L. T. 106; P. C.; *Priestly v. Maclean*, 2 F. & F. 288; *Hoey v. Felton*, 11 C. B. (U. S.) 142; 31 L. J. C. P. 106; 8 Jur. (U. S.) 764; 5 L. T. 354; 10 W. 78; *The Notting Hill*, L. R. 9 Prob. Div. 105 (Eng. C. A.); *Dallea v. Taylor*, 35 Q. B. (Ont.) 395.

* *Gunter v. Beard*, 93 Ala. 227; 9 So. 389; *Reed Lumber Co. v. Lewis*, 94 Ala. 626; 10 So. 333; *Fonge v. Pac. Mail Co.*, 1 Cal. 353; *Davis v. Fish*, 9 G. Greene (Iowa), 406; 48 Am. Dec. 387; *Harris v. Moss*, 112 Ga. 95; 37 S. E. 123; *First Nat. Bank v. Thurman*, 69 Iowa, 693; 25 N. W. 909; *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 435; *Reading v. Donovan*, 6 La. Ann. 491; Code, art. 1928; *Bullock v. Bergman*, 46 Ind. 270; *Vicksburg & M. R. R.*

amounts to a reasonable certainty that they will result from the original injury.⁴⁷ But it is declared that the mere fact that speculation or conjecture is resorted to will not prevent a recovery of damages unless it is necessary to resort thereto.⁴⁸ Nor are damages necessarily remote and speculative because to some extent uncertain and difficult of exact measurement.⁴⁹ Again, where the damages alleged in a complaint are too remote, it is held that the remedy is by motion to strike out instead of by demurrer.⁵⁰

§ 92. Application of rule as to remote or speculative damages.—Damages arising from the peculiar circumstances of the particular case, and not naturally resulting from a breach of contract, are not recoverable unless known to the person breaking the contract.⁵¹ And likewise there can be no recovery for the increased price of having logs sawed elsewhere, this being rendered necessary, owing to the defective construction of a sawmill, where it does not appear that this could have entered into the contemplation of the parties,⁵² or for a loss resulting from a sale of logs without being cut into lumber.⁵³ So damages for loss of profits on a shipment of goods, which a railroad company was obliged to decline, because of noncompletion of work which contractors had agreed to have done by a certain time, are too remote and speculative in an action for a breach of the contract.⁵⁴ And prospective profits which might have been

Co. v. Ragdale, 46 Miss. 458; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Grubb v. Burford*, 98 Va. 553; 37 S. E. 4; 2 Va. Sup. Co. Rep. 467.

⁴⁷ *Streng v. Frank Ibert Brew. Co.* (App. Div. N. Y. 1900), 64 N. Y. Supp. 34; 7 Am. Neg. Rep. 650, per Woodward, J. See also *Cicero & P. St. Ry. Co. v. Brown*, 89 Ill. App. 318; *Bailey v. Westcott*, 16 N. Y. St. R. 671; 4 N. Y. Supp. 67; 14 Daly, 506; *Strohm v. New York, L. E. & W. R. R. Co.*, 96 N. Y. 305, rev'g 32 Hun, 20; *Murtaugh v. New York Cent. R. R. Co.*, 49 Hun (N. Y.), 456; 23 N. Y. St. R. 636; 3 N. Y. Supp.

483; *Cook v. New York Cent. R. R. Co.*, 17 N. Y. St. R. 353.

⁴⁸ *Jacksonville v. Doan*, 48 Ill. App. 247.

⁴⁹ *Chew v. Lucas*, 15 Ind. App. 595; 43 N. E. 235.

⁵⁰ *Norton v. Kumpe*, 121 Ala. 446; 25 So. 841.

⁵¹ *Brauer v. Oceanic Steam Nav. Co.*, 34 Misc. (N. Y.) 127; 69 N. Y. Supp. 465, order modified, 73 N. Y. Supp. 291. See also *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; 12 N. W. 49.

⁵² *Bruhm v. Ford*, 33 U. S. 323.

⁵³ *Bruhm v. Ford*, 33 U. S. 323.

⁵⁴ *Atlantic & D. Ry. Co. v. Del.*

made by the lessees of property, but for the failure of the lessor to rebuild as it was his duty to do are too remote and speculative;⁵⁵ as are also profits not the immediate consequence of defendant's wrongful act.⁵⁶ Again, where owing to the negligent alteration of a message in the course of transmission, a merchant is unable to fulfill a contract obligation, and as a result of such inability loss of business and customers ensued, damages for the latter result are too remote and speculative to be recovered.⁵⁷ So also, where, owing to the negligent delay of a telephone company in delivering a message to a witness to be present at a trial and testify, he failed to appear, and as a result of such failure it was claimed that the suit was lost, damages therefor were held to be too remote.⁵⁸ And again, in an action to recover damages for unlawfully preventing a person from procuring lumber from accustomed sources, the expenses of travel to another place, in order to purchase lumber are not recoverable.⁵⁹ Nor is a wrongdoer, who has broken into a person's house and murdered a servant of the owner, liable for damages, because the owner's family has abandoned such house as a result of the crime, and that in consequence it has become worthless.⁶⁰ And where as a result of the negligent operation of a street roller a horse becomes frightened and a blood vessel in the heart is ruptured, which results in death, the city is not liable therefor.⁶¹

§ 93. **Same subject continued.**—Evidence is inadmissible in an action for personal injuries as to loss of capacity for the enjoyment of the pleasures of life, as it is too vague to furnish any basis for damages.⁶² So also in an action to recover damages for the breaking of a leg, evidence of a hypothetical second fracture is inadmissible.⁶³ And where damages are claimed

Const. Co., 98 Va. 503; 37 S. E. 13; 2 Va. Sup. Ct. Rep. 230.

⁵⁵ Lightfoot v. West, 98 Ga. 546; 25 S. E. 587.

⁵⁶ Morey v. Met. Gas L. Co., 6 J. & S. (N. Y.) 185.

⁵⁷ Fererro v. Western Un. Teleg. Co., 9 App. (D. C.) 455; 24 Wash. L. Rep. 790; 35 L. R. A. 548.

⁵⁸ Martin v. Sunset Teleph. & Teleg. Co., 18 Wash. 260; 51 Pac. 376.

⁵⁹ Jackson v. Stanfield, 137 Ind. 592; 23 L. R. A. 588; 36 N. E. 345.

⁶⁰ Clark v. Gay, 112 Ga. 777; 38 S. E. 81.

⁶¹ Lee v. City of Burlington, 113 Iowa, 356; 85 N. W. 618.

⁶² Locke v. International & G. N. R. Co. (Tex. Civ. App. 1901), 60 S. W. 314.

⁶³ Lincoln v. Saratoga & S. R. Co., 23 Wend. (N. Y.) 425.

for building a railroad nearer to a certain point than specified, the jury cannot consider such elements as danger from fire or the frightening of horses.⁶⁴ And again, the fact that because of excavations in a street, the owner of property on such street has been unable to find a purchaser therefor, is too remote and speculative,⁶⁵ as are also injuries consequentially resulting to third persons who stand in no natural or legal relation to the person injured.⁶⁶ So also in an action to recover damages as a result of a collision of boats, there can be no recovery for injury to the health of a boatman due to exposure in voluntarily remaining aboard after the collision.⁶⁷ And mental suffering because of inability to pay rent due is too remote in an action for personal injuries.⁶⁸ Again, it has been held that there can be no recovery of damages on account of the freezing of goods owing to the inability of the owner of land to construct a cellar for the purpose of holding such goods because of the pendency of a false claim to such land.⁶⁹ So also damages for the sinking of a vessel eight months after a collision are too remote to be chargeable to the collision.⁷⁰

§ 94. Actual, compensatory and substantial damages.—

There is said to be no distinction between actual and compensatory damages,⁷¹ and as we have stated elsewhere, actual, perceptible damage is not indispensable as the foundation of an action.⁷² But the measure of compensation, as based upon the testimony, limits the amount of recovery,⁷³ subject, however, to such right as the court may have in the premises and in the exercise of its discretion under the law to increase the amount of the verdict.⁷⁴

⁶⁴ *Hutchinson v. Chic. & N. W. Ry. Co.*, 41 Wis. 541.

⁶⁵ *City of San Antonio v. Mullally*, 11 Tex. Civ. App. 596; 33 S. W. 256.

⁶⁶ *Gregory v. Brooks*, 35 Conn. 437; 95 Am. Dec. 278.

⁶⁷ *The Brinton*, 50 Fed. 581.

⁶⁸ *Planters' Oil Co. v. Mansell* (Tex. Civ. App.), 43 S. W. 913.

⁶⁹ *Cormier v. Bouroue*, 32 N. B. 283.

⁷⁰ *Grubbs v. The John C. Fisher* (Pa.), 22 Pitts. L. J. N. S. 122.

⁷¹ *Mogle v. Blatch*, 5 Ohio C. C. 51.

⁷² *Webb v. Portland Mfg. Co.*, 3 Story (U. S.), 189, per Story, J., quoted in *Blanchard v. Burbank*, 16 Bradw. (Ill. App.) 375, 383, per Bailey, J.

⁷³ *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 33 N. W. 306; 10 W. 184.

⁷⁴ *Sullivan v. Vicksburg, S. & P. R. Co.*, 39 La. Ann. 800; 2 So. 586.

Again, it is decided that a recovery of nominal damages is no bar to a suit for actual damages, where they did not take place before the commencement of the former suit. Successive suits for actual damages may be brought from time to time as they are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery.⁷⁵ But a judgment for actual damages cannot, it is held, be rendered in an action for exemplary damages.⁷⁶ Again, the simple and direct mode of ascertaining the actual loss should be chosen where there are different modes of estimation or determination of the damages, in preference to a method which is complicated by many uncertain and hypothetical elements.⁷⁷ Another general rule has been stated, viz; that where damages have been sustained for a breach of contract, the plaintiff is not entitled to recover all he could have made had the contract been fulfilled.⁷⁸ And for a breach of contract of sale the law imposes no damages by way of punishment. The innocent party is only entitled to recover his real loss. If the market value is less than the contract price, the buyer has sustained no loss.⁷⁹ So in an action for breach of a contract which contains no qualification or limitation to the contrary, the right to damages is unrestricted and extends to the inclusion of all injuries, whether fore-

⁷⁵ *McConnell v. Kibbe*, 33 Ill. 175, 179; 85 Am. Dec. 265.

⁷⁶ *Cobb v. Columbia & G. N. R. Co.*, 37 S. C. 194; 15 S. E. 878; 12 Ry. & Corp. L. J. 251. If only actual damages are asked on the trial in a suit for both actual and exemplary damages, a charge that the jury shall "only consider the question of actual damages" will be presumed to have been understood. *East Line & R. R. Co. v. Lee* (Tex.), 9 S. W. 604.

⁷⁷ *The Rosend Castle* (U. S. D. C. D. N. Y.), 30 Fed. 462.

⁷⁸ *Bacon's Abr.* (Bouv. 1854) "Damages" D. I. p. 64, citing *Gilpin v. Consequa*, Pet. (U. S. C. C.) 85; *Shepherd v. Hampton*, 3 Wheat. (U. S.) 200; *Douglass v. M'Callister*, 3 Cranch (U. S.), 298; *Willing v. Con-*

sequa, Pet. (U. S. C. C.) 172; *Yonqua v. Nixon*, Pet. (U. S. C. C.) 221; *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Watt v. Potter*, 2 Mason (U. S.), 77; *Pope v. Barrett*, 1 Mason (U. S.), 177; *Blanchard v. Ely*, 21 Wend. (N. Y.) 342; *Boyd v. Brown*, 17 Pick. (Mass.) 453. But see *Bucknam v. Nash*, 3 Fairf. (Me.) 474; *Board v. Head*, 3 Dana (Ky.), 491; *Nourse v. Snow*, 6 Greenl. (Me.) 208. See also *Short v. Skipworth*, 1 Brock. (U. S.) 103, 114, per Chief Justice Marshall. Examine, however, chapters *post*, herein, on contracts.

⁷⁹ *Lawrence v. Porter* (U. S. C. C. A. 6th C.), 93 Fed. 62, 65, 66, per Lurton, Cir. J.; 11 U. S. C. C. A. 27; 22 U. S. A. 483; 26 L. R. A. 167.

seen or otherwise.⁸⁰ So full compensatory damages may be given for breach of a covenant to perform certain acts, whereby a loss results to the plaintiff.⁸¹ A special mode of compensation may, however, be fixed and so operate as to limit or qualify the recovery,⁸² and compensation for the actual loss governs in contracts of indemnity.⁸³ If the injury sustained is not the result of wilful or wanton wrong, compensatory damages only will be allowed.⁸⁴ But a recovery lies to the full extent of an injury sustained by a passenger through a carrier's negligence.⁸⁵ So in tort generally the damages should be a full indemnity commensurate with the injury or loss suffered,⁸⁶ although the amount of damages awarded for an injury or wrong should not as a rule exceed a fair or actual compensation,⁸⁷ unless there is malice, etc.⁸⁸ Again, if a jury determines the doubtful facts in the plaintiff's favor, and they should have allowed actual damages, a failure so to do will constitute a ground for reversal.⁸⁹ Substantial damages may be awarded in an action for personal injuries, even though no direct evidence of the amount of the pecuniary loss be given.⁹⁰ So in actions for such injuries it has been declared that the granting of compensation by an award of substantial damages should be encouraged to compel higher vigilance,⁹¹ and such damages may be recovered for a continuous tort, even though nominal damages have been awarded in a prior suit therefor.⁹² But they should be shown in trespass to

⁸⁰ *Allen v. Steers*, 39 La. Ann. 586; 2 So. 199. But see *Short v. Skipworth*, 1 Brock. (U. S.) 114.

⁸¹ *Trenwith v. Gilvery*, 50 N. J. L. 18; 11 Atl. 325; 10 Cent. 182.

⁸² *Brown v. St. Paul, M. & M. R. Co.*, 36 Minn. 236; 31 N. W. 941.

⁸³ *Willson v. McEvory*, 25 Cal. 169.

⁸⁴ *Green v. Penn. R. Co.* (U. S. C. C. E. D. Pa.), 36 Fed. 66. See also *Maher v. Louisville, N. O. & T. R. Co.*, 40 La. Ann. 64; 3 So. 462; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 213; *Day v. Woodworth*, 13 How. (U. S.) 371. See sec. 89, herein.

⁸⁵ *Purcell v. St. Paul C. R. Co.*, 48

Minn. 134; 50 N. W. 1034; 11 Ry. & Corp. L. J. 114.

⁸⁶ *Bussy v. Donaldson*, 4 Dall. (U. S.) 206.

⁸⁷ *Milwaukee, St. P. R. Co. v. Arms*, 91 U. S. 489; *Stuyvesant v. Wilcox* (Mich.), 52 N. W. 465.

⁸⁸ *Barry v. Edmunds*, 116 U. S. 550.

⁸⁹ *Aiello v. Aaron*, 68 N. Y. Supp. 186; 33 Misc. 680.

⁹⁰ *Clare v. Sacramento Elec. P. & L. Co.*, 122 Cal. 504; 55 Pac. 326; 5 Am. Neg. Rep. 115.

⁹¹ *Scott v. Penn. R. Co.*, 30 N. Y. St. R. 843; 9 N. Y. Supp. 189; case was rev'd; 41 N. Y. St. R. 712.

⁹² *Stafford v. Maddox*, 87 Ga. 537; 13 S. E. 559.

land, and they must be proven, unless only a nominal sum is sought.⁹⁴ So they cannot recover against a vessel in an action by one injured by a fall where the evidence shows that no substantial injuries were received,⁹⁵ and if the record shows an entire failure to prove in what sum, if any, the plaintiffs were damaged, there can be no recovery.⁹⁶ Again, if nominal damages only are allowed, yet, if the plaintiff is entitled, if at all, to a substantial sum, the verdict will be reversed and a new trial granted.⁹⁷

§ 95. Double, triple or treble, or other increased damages.

—The legislature of a state has power to fix the amount of damages beyond compensation by way of punishment for negligence in performing duties necessary for the protection of persons or property, and the mode in which fines and penalties shall be enforced, whether at the instance of private parties or at the suit of the public, and what disposition shall be made of the amounts collected are matters of legislative discretion. Nor is it a valid objection that the sufferer from the negligence, instead of the state, receives such additional damages. Again, the exercise of such power is not a taking of property without due process of law, nor does it deny the equal protection of the laws within the fourteenth article of the amendment of the constitution of the United States.⁹⁸ Some of the cases in

⁹⁴ *Ross v. New Home Sew. Mach. Co.*, 24 Mo. App. 353; *Rich v. Rich*, 16 Wend. (N. Y.) 663; *Benson v. Village of Waukesha*, 74 Wis. 31; 41 N. W. 1017.

⁹⁵ See secs. 76 and 77, herein.

⁹⁶ *The Ed. Roberts* (U. S. C. C. A. 3d C.), 34 C. C. A. 685; 93 Fed. 988.

⁹⁷ *Western Un. Tel. Co. v. Waxelbaum* (Ga. 1901), 39 S. E. 443; 10 Am. Neg. Rep. 254.

⁹⁸ *Gartner v. Saxon*, 19 R. I. 461; *Conrad v. Dobmeyer* (Minn.), 58 N. W. 870. Examine sec. 78, herein.

⁹⁹ *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, a case of fencing railroads; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26. Under

Code, Iowa, sec. 1289, allowing double the value of stock killed or damages caused thereto, and by failure of railroad to fence, etc., see for the underlying principles stated in the text, the citations to the above cases noted in *Russell & Winslow's Syllabus Digest*, U. S. Sup. Ct. Rep.; and that "it is competent for the legislature to provide for doubling damages." See also *Fye v. Chapin* (Mich.), 80 N. W. 797; 7 Am. Neg. Rep. 67, citing *Trompen v. Verhage*, 54 Mich. 304; 20 N. W. 53; *Cummings v. Riley*, 52 N. H. 368; *Chickering v. Lord* (N. H.), 32 Alt. 773; *Fitzgerald v. Dobson*, 78 Me. 359; 7 Alt. 704; *Barrett v. Railroad Co.*, 3 Allen (Mass.), 101.

which double damages are given are for injuries from dogs;⁹⁹ injuries to stock;¹⁰⁰ embezzling money or chattels before administration;¹ unlawful distress;² trespass;³ trespass or trover in cutting timber and carrying it away;⁴ malicious prosecution⁵ to an employer by reason of a laborer or renter having being enticed away;⁶ for unlawful detainer of leased land, but the statute is directory merely;⁷ for forcible entry and detainer,⁸ and for converting logs lying in a river, or on or near the bank thereof.⁹ The following are also instances of the allowance of treble or triple damages. Thus they may be given for injuries to bridges;¹⁰ failure to observe the law of the road;¹¹ forcible entry and detainer;¹² forcible exclusion from real prop-

⁹⁹ *Riley v. Harris* (Mass. 1900), 58 N. E. 584; 9 Am. Neg. Rep. 47; Pub. Stat. Mass. Ch. 102, sec. 93; *Swift v. Applebone*, 23 Mich. 252; Comp. Laws, 645. See as to constitutionality of statute, *Chapin v. Fye*, (U. S. Sup. Ct. 1900), 21 Sup. Ct. Rep. 71; note, 9 Am. Neg. Rep. 48; 80 N. W. 797; *Fye v. Chapin* (Mich. 1899), 7 Am. Neg. Rep. 67; Act No. 161 of 1850, sec. 5593; Comp. Laws, 1897.

¹⁰⁰ *Stovall v. Smith*, 4 B. Mon. (Ky.) 378, Act 1798; *Wood v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 109; Wag. St. p. 310, sec. 43; *Hollyman v. Hannibal & St. J. R. Co.*, 58 Mo. 480.

¹ *Spaulding v. Cook*, 48 Vt. 145; Gen. Stat. ch. 51, sec. 10.

² *Hugill v. Reed*, 49 N. J. L. (20 Vr.) 300; 8 Atl. 287.

³ *Newcomb v. Butterfield*, 8 Johns. (N.Y.) 342; Act, April 9, 1806, sec. 28, ch. 94.

⁴ *Welsh v. Anthony*, 4 Harris (Pa.), 254.

⁵ *Campbell v. Finney*, 3 Watts (Pa.), 84; Act, 1705.

⁶ *Chrestman v. Russell*, 73 Miss. 452; 18 So. 656; Miss. Code, 1892, sec. 1068.

⁷ *Hall & P. Furniture Co. v. Wil-*

bur, 4 Wash. 644; 30 Pac. 665; Wash. Act, March 27, 1890.

⁸ *Michau v. Walsh*, 6 Mo. 346; Acts, 1837, p. 63; *Feedler v. Schroeder*, 59 Mo. 364; Wag. St. pp. 645, 646, sec. 22; *Finley v. Magill*, 57 Mo. App. 481; Rev. Stat. sec. 5108.

⁹ *Parkhurst v. Staples*, 91 Wis. 196; 64 N. W. 882.

¹⁰ *Shepard v. Gates*, 50 Mich. 495; 15 N. W. 878; Comp. Laws, 1320.

¹¹ *Stevens v. Kelley*, 66 Conn. 570; 34 Atl. 502; Conn. Gen. Stat. secs. 2689-2691; *Broschart v. Tuttle*, 59 Conn. 1; 21 Atl. 925; 11 L. R. A. 33.

¹² *Rimmer v. Blasingame*, 94 Cal. 139; 39 Pac. 857; *Iburg v. Fitch*, 57 Cal. 189; Cal. Code, Civ. Proc. sec. 1774; *Wier v. Bradford*, 1 Colo. 14; *Lane v. Ruhl*, 103 Mich. 38; 61 N. W. 347; *Newkirk v. Tracey*, 61 Mich. 174; 27 N. W. 884; How. Ann. Stat. sec. 8306; *Howser v. Melcher*, 40 Mich. 185; Comp. Laws, sec. 6717; *Shaw v. Hoffman*, 25 Mich. 162; *Missoula Elec. L. Co. v. Morgan*, 13 Mont. 394; 34 Pac. 488; *Stover's N. Y. Annot. Code, Civ. Proc. sec. 1669*; *Labro v. Campbell*, 56 N. Y. Super. 70; *Kirchner v. New Home S. M. Co.*, 16 N. Y. Supp. 761; 42 N. Y. St. R. 907; *O'Donnell v. McIntyre*, 2 N. Y. St. R. 689; *Pharis v. Gere*, 31 Hun

erty; ¹³ holding over lands or tenements; ¹⁴ failure of tenant to quit after giving notice; ¹⁵ negligent setting out of fires; ¹⁶ violation of a patent right; ¹⁷ seizure by an officer of property exempt from process; ¹⁸ vexatiously or maliciously suing or causing any action or special proceeding to be instituted in another's name, without the latter's consent; ¹⁹ for certain trespasses ²⁰ if wilful or malicious; ²¹ trespass or trover in cutting timber and carrying it away, ²² unless there was an honest belief by the trespasser that the timber was his; ²³ cutting down, girdling or injuring trees, timber or underwood; ²⁴ waste by tenants in common; ²⁵ or by tenant or guardian; ²⁶ permissive waste by a tenant

(N. Y.), 443; *Compton v. The Chelsea*, 139 N. Y. 538; 54 N. Y. St. R. 538; 34 N. E. 1090, rev'g 70 Hun (N. Y.), 361; 54 N. Y. St. R. 112.

¹³ 2 *Grantham's Annot. Stats. S. D.* (1901) sec. 5813; *Rev. Codes*, N. D. (1899) sec. 5007.

¹⁴ *Cal. Civ. Code* (1899), sec. 3345; 1 *Mont. Codes* (1895), sec. 4351; *Rev. Codes*, N. D. (1899) sec. 5006; 2 *Grantham's Annot. Stats. S. D.* (1901) sec. 5812.

¹⁵ *Cal. Civ. Code* (1899), sec. 3344; 1 *Mont. Codes* (1895), sec. 4350; *Rev. Codes*, N. D. (1899) sec. 5005; 1 *Grantham's Annot. Codes, S. D.* (1901) sec. 5811.

¹⁶ *Galvin v. Gualala Mill Co.* (Cal. 1893), 33 *Pac.* 94; *Cal. Pol. Code*, sec. 3344.

¹⁷ *Gray v. James, Pet.* (U. S. C. C.) 394; *Cross v. United States*, 1 *Gall.* (U. S.) 26; *Stimpson v. Railroad*, 1 *Wall. Jr.* (U. S.) 164; *Welling v. La Bau*, 35 *Fed.* 302; *Lyon v. Donaldson*, 34 *Fed.* 789.

¹⁸ *Wymond v. Amsbury*, 2 *Colo.* 213; *Rev. Stat.* p. 308, sec. 35.

¹⁹ 2 *Stover's N. Y. Annot. Code, Civ. Proc.* sec. 1900.

²⁰ *Snelling v. Garfield*, 114 *Mass.* 443; *Genl. Stat. Mass.* ch. 38, sec. 10; *Brewster v. Link*, 28 *Mo.* 147; *King v. Havens*, 25 *Wend.* (N. Y.) 420.

²¹ *Barnes v. Jones*, 51 *Cal.* 303; *Michigan, L. & I. Co. v. Deer Lake Co.*, 60 *Mich.* 143.

²² *Welsh v. Anthony*, 4 *Harris* (Pa.), 254; *Stover's N. Y. Annot. Code Civ. Proc.* sec. 1668.

²³ *Alt v. Groschlose*, 61 *Mo. App.* 409; 1 *Mo. App. Rep.* 645. See also *Glenn v. Adams* (Ala. 1901), 29 *So.* 836.

²⁴ *Cal. Civ. Code*, sec. 3346; *Annot. Code, Iowa* (1897), sec. 4306; 1 *Mont. Codes* (1895), sec. 4352; *Stover's N. Y. Annot. Code, Civ. Proc.* secs. 1667, 1668; *Rev. Codes*, N. D. (1899) sec. 5008; 2 *Grantham's Annot. Stats. S. D.* (1901) sec. 5814; *McCruden v. Rochester R. Co.*, 5 *Misc.* (N. Y.) 59; 25 *N. Y. Supp.* 114, *aff'd* 77 *Hun* (N. Y.), 609; 59 *N. Y. St. R.* 892; 28 *N. Y. Supp.* 1135, *aff'd* 151 *N. Y.* 623; 45 *N. E.* 1133; *Humes v. Proctor*, 73 *Hun* (N. Y.), 265; 26 *N. Y. Supp.* 315; 57 *N. Y. St. R.* 284, *aff'd* 151 *N. Y.* 520; 45 *N. E.* 948; *Lewis v. Thompson*, 3 *App. Div.* (N. Y.) 329; 73 *N. Y. St. R.* 776.

²⁵ *Hubbard v. Hubbard*, 3 *Shep. (Me.)* 198; *Stat.* 1821, ch. 35.

²⁶ *Annot. Code, Iowa* (1897), sec. 4303; *Danziger v. Silberthan*, 21 *Civ. Proc.* (N. Y.) 283; 18 *N. Y. Supp.* 350.

in dower, although the allowance of such damages is discretionary;² using unsealed weights and measures,³ and treble the value of moneys or valuable thing lost by gaming "at any time or sitting."⁴

§ 96. **Same subject—How fixed.**—In New York, if double, treble or other increased damages are given by statute, the decision of the court or report of the referee must specify the sum awarded as single damages and direct judgment for the increased damages.⁵ So in Connecticut the court increases the amount found by the jury to conform to the statutory allowance.⁶ And in a comparatively recent Michigan case it was declared that "the presumption is that those damages are to be ascertained as in ordinary cases—if the trial be before a jury, by the jury; and by the court when the jury is dispensed with." In this case the provision of the statute was that "upon the trial of any cause mentioned in this section, the plaintiff and defendant may be examined under oath touching the matter at issue, and evidence may be given as in other cases; and if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of, under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved and for costs of suit."⁷ Upon a contention as to the constitutionality of this statute it was held operative in that the word "court" would be construed to mean "the court acting through all its instrumentalities which includes the jury."⁸

§ 97. **Liquidated damages—Penalty.**—Where the Code so provides, a contract liquidating damages is void, except where

² *Sherill v. Connor*, 107 N. C. 543; 12 S. E. 588.

³ *Shannon's Annot. Code, Tenn.* (1896) sec. 3480.

⁴ *Johnson v. McGregor*, 157 Ill. 350; 41 N. E. 558; Ill. Crim. Code, sec. 132.

⁵ *Stover's N. Y. Annot. Code, Civ. Proc.* sec. 1020.

⁶ *Brochart v. Tuttle*, 59 Conn. 1; 21 Atl. 925; 11 L. R. A. 33. See *Quimly v. Carter*, 20 Me. 218; *Lob-*

dell v. New Bedford, 1 Mass. 153; *Burnham v. Strother*, 66 Mich. 519; 33 N. W. 410; *Warren v. Doolittle*, 5 Cow. (N. Y.) 678; *Brewster v. Link*, 28 Mo. 147.

⁷ Mich. Comp. L. 1897, sec. 5593; Act No. 161, of 1850, as to injuries by dogs.

⁸ *Fye v. Chapin* (Mich.), 80 N. W. 797; 7 Am. Neg. Rep. 67, per *Montgomery, J.*

it is impossible or extremely difficult to fix the actual damages, and this applies to an agreement for a certain sum per month on account of deprivation of possession of certain premises,³⁴ although it is decided that parties may in case of breach of covenant liquidate the damages recoverable,³⁵ and also that if the damages are uncertain in their nature in respect to the performance or omission of a particular act, the parties may, by agreement, settle the amount of damages at any sum.³⁶ So a contract for purchase of personal property may validly provide for liquidated damages.³⁷ But it is decided that a stipulation of this character, to be enforceable as such, must be uncertain and not ascertainable by any satisfactory or certain rule of law.³⁸ In a recent case in New York, it was provided in a contract between an electric light company and the owner of a building that a certain amount should become due and payable to the company as damages, if the company discontinued its current, either because the consumer was in arrears or failed to comply with the rules and regulations, or was, through the "fault" of the consumer, prevented from supplying a current according to the provisions of the contract. Under this contract it was held that the company could not discontinue its current, and recover the liquidated damages merely because of a failure to use the electric lamps and motor while waiting for a tenant.³⁹ Again, if it is clearly ascertainable from the terms of the contract that damages were to be paid in a sum agreed upon in case of its breach, it is a valid, enforceable agreement.⁴⁰ But it must clearly appear from the contract, in order to have the payment of a liquidated sum operate as a discharge, that such amount was absolutely to be paid and received in lieu of performance,⁴¹ and if the contract expressly and unambiguously

³⁴ *Eva v. McMahon*, 77 Cal. 467; 19 Pac. 872; Cal. Civ. Code, secs. 1670, 1671. See *Patent Brick Co. v. Moore*, 75 Cal. 205; 16 Pac. 890.

³⁵ *Taul v. Everet*, 4 J. J. Marsh. (Ky.) 10.

³⁶ *Mott v. Mott*, 11 Barb. (N. Y.) 127; *Lampman v. Lochran*, 19 Barb. (N. Y.) 338.

³⁷ *Ilalf v. O'Connor*, 14 Tex. Civ. App. 191; 37 S. W. 238.

³⁸ *Krutz v. Robbins*, 12 Wash. 7; 40 Pac. 415; 28 L. R. A. 676.

³⁹ *United Elec. L. & P. Co. v. Brenneman* (Sup. Ct. App. Term), 21 Misc. (N. Y.) 41; 46 N. Y. Supp. 916; *Joyce on Elec. Law* (ed. 1900), sec. 947.

⁴⁰ *Eakin v. Scott*, 70 Tex. 442; 7 S. W. 777.

⁴¹ *Gray v. Crosby*, 18 Johns. (N. Y.) 219.

provides for the payment of such damages, evidence of a contrary intention is inadmissible.⁴² So a valid stipulation for a liquidated sum limits the liability for a breach of the contract,⁴³ but there cannot be a recovery of the amount agreed upon and the actual damages as well,⁴⁴ nor can it be shown that the actual damages were less,⁴⁵ nor will the covenant be extended by implication, but will be enforced as far as applicable.⁴⁶ But if the damages are not agreed upon as liquidated and a penalty is fixed, the latter does not limit the amount of the recovery.⁴⁷ The most important question, however, in this connection, is whether damages are liquidated or a penalty, and as this discussion belongs to another part of this work, it will be treated in its proper place.

§ 98. **Unliquidated damages.**—As to unliquidated damages it is said, “The rule upon the subject of liquidated and unliquidated damages we take to be, that where a precise sum for damages is not agreed upon and is not of the essence of the contract between the parties, the quantum of damages is unliquidated and it is for the jury to assess them; but where the precise sum has been fixed and agreed upon by the parties, that sum is the ascertained and liquidated damages, and the jury must assess that amount, no more, no less. . . . In the case before us there were no damages agreed upon between the parties, there was not even a penalty named, and the only penalty for breach of the contract, or for negligence in the performance, was what the law would raise and the jury assess according to the circumstances of the case . . . damages which may be gotten rid of altogether or mitigated by proof of circumstances cannot be liquidated,” and the court held that a suit against a telegraph company for damages sustained by the failure of the company to transmit a despatch, ordering a sale of gold, was a claim for

⁴² *Perzell v. Shook*, 21 J. & S. (N. Y.) 501.

⁴³ *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47.

⁴⁴ *Darrow v. Cornell*, 12 App. Div. (N. Y.) 604; 42 N. Y. Supp. 1081.

⁴⁵ *McLean v. McLean*, 15 Wkly. Dig. (N. Y.) 181, rev'd on other grounds, 96 N. Y. 652.

⁴⁶ *Leggett v. Mutual L. Ins. Co.*, 53 N. Y. 394, rev'g 64 Barb. (N. Y.) 23.

⁴⁷ So held in *Noyes v. Phillips*, 60 N. Y. 408. But see *Beers v. Shannon*, 73 N. Y. 292, rev'g 12 Hun (N. Y.), 161.

unliquidated damages.⁴⁸ Claims for unliquidated damages may be settled by the court of claims in a case transmitted thereto by a department, and which involves certain controverted questions of law and fact under a claim on contract.⁴⁹ Such damages should not, however, be increased beyond the amount claimed in the *ad damnum* clause after verdict except upon new trial, where such clause contains the only indication of the demand,⁵⁰ and averaging estimates by the jury in an action for unliquidated damages is not a ground for reversal, where they did not agree to be bound by the result, and the sum awarded is slightly in excess of such verdict.⁵¹ Again, it has been decided that in an action for such damages where the defendant does not admit the same in his answer, the plaintiff must establish the amount of his claim, since the burden of proof rests upon him.⁵² In England the debtor's act,^{52a} making invalid certain transfers with intent to defraud creditors, does not include as a creditor until after judgment is recovered, the plaintiff in an action for unliquidated damages.⁵³

§ 99. Continuing damage and damages—Entirety of damages.—Formerly where a trespass was of a permanent nature and the injury was continually renewed, the allegation was of a continuing injury from one day to another, and this was called laying the action with a *continuando*, the plaintiff not being obligated to bring a suit for every separate day's offense; but if each one of several acts was complete in itself, it could not be laid with a *continuando*, yet if there were repeated acts of trespass, as by cutting down trees, they might be laid to be done not continually, but at different days and times within a given period.⁵⁴ So damages for trespass by cattle may be laid with a *continuando* as at common law, and any number of trespasses

⁴⁸ *Smithson v. United States Teleg. Co.*, 29 Md. 162; *Allen's Teleg. Cas.* 385, 387-389, per Nelson, J.

⁴⁹ *Myerle v. United States*, 33 Ct. Cl. 1.

⁵⁰ *Sweet v. Excelsior Elec. Co. (N. J.)*, 31 Atl. 721.

⁵¹ *McDonnell v. Pescadero & S. M. S. Co.*, 120 Cal. 476; 52 Pac. 725.

⁵² *Smock v. Carter*, 6 Okla. 300; 50 Pac. 262.

^{52a} Act, 1869, sec. 13, sub. 2.

⁵³ So held in *Reg. v. Hopkin's C. C. R.* (1896), 1 Q. B. 652; 65 L. J. M. C. N. S. 125.

⁵⁴ 3 Blackstone's Comm. (4th ed.) Cooley, *212, citing upon the last point *Chicago & E. I. R. Co. v.*

proved within the time specified.⁵⁵ But if the injury directly results from a single act, all the damages must be recovered in one action, for successive actions cannot be brought.⁵⁶ Again, in case of a nuisance, every continuance thereof constitutes a new ground of action with resulting damages,⁵⁷ and where persons are sued for a nuisance, it is a repetition thereof to permit it to exist, and an action lies therefor.⁵⁸ So successive suits may be brought for a continuing trespass as long as it continues.⁵⁹ But if the damages are entire and susceptible of immediate recovery, the claim cannot be divided and successive actions be maintained, for where it is of a permanent character, as in case of a continuing nuisance if the damage is original and may be at once estimated, one action lies for the entire loss.⁶⁰ Again, in trespass quare clausum fregit and for cutting down and carrying away trees, the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass taken as a continuous act.⁶¹ So continuing damages flowing from trespass before and after suit brought must, it is decided, be recovered in one suit.⁶² And a vendee in possession of real property under executory contract of sale may recover the whole damage to the land by a trespass.⁶³ So a mortgagor may recover compensation for the entire damage caused by a trespasser in an action against him before suit by the mortgagor.⁶⁴ But in

Loeb, 118 Ill. 203. See also notes, 53 Am. Rep. 123-139; 59 Am. Rep. 351-369.

⁵⁵ Richardson v. Northrop, 66 Barb. (N. Y.) 85.

⁵⁶ Porter v. Cobb, 22 Hun (N. Y.), 278. See La Rue v. Smith, 153 N. Y. 428, aff'g 63 N. Y. St. R. 592.

⁵⁷ Sloggy v. Dilworth, 38 Minn. 179; 38 N. W. 451; 8 Am. St. Rep. 656; Beckwith v. Griswold, 29 Barb. (N. Y.) 291. See also Wager v. Troy U. R. Co., 25 N. Y. 526; Phillips v. Terry, 3 Abb. Dec. (N. Y.) 607; (3 Abb. U. S. 327); 3 Keyes (N. Y.), 313; Mahon v. New York C. R. Co., 24 N. Y. 658. See also City of Mansfield v. Hunt, 19 Ohio Cir. Ct. R. 486; 10 O. C. D. 567; Quinn v.

Lowell Elec. L. Co., 144 Mass. 476; 11 N. E. 732; 4 N. Eng. 349.

⁵⁸ Hockstrasser v. Martin, 62 Hun (N. Y.), 165; 41 N. Y. St. R. 761.

⁵⁹ Savannah, F. & W. R. Co. v. Davis, 25 Fla. 917; 7 So. 29; 43 Am. & Eng. R. Cas. 542.

⁶⁰ So held in Stodghill v. Chicago, B. & Q. B. Co., 53 Iowa, 341; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203.

⁶¹ Foote v. Merrill, 54 N. H. 490; 20 Am. Rep. 151.

⁶² Cook v. Redman, 45 Mo. App. 397.

⁶³ Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251; 79 N. W. 92.

⁶⁴ Delaware & A. Teleg. & Teleph. Co. v. Elvins (N. J.), 43 Atl. 903.

case of a nuisance, a judgment for defendant in trespass for damages to real property does not bar a like action for damages subsequently accruing after commencement of the first suit, the premises having been repaired and there being new injuries and also aggravation of old ones.⁶⁵ If, however, successive actions may be maintained for a continuing trespass, the recovery is limited so as not to include damages under prior recoveries.⁶⁶ Again, a court of equity may interfere if the trespass is a continuing one,⁶⁷ but if the continuance is prospective merely in case of a nuisance, damages cannot be recovered therefor.⁶⁸ Other matters relevant to this question of continuing damage and damages are presented in the case of physical injuries and future damages, as well as in entirety of damages under contracts, which are considered elsewhere herein under their proper headings.

§ 100. Excessive or unreasonable damages.—It is well settled that a verdict will be set aside or reversed where it is so much in excess of what the facts in the case and the law justifies that it is manifestly the result of passion, prejudice, partiality, sympathy, ignorance, corruption or misconception on the part of the jury, or where the damages are so large or unreasonable, or outrageous in view of all the circumstances of the case and the law, as to shock the conscience or moral sense, and thus clearly evidence that the verdict proceeded from some of the above-mentioned causes; but the rule is otherwise if the above principles do not apply.⁶⁹ But a new trial need not be granted

⁶⁵ *Amrhein v. Quaker City Dye Works*, 192 Pa. 253; 43 Atl. 1008.

⁶⁶ *Cumberland & O. C. Co. v. Hutchings*, 65 Me. 140.

⁶⁷ *Wheelock v. Noonan*, 108 N. Y. 179; 13 N. Y. St. R. 110; 15 N. E. 67.

⁶⁸ *Whitmore v. Bischoff*, 5 Hun (N. Y.), 176.

⁶⁹ *Harris v. Zanone*, 93 Cal. 59; 28 Pac. 845, applied to punitive damages in this case; *Atlanta v. Martin* (Ga.), 13 S. E. 805; *Pearson v. Zehr*, 138 Ill. 48; 29 N. E. 854; *Chicago City R. Co. v. Anderson*, 93 Ill. App.

419, aff'd 61 N. E. 999; *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; 3 Chic. L. J. Wkly. 520; *Chicago & E. R. Co. v. Binkowski*, 72 Ill. App. 22; 2 Chic. L. J. Wkly. 433; *Louisville & N. R. Co. v. Kemper*, 153 Ind. 618; 53 N. E. 931; 1 Repr. 1100; *Courtney v. Clinton*, 18 Ind. App. 620; 48 N. E. 799; *Elkhart & W. R. Co. v. Waldorf*, 17 Ind. App. 29; 46 N. E. 88; *Bell v. Morse* (Kan.), 29 Pac. 1086; *Ft. Scott, W. & W. R. Co. v. Kinney*, 7 Kan. App. 650, 53 Pac. 880; *City of Ludlow v.*

merely because the amount seems to the court to be excessive, nor because the court is dissatisfied with the award;⁷⁰ but they must also appear to have been given under the influence of passion, prejudice, etc.,⁷¹ and the court must be satisfied that such is the fact.⁷² Again, "in no case will the court ask itself whether if it had been substituted instead of the jury, it would have given precisely the same damages, but the court will simply consider whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be deemed so unless the verdict is so excessive or outrageous with reference to those circumstances, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them."⁷³ So, "in all actions which sound in damages, the jury seem to have the discretionary power of giving what damages they think proper; for though

Mackintosh (Ky. 1899), 53 S. W. 524; Chesapeake & O. R. Co. v. Dixon, 20 Ky. L. Rep. 792 (1883); 50 S. W. 252; 47 S. W. 615; 14 Am. & Eng. R. Cas. N. S. 827; Louisville & N. R. Co. v. Donaldson, 19 Ky. L. Rep. 1384; 43 S. W. 439; Peterson v. Western Un. Teleg. Co., 65 Minn. 18; 67 N. W. 646; 33 L. R. A. 302; 1 Chic. L. J. Wkly. 375; Chitty v. St. Louis, I. M. & S. R. Co., 148 Mo. 64; 49 S. W. 868; Wainwright v. Satterfield, 52 Neb. 403; 72 N. W. 359; Neb. Code, Civ. Proc. sec. 314; Consolidated Tract Co. v. Graham, 62 N. J. L. 90; 40 Atl. 773; 4 Am. Neg. Rep. 600; 17 Nat. Corp. Rep. 213; 58 Alb. L. J. 93; 31 Chic. L. N. 35; Robinson v. Metropolitan St. Ry. Co., 63 N. Y. Supp. 969; 31 Misc. 171, aff'd 65 N. Y. Supp. 1144; Rowe v. N. Y. Cent. & H. R. R. Co., 82 Hun (N. Y.), 153; 63 N. Y. St. R. 753; Gale v. N. Y. Cent. R. Co., 13 Hun (N. Y.), 1; 53 How. Pr. 385; Kellow v. Long Isl. R. Co., 42 N. Y. St. R. 813; 16 N. Y. Supp. 676; Blackwell v. O'Gorman Co. (R. L. 1901), 49 Atl. 28, and cases cited;

Vogel v. McAuliffe (R. I.), 31 Atl. 1; St. Louis & W. R. Co. v. Germany (Tex. Civ. App. 1900), 56 S. W. 586; International & G. N. R. Co. v. Hall (Tex. Civ. App.), 21 S. W. 1024; Thirkfield v. Mountain View Cemetery Assn., 12 Utah, 76; 41 Pac. 564; Harrison v. Denver & R. G. W. R. Co. (Utah), 27 Pac. 728; Norfolk & W. R. Co. v. Shote, 92 Va. 34; 22 S. E. 811; Renne v. United States Leather Co., 107 Wis. 305; 83 N. W. 473; York v. Canada Atlantic S. S. Co., 22 S. C. 167.

⁷⁰ Smith v. Pittsburg & W. R. Co. (U. S. C. C. N. D. Ohio), 90 Fed. 783; 41 Ohio L. J. 113; 13 Am. & Eng. R. Cas. N. S. 716. See also Rompillon v. Abbott, 1 N. Y. Supp. 662; Chatterworth v. Rowe, 66 Ill. App. 55.

⁷¹ Meeks v. St. Paul, 64 Minn. 220; 66 N. W. 966.

⁷² Russell v. Bradley (U. S. C. C. D. N. Y.), 50 Fed. 515.

⁷³ Whipple v. Cumberland Mfg. Co., 2 Story (U. S. C. C. D. Me.), 661; Fed. Cas. No. 17,516.

in contracts the very sum specified and agreed on is usually given, yet if there are any circumstances of hardship, fraud or deceit, though not sufficient to invalidate the contract, the jury may consider them, and proportion and mitigate the damages accordingly."⁷⁴

§ 101. Same subject continued.—If the verdict is clearly excessive in view of an agreed measure of damages, a reversal will be granted,⁷⁵ and so where it is in disregard of the charge to the jury as to the measure of damages;⁷⁶ so, where it is not sustained by the evidence and is excessive,⁷⁷ and the excess is not due to inadvertence, misapprehension of facts, error of law or error in computation by the jury.⁷⁸ But if an allowance in excess of the amount admitted is based on conjecture, the verdict will be reversed,⁷⁹ although there will be no reversal where effectual or substantial justice is obtained by the verdict,⁸⁰ and a verdict for damages for personal injuries will not be disturbed as excessive, there being no legal measure of damages,⁸¹ nor will it be reversed as excessive on a writ of error where the trial court did not disturb it.⁸² But where the amount awarded is in excess of that recoverable on the good cause of action, one of the causes averred being bad, the verdict will be reversed.⁸³ Again, where the actual damages awarded are within the rule on which verdicts for excessive damages will be set aside, it will be presumed that the entire verdict, including exemplary damages, is influenced by the same motives, and even though the exemplary damages are remitted, there will be a reversal.⁸⁴ The fact, however, that a person who has received a personal

⁷⁴ 3 Bacon's Abr. "Damages" (D), 1.

⁷⁵ Louisville & N. R. Co. v. Whitely Co. Ct., 20 Ky. L. Rep. 1367; 49 S. W. 332.

⁷⁶ Tietz v. Philadelphia Tract. Co., 169 Pa. 516; 36 W. N. C. 469.

⁷⁷ Green v. Barney (Cal.), 36 Pac. 1026; Ft. Scott, W. & W. R. Co. v. Kinney, 7 Kan. App. 650; 53 Pac. 880.

⁷⁸ Ft. Scott, W. & W. R. Co. v. Kinney, 7 Kan. App. 650; 53 Pac. 880.

⁷⁹ Van Auken v. Clute, 13 App.

Div. (N. Y.) 622; 43 N. Y. Supp. 1166.

⁸⁰ City Bk. v. Mershon, 33 Fed. 240.

⁸¹ Newport News & O. P. R. & Elec. Co. v. Bradford (Va. 1902), 40 S. E. 900.

⁸² Pierce v. Van Dusen (U. S. C. C. A. 6th C.), 47 U. S. A. 339; 78 Fed. 693.

⁸³ Fish Keck Co. v. Redlon, 7 Kan. App. 93; 53 Pac. 72.

⁸⁴ Gulf C. & S. F. R. Co. v. Gordon (Tex.), 7 S. W. 695.

injury, and has from mere ignorance, and not in bad faith, returned to work, and thus aggravated such injury, will not cause damages which have been rendered therefor to be reduced, although compensation for the injury is impossible of separation from the aggravation.⁶⁵ Another important factor is that the point must be properly brought up and presented on appeal or error or no relief is available.⁶⁶

§ 102. Voluntarily remitting excess — Remittitur by court.—The prevailing party may remit the excess where it is small and is due to miscalculation,⁶⁷ or is not so great as to indicate any improper motive,⁶⁸ or where there is an inadvertence of the trial court in directing a verdict for a few dollars more, the error is not available when first raised on appeal and the excess is voluntarily remitted,⁶⁹ nor will there be a reversal where the only ground urged for a new trial is an excess which is remitted.⁷⁰ Again, the parties are not deprived of their constitutional right

⁶⁵ Toledo Elec. St. R. Co. v. Tucker, 13 Ohio C. C. 411; 7 Ohio Dec. 167. See 14 L. R. A. 677, as to excessive verdicts for personal injuries, and see extended note at end of chapter, *post*, herein, on personal injuries.

⁶⁶ Curran v. Folley, 67 Ill. App. 543; Stewart v. Butts, 61 Ill. App. 483; Crooks v. Hibbard, 58 Ill. App. 568; New York C. & St. L. R. Co. v. Hamlet Hay Co., 149 Ind. 344; 47 N. E. 1060; 9 Am. & Eng. R. Cas. N. S. 291, rehearing denied, 49 N. E. 269; J. V. Farwell & Co. v. Zenon, 100 Iowa, 640; 65 N. W. 317, *aff'd* 69 N. W. 1030; Briscoe v. Little, 19 Misc. (N. Y.) 5; 42 N. Y. Supp. 908; *aff'g* 41 N. Y. Supp. 1107; Q. W. Loverin-Browne Co. v. Bk. of Buffalo, 7 N. D. 569; 75 N. W. 923; Gulf C. & S. P. R. Co. v. Gaedecke (Tex. Civ. App.), 39 S. W. 312; 1 Am. Neg. Rep. 707; Chesnutt v. Chism, 20 Tex. Civ. App. 23; 48 S. W. 549; Third Nat. Bk. v. National Bk. (U. S. C. C. A. 5th C.), 30 C. C. A. 436; 58 U. S. App. 148; 86 Fed. 852.

⁶⁷ McCormick H. M. Co. v. Wesson (Tex. Civ. App.), 41 S. W. 725; 42 S. W. 328. See sec. 108, herein.

⁶⁸ Chicago & E. I. R. Co. v. Cleminger, 77 Ill. App. 186, *aff'd* 178 Ill. 536; 53 N. E. 320, citing Holmes v. Jones, 121 N. Y. 461; Hennessy v. District of Columbia, 8 Mackey, 220; Missouri P. R. Co. v. Dwyer, 36 Kan. 58; Peyton v. Texas & P. R. Co., 41 La. Ann. 861; Howard v. Grover, 28 Me. 97; 48 Am. Dec. 478; Galveston, H. & S. A. R. Co. v. Duellin, 86 Tex. 450; Lombard v. Chicago, R. I. & P. R. Co., 47 Iowa, 494; Phelps v. Cogswell, 70 Cal. 201; Cogswell v. West Street & N. E. Electric R. Co., 5 Wash. 46; Brown v. Southern P. Co., 7 Utah, 288; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; 49 Am. Rep. 724; Kennon v. Gilmer, 9 Mont. 108; Hutchins v. St. Paul, M. & M. R. Co., 44 Minn. 5.

⁶⁹ Q. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569; 75 N. W. 923.

⁷⁰ Wall v. Posey, 105 Ga. 484; 30

of trial by jury by the affirmance of a judgment upon the remittitur of a suggested sum,⁹¹ and the appellate court may affirm a judgment on condition that a certain sum or certain items be remitted,⁹² where the amount can be ascertained by computation,⁹³ or where the measure of recovery is not fixed by law.⁹⁴ But the verdict must be such as to come within the rule of influence, passion or prejudice in order to be cured by a remittitur.⁹⁵ Again, it is decided that the common-law rule that an excessive verdict may be cured by a remittitur has not been changed except in so far as the verdict is entirely vitiated by the Code provision allowing it to be set aside when given under the influence of passion or prejudice,⁹⁶ and in case of such suggestion or condition as to remitting a part of the award and a refusal so to do by the party, a new trial may be granted.⁹⁷ But it is also decided that if the verdict is the result of passion or prejudice, a new trial should be granted instead of a remittitur being required.⁹⁸ "And where the record as brought to this court shows that in the judgment of the court below the sum awarded by the jury was in substantial excess of a just allowance and awarded without due and careful consideration, a retrial of the case will be ordered, notwithstanding the remission of the sum deemed to be unjust."⁹⁹

S. E. 729; *Augusta R. Co. v. Glover* (Ga.), 18 S. E. 406; 58 Am. & Eng. R. Cas. 269.

⁹¹ *Texas & N. O. R. Co. v. Syfan*, 91 Tex. 562; 44 S. W. 1064, aff'g 43 S. W. 551.

⁹² *Rand v. Binder* (Iowa), 75 N. W. 505.

⁹³ *Brown v. Doyle*, 69 Minn. 543; 72 N. W. 814; *Chouteau v. Suydam*, 21 N. Y. 179.

⁹⁴ *Galveston H. & S. A. R. Co. v. Hynes*, 21 Tex. Civ. App. 34; 50 S. W. 624; 6 Am. Neg. Rep. 208.

⁹⁵ *Wainwright v. Satterfield*, 52 Neb. 403; 72 N. W. 359; *North Chicago St. R. Co. v. Anderson*, 70 Ill. App. 336.

⁹⁶ *Wainwright v. Satterfield*, 52

Neb. 403; 72 N. W. 359; Neb. Code, Civ. Proc. sec. 314.

⁹⁷ *Musser v. Lancaster City St. R. Co.*, 15 Pa. Co. Ct. 430; 12 Lanc. L. Rev. 12.

⁹⁸ *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; 3 Chic. L. J. Wkly. 520.

⁹⁹ *Atchison, Topeka & S. F. R. Co. v. Richards*, 58 Kan. 344; 49 Pac. 436; 3 Am. Neg. Rep. 25, per *Doster*, Ch. J. See sec. 108, herein. See further as to remitting excess and remittitur generally. *Kerry v. Pacific M. & S. Co.*, 121 Cal. 564; 54 Pac. 262, modifying 54 Pac. 89; *McFadden v. Dietz*, 115 Cal. 697; 47 Pac. 777; *Scholfield G. & P. Co. v. Scholfield*, 71 Conn. 1; 40 Atl. 1046; *Ross v. Fickling*, 11

§ 103. Where excess is small.—Where the excess is so small as to come within the maxim de minimis, there will be no reversal;¹⁰ nor where the excess is a few dollars more in a verdict of guilty in a prosecution for obtaining money under false pretenses.¹ But if the damages are substantially in excess of the

App. D. C. 442; 25 Wash. L. Rep. 806; Dowdie v. State (Ga.), 29 S. E. 595; King v. Black Diamond C. Co., 99 Ga. 103; 24 S. E. 970; Spring Valley v. Spring Valley Coal Co., 173 Ill. 497; 50 N. E. 1089; 16 Nat. Corp. Rep. 887, rev'g 72 Ill. App. 629; 30 Chic. Leg. N. 164; Stone v. Billings, 167 Ill. 179; 47 N. E. 372, aff'g 63 Ill. App. 371; Kansas & T. Coal Co. v. Reid (Ind. Ty. App.), 40 N. W. 896; Newbury v. Gretchell & M. L. Mfg. Co., 100 Iowa, 441; 69 N. W. 743; Leavenworth, N. & S. R. Co. v. Meyer, 58 Kan. 305; 49 Pac. 89; Bealle v. School, 1 A. K. Marsh. (Ky.) 475; Postal Teleg. Cable Co. v. Louisiana W. R. Co., 49 La. Ann. 1270; 22 So. 219; Sloman v. Mercantile C. G. Co., 112 Mich. 258-264; 4 Det. Leg. N. 28; 70 N. W. 886; 26 Ina. L. J. 665; Chitty v. St. Louis, I. M. & S. R. Co., 148 Mo. 64; 49 S. W. 868; Warder v. Henry, 117 Mo. 530; 23 S. W. 776; Lenzen v. Miller, 53 Neb. 137; 73 N. W. 460, modifying 51 Neb. 855; 71 N. W. 715; Lawrence v. Church, 129 N. Y. 635; 29 N. E. 106; 41 N. Y. St. R. 513; Carter v. Beckwith, 128 N. Y. 312; 40 N. Y. St. R. 343; 28 N. E. 582; Everett v. Akina, 8 Okla. 184; 56 Pac. 1062; Bricker v. Elliott, 58 Ohio St. 726; 51 N. E. 1096; Cochran v. Baker, 34 Ore. 555; 52 Pac. 520; Lantz v. Frey, 19 Pa. St. 366; Kidder v. Aaron, 10 S. D. 256; 72 N. W. 893; Crabb v. Nashville Bk., 6 Yerg. (Tenn.) 333; Fidelity & C. Co. v. Allibone, 90 Tex. 660; 40 S. W. 399; Missouri, K. & T. R. Co. v. Warren, 90 Tex. 566; 40 S.

W. 6, aff'g 39 S. W. 652; Texas Trunk R. Co. v. Johnson, 86 Tex. 421; 25 S. W. 417, aff'g 25 S. W. 740; Ft. Worth & D. C. R. Co. v. Measles, 81 Tex. 474; 17 S. W. 124; Tenant v. Gray, 5 Munf. (Va.) 494; Kohler v. Fairhaven & N. W. R. Co., 8 Wash. 455; 36 Pac. 681; denying rehearing 8 Wash. 452; 36 Pac. 253; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95; Reed v. Keith, 99 Wis. 672; 75 N. W. 392; Second Ward Sav. Bk. v. Schrauck, 97 Wis. 250; 73 N. W. 31; 39 L. R. A. 569; Evans v. Foster, 80 Wis. 509; 50 N. W. 410; 14 L. R. A. 117; Koenigsberger v. Richmond S. M. Co., 158 U. S. 41; 39 L. Ed. 889; 15 Sup. Ct. Rep. 751; Lewis v. Wilson, 151 U. S. 551; 38 L. Ed. 267; 14 Sup. Ct. Rep. 419; Texas & P. R. Co. v. Horn, 151 U. S. 110; 38 L. Ed. 91; 14 Sup. Ct. Rep. 259; North American L. & T. Co. v. Colonial & U. S. M. Co., 28 C. C. A. 88; 55 U. S. App. 157; 83 Fed. 796; Hazard Powder Co. v. Volger, 7 C. C. A. 130-136; 58 Fed. 152-158.

¹⁰⁰ Tonstall v. Robinson (U. S. C. C. Ark.), 229. Excess of 29 cents no ground for reversal. Matthews v. First Nat. Bk. (Tex. Civ. App.), 36 N. S. W. 331. Nor an excess of 50 cents but the excess will be directed to be written off. Dannenberg v. Guernsey (Ga.), 7 S. E. 105. But an excess of \$3 is not within the maxim. Cameron Sun v. McAnaw, 72 Mo. App. 196. See further, Cullanan v. Shaw, 24 Iowa, 441; Moffett v. Ayres, 3 N. J. L. (2 Pen.) 655.

¹ Wax v. State (Neb.), 61 N. W. 117.

amount that ought to be recovered, a new trial will be granted; the word "substantially" being used as opposed to the maxim, "De minimis non curat lex." And this rule obtains even though the setting aside of the verdict was not requested on that ground.²

§ 104. Evidence as a factor.—Evidence on appeal will sustain a verdict even though there are excessive damages where the prevailing party is entitled to anything, and the question of relief is not before the court.³ Nor will there be a reversal where the judgment is for the right party, and is sustained by the evidence;⁴ nor where there is any legitimate proof in the record to sustain the evidence;⁵ nor where the amount awarded is authorized by the evidence and the court has charged the jury correctly as to the measure of damages;⁶ nor where the issues were fairly submitted to the jury, although the verdict is for as large an amount as the evidence will sustain;⁷ nor where the instructions were that the jury were not bound to accept all plaintiff's testimony as true as to the extent of his injury, but should, upon all the evidence, award only such damages as they believed plaintiff fairly and justly entitled to receive and the plaintiff to pay;⁸ nor where the plaintiff fails to insert a statement that the case contains all the evidence;⁹ nor where all the evidence is not returned on the question of

² Rowland Lumber Co. v. Ross (Va. 1902), 40 S. E. 922.

³ Globe Accdt. Ins. Co. v. Helwig, 13 Ind. App. 530; 41 N. E. 976.

⁴ Evans v. Missouri P. R. Co., 73 Mo. App. 76; 1 Mo. App. Rep. 19. See also Messinger v. Dunham, 62 Ark. 326; 35 S. W. 435; Grant v. Dreyfus (Cal.), 52 Pac. 1074; Kellogg Newspaper Co. v. Paterson, 59 Ill. App. 89; Cone v. Smyth, 3 Kan. App. 607; 45 Pac. 247; Wilson v. Smith, 18 Ky. L. Rep. 927; 38 S. W. 870; Johnson v. Parker, 58 N. Y. St. R. 332; 28 N. Y. Supp. 146; 7 Misc. 685; Caldwell v. Parker (Tex.), 17 S. W. 87; Montreal Gas Co. v. St. Laurent, 26 Can. S. C. 176; The

Robert Graham Dun (U. S. C. C. A. 1st. C.), 17 C. C. A. 90; 33 U. S. App. 297; 70 Fed. 270; Muller v. Ryan, 2 N. Y. Supp. 736.

⁵ Murray v. Salt Lake City R. Co., 16 Utah, 456; 52 Pac. 596.

⁶ Berkson v. Kansas City Cable Co., 144 Mo. 211; 45 S. W. 1119.

⁷ Murphy v. Rementer (Pa.), 7 Del. Co. Rep. 203; 15 Lanc. L. Rev. 270.

⁸ Christian v. Erwin (Ill.), 17 N. E. 707.

⁹ Hunt v. Webber, 22 App. Div. N. Y. 631; 48 N. Y. Supp. 24. See Reuhl v. Sperry (C. C.), Ohio C. D. 688.

damage,¹⁰ for the objection of excessive damages will not be considered on appeal in the absence of evidence;¹¹ nor will there be a reversal where evidence is wanting that the jury acted corruptly or perversely, or that the damages are grossly excessive;¹² nor where there is evidence tending to show that the damages were in the amount of the verdict;¹³ nor where, although the verdict seems too large, it is, nevertheless, within the estimates of competent witnesses;¹⁴ nor where, by the testimony of several witnesses, the damages aggregate the amount of the verdict;¹⁵ nor where, in an action of trespass and injury to real property, the actual damages proven are less than one half the verdict, which is for a small amount, as an abstract sum;¹⁶ nor where the evidence is conflicting and the amount is fixed by the jury below the highest and above the lowest estimate of the witnesses;¹⁷ nor where some of the witnesses have fixed the damages at a larger sum than that given;¹⁸ nor where, notwithstanding such conflicting evidence, there is sufficient testimony to sustain the verdict;¹⁹ nor where in such case the amount after remittitur was approved by the trial court and justified by the evidence,²⁰ for "whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury,"²¹ although it is said that the appellate court will not weigh the evidence.²² But a verdict will not stand on appeal which is for the largest amount justified by the evidence,

¹⁰ *Davis v. Tribune Job Print. Co.*, 70 Minn. 95; 72 N. W. 808.

¹¹ *Casey v. Oakes*, 17 Wash. 409; 50 Pac. 53, Rev'g 15 Wash. 450; 48 Pac. 53.

¹² *Doyle v. Maine S. L. R. Co. (Me.)*, 13 Atl. 275.

¹³ *Asher Lumber Co. v. Lunsford*, 17 Ky. L. Rep. 559; 32 S. W. 166.

¹⁴ *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488; 78 N. W. 936.

¹⁵ *Texas & P. R. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643.

¹⁶ *Zimmerman v. Bonzar* (Pa.), 16 Atl. 71.

¹⁷ *Calumet R. R. Co. v. Moore* (Ill.), 15 N. E. 764.

¹⁸ *Denver & R. G. R. Co. v. Bourne* (Colo.), 16 Pac. 839; *Same v. Schmidt* (Colo.), 16 Pac. 842. See *Board of Street Opening, In re*, 1 N. Y. Supp. 145; *Clark v. Pope* (Fla.), 10 So. 586.

¹⁹ *Lindeman v. Fry*, 77 Ill. App. 89, aff'd 178 Ill. 174; 52 N. E. 851.

²⁰ *Royal Ins. Co. v. Crowell*, 77 Ill. App. 544.

²¹ *Harrison v. Sutter St. R. Co.*, 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403.

²² *Thomas v. Snyder*, 20 Ill. App. 146; 50 N. E. 398.

§§ 105, 106 GENERAL PRINCIPLES OF DAMAGES.

unless there is a remittitur for the excess;²³ and it will be reversed where it is not warranted in any view of the evidence, and there were errors on the trial,²⁴ although if exemplary damages might have been allowed, the verdict will stand as to any excess of actual damages.²⁵ Again, even though there is no proof of special damages, the verdict in an action of slander will not be reversed where the excess is not such upon the facts as to show prejudice.²⁶

§ 105. Two or more excessive verdicts.—A verdict does not cease to be excessive because of repeated adjudications, for a wrong does not ripen into a right, and the last verdict will be set aside if grossly excessive in itself,²⁷ although it will not be disturbed in the absence of evidence that any verdict was excessive,²⁸ nor unless it appears that the last award was excessive or unreasonable.²⁹ Again it is declared in a Wisconsin case that a decision as to the amount of damages recoverable on a given state of facts in a particular case when once rendered in this court is *res adjudicata* and absolutely controlling in such case, the same as a decision upon any other question. And a verdict for more than the amount once held erroneous, because excessive, cannot thereafter be held good upon the same or substantially the same evidence because sanctioned by a second or any number of juries.³⁰

§ 106. In excess of amount claimed or of *ad damnum* clause.—The verdict and judgment should not be for a greater amount than the complaint, declaration or petition claims, or it

²³ *Carter v. Kansas City, Ft. S. & M. R. Co.*, 69 Mo. App. 295.

²⁴ *Bates v. British Amer. Assur. Co.*, 100 Ga. 249; 28 S. E. 155.

²⁵ *West Chicago St. R. Co. v. Morrison A. & A. Co.*, 160 Ill. 288; 43 N. E. 393.

²⁶ *Unterberger v. Scharf*, 51 Mo. App. 102.

²⁷ *Consolidated Tract. Co. v. Graham*, 62 N. J. L. 90; 40 Atl. 773; 58

Alb. L. J. 93; 17 Natl. Corp. Rep. 213; 31 Chic. L. News, 35; 4 Am. Neg. Rep. 660; 44 Atl. 964.

²⁸ *Covington S. R. T. R. Co. v. Piel* (Ky.), 8 S. W. 449.

²⁹ *Chicago & A. R. Co. v. Pearson*, 82 Ill. App. 605.

³⁰ *Collins v. Janesville* (Wis. 1901), 87 N. W. 241; 10 Am. Neg. Rep. 520, 529, per Marshall, J.

will be reversed,³¹ although the excess may be remitted,³² or if the court correct it during the same term it is not error,³³ but the objection cannot be first raised on appeal;³⁴ nor is it ground for reversal where the excess is merely for accrued interest pending suit;³⁵ nor will the verdict be disturbed where the amount thereof corresponds with the sum fixed by agreement during trial.³⁶ But a new trial should be granted where there is no amendment during trial and the excess is not required to be written off, and so even though such excess is merely of interest on the damages claimed,³⁷ although it is held that the general rule does not apply where the judgment does not exceed the ad damnum.³⁸

§ 107. Inadequate damages.—If the damages are so grossly less or disproportionate as to come within the rule as to passion or prejudice of the jury stated in regard to excessive damages,³⁹ the court will reverse the same. So it has been decided that if the admitted facts are ignored as to the damages sustained and the charge of the court has been plainly disregarded and the award as found is insufficient, less than that claimed, is contrary to law and not supported by the evidence, the court will on ap-

³¹ See *Flourney v. Childress Minor* (Ala.), 93; *Dinsmore v. Anstil Minor* (Ala.), 89; *Derrick v. Jones*, 1 Stew. (Ala.) 18; *Hogan v. Taylor, Hempst.* (U. S. C. C. Ark.) 20; *Hudspeth v. Gray*, 5 Ark. 175; *Gage v. Rogers*, 20 Cal. 91; *Palmer v. Reynolds*, 3 Cal. 396; *Smith v. Allen*, 5 Day (Conn.), 357; *Brown v. Smith*, 24 Ill. 196; *Gower v. Carter*, 3 Iowa, 244; *Rowan v. Lee*, 3 J. J. Marsh. (Ky.) 97; *Grosvenor v. Danforth*, 16 Mass. 74; *Potter v. Prescott*, 2 Hun (Mass.), 686; *Pope v. Salsmon*, 35 Mo. 362; *Beckwith v. Boyce*, 12 Mo. 440; *Excelsior Elec. Co. v. Sweet*, 59 N. J. L. 441; *Lake v. Merrill*, 10 N. J. L. 288; *Weed v. Lee*, 50 Barb. (N. Y.) 354; *Crabb v. Nashville Bk.*, 6 Yerg. (Tenn.) 333; *Tenant v. Gray*, 5 Munf. (Va.) 494.

³² *Holeman v. Coleman*, 1 A. K. Marsh. (Ky.) 296.

³³ *Fidelity & C. Co. v. Weise*, 80 Ill. App. 499; *Grand Lodge A. O. & U. W. Co. v. Bagley*, 60 Ill. App. 589; *Hunt v. O'Brien*, 59 Ill. App. 321; *Cunningham v. Alexander*, 58 Ill. App. 296.

³⁴ *Metropolitan Accdt. Ins. Co. v. Froiland*, 161 Ill. 30; 43 N. E. 766; 25 Ins. L. J. 595, aff'g 59 Ill. App. 522. See also *Lauter v. Simpson*, 2 Ind. App. 293; 28 N. E. 324.

³⁵ *Wilson v. Panne*, 1 Kan. App. 721; 41 Pac. 984.

³⁶ *Georgia R. & Bkg. Co. v. Crawley*, 87 Ga. 191; 13 S. E. 508.

³⁷ *Plato v. Turrill*, 18 Ill. 273.

³⁸ Sec. 99, herein.

³⁹ *Kerry v. Pacific M. S. Co.*, 121

peal reverse the same; ⁴⁰ and where the damages can be definitely ascertained and the award is unreasonably small, the verdict will be reversed.⁴¹ So where the evidence of plaintiff, if believed would necessitate a larger judgment or the evidence of defendant if believed would require a judgment for him.⁴² Again, a new trial is proper where the instructions to the jury would authorize them to find a larger amount,⁴³ or where the verdict should necessarily have been for a larger sum than was rendered upon the issues and evidence, ⁴⁴ or where the plaintiff, if entitled to recover at all, is clearly entitled to a larger sum than that awarded,⁴⁵ or where the actual damages are proven with such certainty as to a reasonably definite measure of damages that the verdict is manifestly inadequate,⁴⁶ or where in general they evidence the result of passion, prejudice, etc.⁴⁷ But the appeal court must be convinced that the jury was influenced by partiality, passion or prejudice, or by some misconception of the evidence or the law.⁴⁸ And courts of appeal are not inclined to increase the damages unless they are manifestly insufficient;⁴⁹ nor will the judgment be reversed where there is evidence to warrant the finding of the jury;⁵⁰ nor where the evidence somewhat conflicts even though the courts' views do not coincide with the finding;⁵¹ nor merely because the verdict was based upon the lowest instead of the highest estimate;⁵² nor where some of the

⁴⁰ *Koebig v. Southern Pac. Co.*, 108 Cal. 235; 41 Pac. 469.

⁴¹ *Wilson v. Morgan*, 58 N. J. L. (29 Vr.) 426.

⁴² *Kina v. C. C. Bendall Commission*, 7 Colo. App. 507; 44 Pac. 377.

⁴³ *Distad v. Shanklin*, 11 S. D. 1; 75 N. W. 205.

⁴⁴ *Yager v. Exchange Nat. Bk.*, 57 Neb. 310; 77 N. W. 768.

⁴⁵ *Hexterv. Cory (Tex.)*, 18 S. W. 574.

⁴⁶ *Hackett v. Pratt*, 52 Ill. App. 346.

⁴⁷ *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579; 34 S. W. 493. See also *Townsend v. Brigga*, 88 Cal. 230; *Hanson v. Urbana & C. Elec. St. R. Co.*, 75 Ill. App. 474; *Galloway v. Weber*, 55 Ill. App. 366; *Hackett v.*

Pratt, 52 Ill. App. 346; *Conrad v. Dobmeier*, 57 Minn. 147; *Warne v. Stanton*, 12 App. Div. (N. Y.) 623; 43 N. Y. Supp. 1167; *Bradwell v. Pittsburg & W. End Co.*, 139 Pa. 404. *Coffin v. Varilla*, 8 Tex. Civ. App. 417; *Allison v. Gulf C. & S. F. R. Co. (Tex. Civ. App.)*, 29 S. W. 425.

⁴⁸ *Palmer v. Leader Pub. Co.*, 7 Pa. Sup. Ct. 594; 42 W. N. C. 556; 29 Pitts. L. J. N. S. 101.

⁴⁹ *Holmes v. Tennessee Coal I. & R. Co.*, 49 La. Ann. 1465; 3 Am. Neg. Rep. 174.

⁵⁰ *Hercules Iron Works v. Elgin J. & E. R. Co. (Ill.)*, 30 N. E. 1050.

⁵¹ *Brooks v. Ludin*, 1 N. Y. Supp. 338.

⁵² *Clarke v. Chicago, K. & N. R. Co. (Neb.)*, 37 N. W. 484.

evidence would justify a smaller verdict;⁵³ nor where a nonsuit should have been granted upon the evidence;⁵⁴ nor where the testimony fails to show that greater damages were sustained or unless some rule of law has been violated;⁵⁵ or where the sum awarded is all that the only evidence legally admitted reasonably warranted, even though the court may have been incorrect in his theory as to the measure of compensation;⁵⁶ nor can a party complain as to the insufficiency of a master's allowance in his report where it was confirmed by the chancellor without exception taken.⁵⁷

§ 108. Excessive and inadequate damages—Power of court.—It is decided that excessive damages as a ground for a new trial applies only to actions *ex delicto*.⁵⁸ In Illinois the

⁵³ *Beavers v. Missouri P. R. Co.*, 47 Neb. 761; 66 N. W. 821.

⁵⁴ *Cominsky v. Connellsville N. H. & L. St. R. Co.*, 4 Pa. Super. Ct. 431.

⁵⁵ *McBean v. McCullum*, 89 Hun (N. Y.), 95; 34 N. Y. Supp. 1003; 68 N. Y. St. R. 838.

⁵⁶ *Warrior Coal & C. Co. v. Mabel M. Co.*, 112 Ala. 624; 20 So. 918.

⁵⁷ *Reedy v. Weakley* (Tenn. Ch. App.), 39 S. W. 739. See further as to nonreversal for inadequacy of verdict, *Broom v. Jennings*, Kirby (Conn.), 392; *Farley v. Gate City Gas-light Co.*, 105 Ga. 323; 31 S. E. 193; *Roberts v. Rigdon* (Ga.), 7 S. E. 742; *Egel v. Fischer*, 44 Ill. App. 362; *Central Un. Teleph. Co. v. Fehring*, 146 Ind. 189; 45 N. E. 64; *Paxton v. Vincennes Mfg. Co.*, 20 Ind. App. 253; 50 N. E. 583; *Schwartz v. Davis*, 90 Iowa, 324; *Baldwin v. Dewitt*, 19 Ky. L. Rep. 1248; 43 S. W. 246; *Linss v. Chesapeake & O. R. Co.* (U. S. C. C. D. Ky.), 91 Fed. 964; *Benedict v. Michigan B. & P. Co.*, 115 Mich. 527; 73 N. W. 802; 4 Det. L. N. 967; *Nelson v. West Duluth* (Minn.), 57 N. W. 149; *Murphy v. Rementer* (Pa. C. P.), 7 Del. Co. Rep. 203; 15 Lanc. L. Rev.

270; *The George W. Clyde* (U. S. C. C. A. 2d C.), 58 U. S. App. 10; 30 C. C. A. 292; 86 Fed. 665. See also note, 47 L. R. A. 33, under the following headings: Inadequacy of damages as a ground for setting aside a verdict: (I.) Power and duty of the court as to; (II.) rule in contract actions; (III.) rule in actions with relation to property and property rights; (IV.) rule in actions for personal injuries: (a) generally; (b) actions for libel and slander; (c) actions for malicious prosecution and false imprisonment; (d) actions for assault and battery and other torts; (e) actions for personal injuries caused by negligence: (1) general rules as to; (2) what sufficient to show bias or omission of duty—instances; (f) statutory provisions as to smallness of damages for personal injury; (V.) effect of uncertainty as to cause of injury; (VI.) who entitled to relief; (VII.) matters of procedure; (VIII.) increase of verdict by court.

⁵⁸ *Harvesting Mach. Co. v. Gray* (Ind.), 16 N. E. 787; *Thomas v. Merry* (Ind.), 15 N. E. 244.

supreme court will not review the question of excessive damages,⁶⁰ but it is determined in Louisiana that the supreme court may diminish or increase damages according to its judgment and reasonable discretion, based upon the facts in the particular case.⁶¹ In Michigan the court may act upon its own motion where the award is insufficient and order a new trial.⁶² In Missouri no power exists in the supreme court to set aside a judgment where the only reason is that the verdict appears larger than the evidence seems to justify.⁶³ Nor will the New York court of appeals whose jurisdiction is limited to the review of questions of law,⁶⁴ interfere with the insufficiency of an award unless, upon the uncontradicted evidence affected by no question of credibility, the award is inadequate, or a wrong principle has been adopted in admeasuring the damages to the prejudice of the prevailing party.⁶⁵ And so where the damages are excessive the remedy being in the lower court.⁶⁶ So in New Mexico the supreme court does not sit to pass upon the amount of the award of a jury, but only to correct errors on the trial;⁶⁷ nor will the supreme court of South Carolina review the refusal by a circuit judge of a new trial for excessive damages;⁶⁸ and so as to the Texas court of civil appeals, unless a manifest wrong has been done.⁶⁹ Again, in the United States circuit court of appeals the power is limited to the inquiry whether the instruction to the jury properly directed the mode of assessing damages.⁷⁰

⁶⁰ *Chicago & G. T. R. Co. v. Gasiowski*, 155 Ill. 189; 40 N. E. 601, aff'g 54 Ill. App. 276; *Goldie v. Werner*, 151 Ill. 551; 38 N. E. 95.

⁶¹ *Rice v. Crescent City*, 51 La. Ann. 108; 24 So. 791.

⁶² *Ft. Wayne & B. I. R. Co. v. Donovan*, 110 Mich. 173; 68 N. W. 115; 3 Det. L. N. 369.

⁶³ *Fullerton v. Fordyce*, 144 Mo. 519; 44 S. W. 1053; 10 Am. & Eng. R. Cas. N. S. 729.

⁶⁴ *Const. N. Y.* (1900), art. VI, sec. 9; *N. Y. Laws*, 1887, ch. 507.

⁶⁵ *Slavin v. State*, 152 N. Y. 45; 46 N. E. 321.

⁶⁶ *Starbird v. Barrows*, 62 N. Y.

615. See as to appellate term of New York supreme court, *Tyler v. Third Ave. R. Co.*, 18 Misc. (N. Y.) 165; 41 N. Y. Supp. 523. See as to general term of New York supreme court, *McHugh v. New York El. R. Co.*, 47 N. Y. St. R. 73; 19 N. Y. Supp. 744.

⁶⁷ *Schofield v. Territory, Amer. Valley Co.*, 9 N. M. 526; 56 Pac. 306.

⁶⁸ *Gillman v. Florida C. & P. R. Co.*, 53 S. C. 210; 31 S. E. 224; 12 Am. & Eng. R. Cas. N. S. 125; *Dobson v. Cothran*, 34 S. C. 518; 13 S. E. 679.

⁶⁹ *Galveston, H. & S. A. R. Co. v. Gibson* (Tex. Civ. App.), 38 S. W. 480.

⁷⁰ *Homestake Min. Co. v. Fullerton*

§ 109. Excessive and inadequate damages—Trial court.—

"It has been repeatedly held by this court that if a verdict for damages is, in the judgment of the trial court, excessive and the result of inconsiderate judgment or unfairness of action, it is its duty to set it aside and award a new trial, instead of ordering a remittitur of the amount deemed to be excessive."⁷⁰ But the trial court may in California direct a new trial unless the prevailing party remit the excess where, in the said court's opinion, the award is not sustained by the evidence.⁷¹ So in Georgia the appellate court will not interfere with the granting of a new trial by the trial court subject to the remitting of a part, where it does not appear that the verdict was required under the law and the facts, and a new trial had not previously been granted.⁷² Again, it is decided in Illinois that it is the trial court's duty to grant a new trial, in case of an excessive verdict, or to insist upon the excess being remitted,⁷³ Again, a referee's report is conclusive like the verdict of a jury upon exceptions raised presenting questions of fact for the trial term.⁷⁴ And the appellate division of the New York supreme court will not further reduce a verdict where, upon the trial justice's opinion, there should be no further modification.⁷⁵ So in Pennsylvania it is decided that the trial court and the appellate court should determine as to a verdict being excessive or not upon the evidence.⁷⁶

§ 110. Jury and instructions generally.—These questions are considered in this treatise in connection with the various subjects in which the points have arisen and will, therefore, be only generally noticed here. Thus a jury may award damages for

(U. S. C. C. A. 8th C.), 16 C. C. A. 545; 36 U. S. App. 32; 69 Fed. 923; 2 Am. & Eng. Corp. Cas. N. S. 596. See further note, 47 L. R. A. 33.

⁷⁰ Atchison, T. & S. F. R. Co. v. Richards, 58 Kan. 344; 49 Pac. 436; Drumm v. Cessnum, 58 Kan. 331; 49 Pac. 78.

⁷¹ Etchas v. Orena, 121 Cal. 270; 53 Pac. 798.

⁷² Harris v. Central of Ga. R. Co., 103 Ga. 495; 30 S. E. 425.

⁷³ West Chicago St. R. Co. v. Wheeler, 73 Ill. App. 368; 3 Chic. L. J. Wkly. 125.

⁷⁴ Drown v. Hamilton (N. H.), 44 Atl. 79.

⁷⁵ Stemmerman v. Nassau Elec. R. Co., 36 App Div. (N. Y.) 218; 56 N. Y. Supp. 730.

⁷⁶ Powers v. Rich, 184 Pa. 325; 39 Atl. 62; 41 W. N. C. 407.

personal injuries even though no opinion has been given as to the amount.⁷⁷ And they may be charged that the only question is as to the measure of damages where there is such conclusive proof of defendant's liability as to preclude a verdict for him.⁷⁸ And they may be instructed to award damages to the plaintiff if they believe his testimony, there being none other.⁷⁹ But the jury must determine the measure of damages as a fact in accordance with the law.⁸⁰ If the instruction applies only to the amount of damages and there is no contention that the judgment is excessive, the charge is not open to objection.⁸¹ And portions as to which there is no evidence as to damages may be eliminated and a requested instruction so modified.⁸² So if the true general rule of damages is stated correctly and specific application thereof is made by other instructions, the charge is not erroneous even though turgid and redundant,⁸³ and where the verdict is for defendant no prejudicial error arises because correct instructions as to the measure of damages are refused.⁸⁴ But the party should request a proper charge upon the measure of damages, and if he omits so to do he cannot complain on appeal of the court's omission to so instruct.⁸⁵ Proper instructions, however, as to the compensation, do not cure errors in admission of evidence.⁸⁶ And a charge is erroneous which permits the jury in estimating damages to consider offensive questions by counsel on cross-examination after warning.⁸⁷ So an instruction which requires too high a degree of care in preventing injury to property is erroneous.⁸⁸

⁷⁷ *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274.

⁷⁸ *Union P. R. Co. v. McDonald*, 152 U. S. 262; 14 Sup. Ct. Rep. 619; 38 Fed. 434.

⁷⁹ *White v. Blanchard*, 164 Pa. 345; 30 Atl. 204; 25 Pitts. L. J. N. S. 103.

⁸⁰ *Parke v. Frank*, 75 Cal. 364.

⁸¹ *Baltimore & O. S. W. R. Co. v. Slanker*, 77 Ill. App. 567, aff'd 180 Ill. 357; 54 N. E. 309.

⁸² *Boggess v. Metropolitan St. R.*

Co., 118 Mo. 328; 23 S. W. 159; 24 S. W. 210.

⁸³ *Nye & S. Co. v. Snyder*, 56 Neb. 754; 77 N. W. 118.

⁸⁴ *Montgomery v. Willis* (Neb.), 63 N. W. 494.

⁸⁵ *Texas & P. R. Co. v. Cody* (U. S. C. C. A. 5th C.), 67 Fed. 71.

⁸⁶ *Kohne v. White* (Wash.), 40 Pac. 794.

⁸⁷ *Driscoll v. Collins*, 31 N. B. 604.

⁸⁸ *King v. Miles City Irrig. D. Co.*, 16 Mont. 463; 41 Pac. 431.

CHAPTER V.

EXEMPLARY DAMAGES.

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| <p>§ 111. Exemplary damages generally.</p> <p>112. Are in nature of punishment.</p> <p>113. Are in nature of punishment, continued.</p> <p>114. Where act punishable or punished criminally.</p> <p>115. Not as punishment but as compensation.</p> <p>116. Doctrine of exemplary damages denied.</p> <p>117. Same subject continued.</p> <p>118. Plaintiff not entitled to as matter of right.</p> <p>119. Elements necessary to justify.</p> <p>120. Wanton or malicious act.</p> <p>121. Malice sufficient to justify.</p> <p>122. Gross negligence.</p> <p>123. Actual damage should be shown.</p> <p>124. Actions allowed in.</p> <p>125. Instances when allowed.</p> <p>126. Interference with exercise of personal rights.</p> <p>127. Instances when not allowed.</p> <p>128. In action on bond.</p> <p>129. State may fix amount.</p> <p>130. Where two or more defendants.</p> | <p>131. Against persons under legal disability.</p> <p>132. Effect of death of wrongdoer.</p> <p>133. Mitigation of damages.</p> <p>134. Act done in exercise of a supposed right.</p> <p>135. Against corporations — Accepted rule.</p> <p>136. Decisions holding ratification or authorization of act necessary.</p> <p>137. Same subject—Particular decisions.</p> <p>138. Same subject—Illustrations.</p> <p>139. Decisions holding ratification or authorization of act unnecessary.</p> <p>140. Same subject—Particular decisions.</p> <p>141. Same subject—Illustrations.</p> <p>142. Against municipal corporations.</p> <p>143. Evidence as to motives.</p> <p>144. Evidence as to financial condition of defendant.</p> <p>145. Amount, matter of discretion with jury.</p> <p>146. Instructions as to exemplary damages.</p> |
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§ 111. Exemplary damages generally.—Exemplary, punitive or vindictive damages, which are practically synonymous,¹ though said to be wrong in theory,² are, nevertheless, allowable

¹ *Hurfurth v. Corp. of Washington*, v. Drake, 2 Metc. (Ky.) 146; 74 Am. 6 D.C. 288; *Roth v. Eppy*, 80 Ill. 288; Dec. 406.

Lowry v. Coster, 91 Ill. 182; *Chiles* ² *Dougherty v. Shown*, 48 Tenn. 302.

in certain cases of tort.³ Of this rule, allowing such damages, it has been said that "although it has been occasionally resisted

**Scott v. Donald*, 165 U. S. 58; 41 L. Ed. 632; 17 Sup. Ct. Rep. 265, aff'g 74 Fed. 859; 13 Nat. Corp. Rep. 6; *Bary v. Edmunds*, 116 U. S. 550; 29 L. Ed. 729; *Conard v. Pac. Ins. Co.*, 6 Pet. (U. S.) 262; *Boston Mfg. Co. v. Fiske*, 2 Mason (U. S.), 120; *Cowen v. Winters*, 96 Fed. 935; *Morning Journal Assn. v. Rutherford*, 51 Fed. 513; *New York, L. & W. Ry. Co. v. Bennett*, 50 Fed. 496; *United States v. Taylor*, 35 Fed. 484; *Western Un. Teleg. Co. v. Cunningham*, 99 Ala. 314; 4 Am. Elec. Cas. 658; *Floyd v. Hamilton*, 33 Ala. 235; *McCullough v. Walton*, 11 Ala. 492; *Kirkser v. Jones*, 7 Ala. 622; *Clark v. Bales*, 15 Ark. 452; *Bundy v. Maginness*, 76 Cal. 532; 18 Pac. 668; *Cal. Civ. Code*, sec. 3294; *Ores v. McGlasher*, 74 Cal. 148; 15 Pac. 452; *Waters v. Dumas*, 75 Cal. 564; 17 Pac. 685; *Nightingale v. Scannell*, 18 Cal. 315; *Wynne v. Parsons*, 57 Conn. 73; 17 Atl. 362; *Mason v. Hawes*, 52 Conn. 12; 52 Am. Rep. 552; *Dalton v. Beers*, 38 Conn. 529; *Robinson v. Burton*, 5 Harr. (Del.) 335; *Jacobus v. Congregation of C. of I.*, 107 Ga. 518; 6 Am. Neg. Rep. 434; 49 Cent. L. J. 307; 4 Chic. L. J. Wkly. 408; 33 S. E. 853; *Barber v. Lainier*, 82 Ga. 216; 8 S. E. 57; *Coleman v. Ryan*, 58 Ga. 1321; *Ga. Civ. Code*, sec. 3906; *Harrison v. Ely*, 120 Ill. 83; 11 N. E. 334; *Roth v. Eppy*, 80 Ill. 283; *Donnelly v. Harris*, 41 Ill. 126; *Sherman v. Dutch*, 16 Ill. 283; *McNamara v. King*, 7 Ill. 432; *Binford v. Young*, 115 Ind. 179; 16 N. E. 192; *Moore v. Crose*, 43 Ind. 34; *Mullison v. Hoch*, 17 Ind. 227; *Taber v. Hutson*, 5 Ind. 322; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Thill v. Pohlmann*, 76 Iowa, 638; 41 N. W. 385. See Iowa Code, sec. 1557; *Redfield v. Redfield*, 75 Iowa, 435; 39 N. W. 688; *Fox v. Wunderlich*, 64 Iowa, 187; *Cochran v. Miller*, 13 Iowa, 128; *Annot. Code*, Iowa (1897), sec. 4200; *Hefley v. Baker*, 19 Kan. 9; *Malone v. Murphy*, 2 Kan. 250; *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Bronson v. Green*, 2 Duv. (Ky.) 234; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Webb v. Gilman*, 80 Me. 177; 13 Atl. 688; *Wilkinson v. Drew*, 75 Me. 260; *Pike v. Dilling*, 48 Me. 539; *Blumhardt v. Rohr*, 70 Md. 328; 17 Atl. 266; *Elbin v. Dean*, 33 Md. 135; *Baltimore, etc., R. R. Co. v. Breinig*, 25 Md. 378; *Newman v. Stein*, 75 Mich. 402; *Ross v. Leggett*, 61 Mich. 445; *Beck v. Small*, 35 Minn. 465; 29 N. W. 69; *Seeman v. Feeney*, 19 Minn. 79; *Fox v. Stevens*, 13 Minn. 272; *Lynd v. Pickett*, 7 Minn. 184; *Higgins v. Louisville, N. O. & Tex. R. R. Co.*, 64 Miss. 80; 8 So. 176; *Vicksburg & Meridian R. R. Co. v. Scanlon*, 63 Miss. 413; *Bell v. Morrison*, 27 Miss. 68; *Green v. Craig*, 47 Mo. 90; *Callahan v. Cararoto*, 39 Mo. 156; *Stoneseifer v. Sheble*, 31 Mo. 243; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304; 2 Am. Rep. 229; *Magee v. Holland*, 27 N. J. L. 86; 72 Am. Dec. 341; *Winter v. Peterson*, 24 N. J. L. 524; *Warner v. Press Pub. Co.*, 132 N. Y. 181; 43 N. Y. St. R. 633; 30 N. E. 393; *Brook v. Harrison*, 91 N. Y. 83; *Hamilton v. Eno*, 81 N. Y. 116; *Voltz v. Blackmar*, 64 N. Y. 440; *Wort v. Jenkins*, 14 Johns. (N. Y.) 351; *Walker v. Wilson*, 8 Bosw. (N. Y.) 586; *Bowden v. Bailes*, 101 N. C. 612; *S. E. 342*; *Louder v. Hinson*, 4 Jones L. (N. C.) 369; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Hayner v. Cowden*, 27 Ohio St. 292;

by text writers and courts, it has become by a great array of decisions so firmly rooted in the common law that it cannot be overturned except by an act of the legislature."⁴

§ 112. Are in nature of punishment.—The question whether exemplary damages are to be considered as a compensation or are in the nature of a punishment has been much discussed.

- 22 Am. Rep. 303; *Smith v. Ft. W. & C. R. R. Co.*, 23 Ohio St. 10; *Atlantic & Great W. Ry. Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Heneky v. Smith*, 10 Oreg. 349; 45 Am. Rep. 143; *Reynolds v. Braithwaite*, 131 Pa. St. 416; 18 Atl. 1110; 25 W. N. C. 269; 47 Phila. Leg. Int. 426; 20 Pitta. L. J. N. S. 361; *Barnett v. Reed*, 51 Pa. St. 190; *McKnight v. Ratcliffe*, 44 Pa. St. 168; *Nagle v. Mul-lison*, 34 Pa. St. 48; *Hodgson v. Millward*, 3 Grant (Pa.), 406; *Hazard v. Israel*, 1 Binn. (Pa.) 228; 2 Am. Dec. 438; *Kenyon v. Cameron*, 17 R. I. 122; 20 Atl. 233; *Wade v. Elec. L. & P. Co.*, 51 S. C. 296; 64 Am. St. Rep. 676; 29 S. E. 233; *Quinn v. So. Car. Ry. Co.*, 29 S. C. 381; 1 L. R. A. 682; 7 S. E. 614; *Jefcoat v. Knotts*, 1 Rich. L. (S. C.) 649; *Genay v. Mor-ris*, 1 Bay. (S. C.) 6; *Dougherty v. Shown*, 48 Tenn. 302; *Goodall v. Thurman*, 1 Head (Tenn.), 209; *Shannon's Annot. Code, Tenn.* (1896) 5291; *Biering v. First Nat. Bank*, 69 Tex. 599; 7 S. W. 90; *Shaw v. Brown*, 41 Tex. 446; *Stell v. Paschall*, 40 Tex. 640; *Camp v. Camp*, 59 Vt. 667; 10 Atl. 748; *Rea v. Harrington*, 58 Vt. 181; 56 Am. Rep. 561; 2 Atl. 475; *Ellsworth v. Potter*, 41 Vt. 686; *Nye v. Merriam*, 35 Vt. 538; *Spear v. Hiles*, 67 Wis. 350; 30 N. W. 506; *Pickett v. Crook*, 20 Wis. 358; *Mc-Williams v. Bragg*, 3 Wis. 424; *Union Pac. R. R. Co. v. Hause*, 1 Wyo. 27; *Mayer v. Frobe*, 40 W. Va. 246, 249; 23 S. E. 58; *Bell v. Midland Ry. Co.*, 10 C. B. N. S. 306; *Huckle v. Money*, 2 Wils. 205; *Beardmore v. Carrington*, 2 Wils. 244; *Sears v. Lyons*, 2 Stark. N. P. 317; *Merest v. Harvey*, 5 Taunt. 442; *Thomas v. Harris*, 3 H. & N. 961; *Emblem v. Myers*, 6 H. & N. 54; *Skull v. Gleinster*, 33 L. J. C. P. 185; *Pearson v. Lemaitre*, 5 M. & G. 700; *Forde v. Skinner*, 4 C. & P. 239; *Doe v. Filliter*, 13 M. & W. 47; *Brewer v. Dew*, 11 M. & W. 625; *Leith v. Pope*, 2 Wm. Bl. 1327; *Caddy v. Barlow*, 1 Man. & Ryl. 275; *Stein v. Belanger*, Rap. Jud. Queb. 9 C. S. 535. But see *contra*, *Greeley S. L. & P. Ry. Co. v. Yeager*, 11 Colo. 345; 18 Pac. 211; *Murphy v. Hobbs*, 7 Colo. 541; 49 Am. Rep. 366; 5 Pac. 119; *Hawes v. Knowles*, 114 Mass. 518; *Smith v. Holcomb*, 99 Mass. 552; *Stowe v. Heywood*, 7 Allen (Mass.), 119; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Spear v. Hubbard*, 4 Pick. (Mass.) 143; *Wilson v. Bowen*, 64 Mich. 133; *Detroit Daily Post v. McArthur*, 16 Mich. 447; *Bank of Commerce v. Goos*, 39 Nat. 437; 23 L. R. A. 190; 58 N. W. 84; *Boldt v. Budwig*, 19 Nat. 739; *Riewe v. Mc-Cormick*, 11 Neb. 263; *Roose v. Per-kins*, 9 Neb. 315; *Boyer v. Barr*, 8 Neb. 70; *Bixby v. Dunlap*, 56 N. H. 456; *Fay v. Parker*, 53 N. H. 342; *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. St. 45; 25 Pac. 1072; 11 L. R. A. 689; 26 Am. St. Rep. 842; 2 Greenleaf on Ev. (16th ed.) sec. 253n.
- ⁴ *McCarthy v. Miskern*, 22 Minn. 90, per Gillfillan, C. J.,

The general rule, however, as sustained by the great weight of authority, is that such damages are allowed as a punishment and for the purpose of restraining others from following a similar line of conduct.⁵ In those cases where the injury complained of is due to fraud, malice, gross negligence or oppression, the law blends the interests of society and of the aggrieved individual and awards such damages as an example to the wrongdoer or others and for the purpose of deterring them from similar trans-

⁵ *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 107; 37 L. Ed. 101; *Milwaukee & St. P. Ry. Co. v. Arms*, 19 U. S. 489; 23 L. Ed. 374; *Day v. Woodwarth*, 13 How. (U. S.) 371; 14 L. Ed. 185; *Stimpson v. Railroads*, 1 Wall. Jr. (U. S.) 164; *Fed. Cas. No. 13,456*; *Press Pub. Co. v. Monroe*, 73 Fed. 201; 51 L. A. 353; *Tibler v. Alford*, 12 Fed. R. 262; *Alabama, etc., R. Co. v. Sellers*, 93 Ala. 9; 9 So. 375; *Citizens St. R. Co. v. Steen*, 42 Ark. 321; *Cal. Civ. Code*, sec. 3294; *Dibble v. Morris*, 26 Conn. 426; *Beecher v. Derby Bridge & Ferry Co.*, 24 Conn. 491; *Huntley v. Bacon*, 15 Conn. 267; *Linsley v. Bushnell*, 15 Conn. 236; *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384; 27 Am. Dec. 682; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Lake Erie & W. R. Co. v. Christison*, 39 Ill. App. 495; *Root v. Sturdivant*, 70 Iowa, 65; 29 N. W. 802; *Parkhurst v. Masteller*, 57 Iowa, 474; 10 N. W. 804; *Ward v. Ward*, 41 Iowa, 686; *Williamson v. Stage Co.*, 24 Iowa, 171; *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Titus v. Corkins*, 21 Kan. 722; *Kentucky Cent. R. R. Co. v. Dilla*, 4 Bush (Ky.), 311; *Phila. Wilm. & Balt. R. R. Co. v. Larkin*, 47 Md. 155; 28 Am. Rep. 442; *Bannon v. Railroad*, 24 Md. 108; *New Orleans & C. R. R. Co. v. Stathan*, 42 Miss. 607; *Buckley v. Knapp*, 48 Mo. 162; *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351; *Fohrmann v. Consol. Tract. Co.* (N. J.), 43 Atl. 892; 6 Am. Neg. Rep. 601; *Voltz v. Blackmar*, 64 N. Y. 444; *Millard v. Brown*, 35 N. Y. 297; *Etchberry v. Levielle*, 2 Hilt. (N. Y.) 40; *Tift v. Culver*, 3 Hill (N. Y.), 180; *Wallace v. Mayor*, 2 Hilt. (N. Y.) 440; 9 Abb. Pr. 40; *Sullivan v. Oregon Ry. & Nav. Co.*, 12 Oreg. 392; 7 Pac. 508; 53 Am. Rep. 364; *Johnson v. Allen*, 100 N. C. 131; *Reeves v. Winn*, 97 N. C. 246; *Gillreath v. Allen*, 10 Ired. (N. C.) 67; *Pitts. C. & St. L. Ry. Co. v. Lyon*, 123 Pa. St. 140; 16 Atl. 607; 2 L. R. A. 489; 10 Am. St. Rep. 517; *Hodgson v. Millward*, 3 Grant (Pa.), 406; *Hagan v. Prov. & W. R. Co.*, 3 R. I. 88, 91; *Samuels v. Richmond & D. R. Co.*, 35 S. C. 493; 14 S. E. 943; *Louisville, N. & Gt. So. R. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; 47 Am. Rep. 279; *Dougherty v. Shown*, 1 Heisk. (Tenn.) 302; *Cox v. Crumley*, 5 Lea (Tenn.), 529; *Polk v. Fancher*, 1 Head (Tenn.), 336; *Rogers v. Ferguson*, 36 Tex. 544; *Claiborne v. Chesapeake & O. R. Co.*, 46 W. Va. 363; 33 S. E. 262; 14 Am. & Eng. R. Cas. N. S. 217; *Mayer v. Frobe*, 40 W. Va. 246; 22 S. E. 58 (in West Virginia these two cases overrule the former decisions of *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485; *Beck v. Thompson*, 31 W. Va. 459; 13 Am. St. Rep. 870; 7 S. E. 447); *McWilliams v. Bragg*, 3 Wis. 424; *Clissold v. Machell*, 26 Up. Can. Q. 427.

actions.⁶ In several states, however, the rule has been affirmed that though punitive damages are those allowed beyond a compensation, they are not in the nature of a public punishment but are based upon the act as a tort.⁷ And it has been held improper to charge the jury that "you may give what is called vindictive damages, that is, such damages as will satisfy the highly excited feelings of the party injured."⁸

§ 113. Are in nature of punishment, continued.—The doctrine that such damages are allowed as an example or by way of punishment has been repeatedly affirmed in the federal courts.⁹ So in the United States supreme court it has been declared that, "in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. . . . In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to give in addition to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example which has sometimes been called smart money. This has always been left to the discretion of the jury as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case."¹⁰ And again in another decision in this court it was said that "jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recom-

⁶ Louisville, N. & Gt. So. R. R. Co. v. Swineford, 44 Wis. 282; 28 Am. v. Guinan, 11 Lea (Tenn.), 98; 47 Rep. 582.

⁷ Am. Rep. 279. ⁸ Jones v. Turpin, 6 Heisk. (Tenn.)

⁹ Humphries v. Johnson, 20 Ind. 181.

¹⁰ Hendrickson v. Kingsbury, 21 190; Chiles v. Drake, 59 Ky. ⁹ See cases cited in preceding note.

¹⁰ Day v. Woodworth, 13 How. 146; 74 Am. Dec. 406; City of Lowell (U. S.) 371; 14 L. Ed. 185, per Mr.

v. Short, 4 Cush. (Mass.) 275; Brown Justice Grier.

pensed, but that the offender is to be punished, and although the soundness of it has been questioned, it must be accepted as the general rule in England and in most of the states of this country.”¹¹ The words of the court in a New York decision are also pertinent in this connection, it being declared that “in vindictive actions, as they are sometimes termed, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry with a view to the assessment of damages; and if the defendant in committing the wrong complained of, acted recklessly or wilfully and maliciously with a design to oppress and injure the plaintiff, the jury in fixing the damages may disregard the rule of compensation, and beyond that may, as a punishment to the defendant and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been held to apply in the case of wilful injury to property, and in actions of tort founded upon negligence amounting to misconduct and recklessness.”¹² And in an early decision in North Carolina words of similar import are also used. In this case it was said that, “in actions of tort where there are circumstances of aggravation, juries are not restricted in the measure of damages to the mere compensation for the injury sustained, but may, in their discretion, increase the amount according to the degree of malice by which the evidence shows the defendant was actuated, the extent of the injury intended, and not that which was really inflicted. Accordingly, juries are told in many cases they may give exemplary damages, that is, such as will make an example of the defendant, or vindictive damages or smart money, terms which explain themselves. . . . Injuries sustained by a personal insult or attempt to destroy character, are matters which cannot be regulated by dollars and cents. It is fortunate that while juries endeavor to give ample compensation for the injury actually sustained, they

¹¹ *Milwaukee & St. P. Ry. Co. v. Bennett*, 19 N. Y. 174; *Taylor v. Arms*, 91 U. S. 489; 23 L. Ed. 374, per Mr. Justice Davis.

¹² *Voltz v. Blackmar*, 64 N. Y. 444, per *Andrews, J.* See also *Millard v. Brown*, 35 N. Y. 297; *Hunt v. Wend*, (N. Y.) 113.

are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty, otherwise there would be many injuries without adequate remedy.”¹³ So, also, this doctrine has been affirmed in the Connecticut cases by the statement that “there is no principle better established, and no practice more universal, than that vindictive damages or smart money may be, and is, awarded by the verdicts of juries in cases of wanton or malicious injuries, and whether the form of the action be trespass or case.”¹⁴ And it has been said in a Missouri decision that “this is now the general and almost universal doctrine and is thoroughly imbedded in the jurisprudence of this state.”¹⁵

§ 114. Where act punishable, or punished criminally.—

The objection has been raised in some jurisdictions, that if the act of the defendant may also be punished, or has been punished criminally, exemplary damages should not be given, since this would be an infliction upon him of two punishments for the same offense, in violation of his legal rights. Though much has been said in favor of such a rule, yet the courts have generally adhered to the doctrine that the fact that the defendant is punishable, or has been punished criminally, for the act causing the loss or injury, should not defeat an allowance of exemplary damages. The latter though being in the nature of a punishment are, nevertheless, incidentally compensatory for the wrongful act of the defendant, and such damages, though being also penal, yet are for the wrongful injury to the individual, while the punishment inflicted criminally is for the injury caused to society at

¹³ *Gilreath v. Allen*, 10 Ired. (N. C.) 67, per Pearson, J. See also *Johnson v. Allen*, 100 N. C. 131; 5 S. E. 666; *Reeves v. Winn*, 97 N. C. 246; *Smithwick v. Ward*, 7 Jones (N. C.), 64; *McAnlay v. Birkhead*, 13 Ired. L. (N. C.) 28; *Howell v. Howell*, 10 Ired. L. (N. C.) 84.

¹⁴ *Lindsley v. Bushnell*, 15 Conn. 226; 38 Am. Dec. 79, per Church, J. See also *Denison v. Hyde*, 6 Conn. 578; *Edwards v. Beach*, 3 Day (Conn.), 447.

¹⁵ *Buckley v. Knapp*, 48 Mo. 162, per Wagner, J. See also *Frauz v. Hilterbrand*, 45 Mo. 121; *Callaghan v. Cafferata*, 39 Mo. 137; *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351; *Freidenheit v. Edmundson*, 36 Mo. 227; 88 Am. Dec. 141; *Walker v. Borland*, 21 Mo. 289; *Corwin v. Walter*, 18 Mo. 73; *Milburn v. Beach*, 14 Mo. 104; *Von Fragstein v. Windler*, 2 Mo. App. 588; but see opinion expressed in *McKeon v. Citizens St. Ry. Co.*, 42 Mo. 79.

large for the same wrongful act.¹⁶ In an early case in New York it is said in this connection that, "in vindictive actions jurors are always authorized to give exemplary damages where the injury is attended with circumstances of aggravation; and the rule is laid down without the qualification that we are to regard either the possible or actual punishment of the defendant by indictment and conviction at the suit of the people. That the criminal suit is not a bar to the civil, and that no court will drive the prosecutor to elect between them if the former be by indictment, is entirely settled. . . . He may proceed by both at the same time; nor will the court even stay proceedings in the civil prosecution to govern themselves, by the event of a pending criminal prosecution. . . . We concede that smart money allowed by a jury and a fine imposed at the suit of the people, depend on the same principle. Both are penal and intended to

* *Brown v. Evans*, 17 Fed. 912; *Wilson v. Middleton*, 2 Cal. 54; *Howlett v. Tuttle*, 15 Colo. 454; 24 Pac. 921; *Smith v. Bagwell*, 19 Fla. 117; 45 Am. Rep. 12; *Jefferson v. Adams*, 4 Harr. (Del.) 321; *Brannon v. Silvernail*, 81 Ill. 434; *Ward v. Ward*, 41 Iowa, 686; *Garland v. Wholeham*, 26 Iowa, 185; *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Jockers v. Borgmann*, 29 Kan. 109; 44 Am. Rep. 625; *Chiles v. Drake*, 2 Metc. (Ky.) 146; 74 Am. Dec. 406; *Johnson v. Smith*, 64 Me. 553; *Boetcher v. Staples*, 27 Minn. 306; 38 Am. Rep. 295; 7 N. W. 263; *Wheatley v. Thorn*, 23 Miss. 62; *Baldwin v. Fries*, 46 Mo. App. 288; *Corwin v. Walton*, 18 Mo. 71; 59 Am. Dec. 285; *New v. McKechnie*, 95 N. Y. 632; *Cook v. Ellis*, 6 Hill (N. Y.), 466; *Fry v. Bennett*, 4 Duer (N. Y.), 247; *Sowers v. Sowers*, 87 N. C. 303; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Atlantic & Great Western Ry. Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Roberts v. Mason*, 10 Ohio St. 278; *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341; *Wolf v. Cohen*, 8 Rich. L. (S. C.) 144; *Cole v. Tucker*, 6 Tex. 266; *Hoadley v. Watson*, 45 Vt. 289; 12 Am. Rep. 197; *Borland v. Barrett*, 76 Va. 128; *Brown v. Swineford*, 44 Wis. 282; *Jones v. Clay*, 1 Bos. & Pull. 191; *Jacks v. Bell*, 3 Carr. & P. 316; but see *contra* *Huber v. Teuber*, 3 McArthur (D. C.), 484; *Cherry v. McCall*, 23 Ga. 193; *Albrecht v. Walker*, 73 Ill. 69; *Wabash Pr. & Pub. Co. v. Crumrine*, 123 Ind. 89, 93; 21 N. E. 904; *Farman v. Lauman*, 73 Ind. 568; *Stewart v. Madox*, 63 Ind. 51; *Koerner v. Oberly*, 56 Ind. 284; 26 Am. Rep. 34; *Meyer v. Bohlfig*, 44 Ind. 238; *Humphries v. Johnson*, 20 Ind. 190; *Nossaman v. Rickert*, 18 Ind. 350; *Butler v. Mercer*, 14 Ind. 479; *Struble v. Nodwift*, 11 Ind. 64; *Johnson v. Vuthrick*, 7 Ind. 137; *Taber v. Hutson*, 5 Ind. 322; 61 Am. Dec. 96; *Western Un. Teleg. Co. v. Bierhaus*, 8 Ind. App. 563; 4 Am. Elec. Cas. 723; *Ormsby v. Johnson*, 1 B. Mon. (Ky.) 80; *Austin v. Wilson*, 58 Mass. (4 Cush.) 273; 50 Am. Dec. 766.

deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment."¹⁷

§ 115. **Not as punishment but as compensation.**—In New Hampshire the doctrine of damages being awarded as a punishment or example is distinctly denied. The courts in this state, though speaking of such damages as exemplary, endeavor to reconcile them with the idea of compensation, it being declared that they are allowed by way of remuneration for the wrong done, considering the aggravating circumstances and the wilful or reckless character of the act. The rule that exemplary damages may be given as a punishment in cases of express fraud, malice, indignity, wantonness, oppression, insult and cruelty, is supported by the early decisions in New Hampshire.¹⁸ But in the case of *Fay v. Parker*,¹⁹ which contains an elaborate and lengthy review of the decisions and authorities as to such damages, it is declared that the plaintiff in an action of tort is entitled to a full compensation for the injury sustained by him, but that this cannot be increased by the addition of a fine for the punishment of the defendant.²⁰ And in a later case in this

¹⁷ *Cook v. Ellis*, 6 Hill (N. Y.), 466; 41 Am. Dec. 757, per curiam.

¹⁸ *Woodman v. Nottingham*, 49 N. H. 387; *Belknap v. Boston & Me. R. R.*, 49 N. H. 358; *Holyoke v. Grand Trunk Ry.*, 48 N. H. 541; *Taylor v. Grand Trunk Ry.*, 48 N. H. 303; *Cram v. Hadley*, 48 N. H. 191; *Towle v. Blake*, 48 N. H. 92; *Moore v. Bowman*, 47 N. H. 494; *Perkins v. Towle*, 43 N. H. 220; *Knight v. Foster*, 39 N. H. 576; *Hopkins v. Railroad*, 36 N. H. 9; *Symonds v. Carter*, 32 N. H. 458; *Davidson v. Goodall*, 18 N. H. 423; *Whipple v. Walpole*, 10 N. H. 130.

¹⁹ 53 N. H. 342; 16 Am. Rep. 270.

²⁰ The court in conclusion said in this case: "The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate. Let the criminal

law deal with the criminal and administer punishment for the legitimate purpose and end of punishment—namely the reformation of the offender and the safety of the people. Let the individual whose rights are infringed and who has suffered injury go to the civil courts and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled and which belong to others. Why longer tolerate a false doctrine which in its practical exemplification deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? Deprives him of the right of meeting the witnesses against him face to face? Deprives him of the right of not being compelled to testify against himself?

state it is said that damages sometimes termed exemplary, vindictive or punitive are awarded, but these terms do not imply that they are awarded as a punishment for violation of the criminal law. They are not open to the objection of exposing the defendant to a double punishment, but are rather to be considered as a compensation for the wrong, considering the existence of malice on the part of the defendant.²¹ It was declared by the court in this case that: "It is incorrect to separate what is called actual damages from what is called exemplary damage. The rule is not, as I understand it, to instruct the jury in the first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that if they find the defendant has been malicious, they may give another separate sum in damages by way of example or for the sake of punishment. The true rule, as I understand it, is to instruct the jury that if they find the defendant has been malicious, the rule of damages will be more liberal; that instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation—the insults, offended feelings, degradation, and so on—and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay."²² And in an early case in Kentucky the view that such damages may be allowed but that they are to be considered as a remun-

Deprives him of the right of being acquitted unless the proof of his offense is established beyond all reasonable doubt? Deprives him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of the fundamental law? The sole object in its practical results seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff require the

destruction of the constitution, there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guarantees of that instrument and explode the very foundation upon which constitutional guarantees are based, for no other purpose than to perpetuate false theories and develop unwholesome fruit?" Per Foster, J.

²¹ Bixby v. Dunlap, 56 N. H. 456; 22 Am. Rep. 475n.

²² Per Cushing, C. J.

neration for circumstances of aggravation was also affirmed by the court.²³

§ 116. Doctrine of exemplary damages denied.—In one of the later cases in Michigan it is declared that the purpose of an action of tort is to recover such damages as have been sustained as a result of an injury at the hands of the defendant, the object of such action being compensation to the plaintiff, and that when that is accorded, anything beyond, by whatever name called, is unauthorized.²⁴ And it is also declared in this same case that "it is not the province of the jury, after full damages have been found for the plaintiff so that he is fully compensated for the wrong committed by the defendant, to mulct the defend-

²³ "The right, however, of the plaintiff to recover vindictive damages for personal injuries where the commission of the act complained of is accompanied with circumstances of aggravation has been repeatedly recognized by this court as proper, and this must now be regarded as a settled rule of law in this state. This rule, when properly understood, is in our opinion supported by principle and analogy and has a decided preponderance of authority in its favor. The arguments used in opposition to the rule proceed on the erroneous assumption that vindictive damages are inflicted by way of criminal or penal punishment, and are not given by way of compensation for the injury complained of. Such damages may operate by way of punishment, but they are allowed by way of remuneration for the wrong suffered. They are proportioned to the aggravating circumstances and wilful and reckless character of the act which occasioned the injury to the plaintiff. They are discretionary with the jury as the damages for personal injuries always are. The actual damages which are sustained in such cases cannot be

measured or determined by any definite criterion, but have to be fixed by the jury on a proper consideration of all the circumstances of the case. Where the element of wilful negligence, malice or oppression intervenes, the law permits the jury to give what is termed punitive, vindictive or exemplary damages and such damages although given to recompense the sufferer, do inflict a punishment upon the offender. But such is the effect of every judgment for damages which is rendered in an action for an injury to the person; and there would be as much propriety in the argument that as damages in such cases always operate as a punishment, the offender, if the act be one for which he is liable to be indicted, will be thereby twice punished for the same offense, as there is that such an effect is produced when the damages are increased and made exemplary on account of the reckless conduct of the offending party." *Chiles v. Drake*, 2 Metc. (Ky.) 146; 74 Am. Dec. 406, per Simpson, C. J.

²⁴ *Wilson v. Bowen*, 64 Mich. 141; 31 N. W. 81, per Champlin, J.

ant in an additional sum to be handed over to the plaintiff as a punishment for the wrong he has done to the plaintiff."²⁴ In an earlier case in this state, however, it is declared that the jury, while they should confine themselves to awarding a compensation and should under no circumstances in addition to compensating the plaintiff, proceed to punish the defendant, yet they should fairly compensate the plaintiff for the injury he has sustained, and in so doing may consider such aggravating circumstances, as accompanied the defendant's act in estimating the damages,²⁵ and a similar doctrine seems to be followed in the Massachusetts decisions.²⁶

§ 117. Same subject continued.—The doctrine of exemplary or punitive damages is also denied in the earlier Colorado decisions. As to the award of such damages being a violation

²⁴ *Wilson v. Bowen*, 64 Mich. 141; 31 N. W. 81, per Champlin, J.

²⁵ In this case it is said that "the purpose of an action for tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant. In some cases the damages are incapable of pecuniary estimation, and the court performs its duty by submitting all the facts to the jury and leaving them to estimate the plaintiff's damages as best they may under all the circumstances. In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation which are calculated to vex and annoy the plaintiff and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all

cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view and any instruction which is calculated to lead them to suppose that besides compensating the plaintiff they may punish the defendant is erroneous." *Stilson v. Gibbs*, 53 Mich. 280; 18 N. W. 815, per Cooley, C. J. See also in this connection, *McPherson v. Ryan*, 59 Mich. 33; 26 N. W. 321; *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 609; 28 N. W. 695; *Johnston v. Disbrow*, 47 Mich. 59; 10 N. W. 79; *Fay v. Swan*, 44 Mich. 544; 7 N. W. 215; *Scripps v. Reilly*, 38 Mich. 23. But see *Ganssly v. Perkins*, 30 Mich. 492; *Elliott v. Herz*, 29 Mich. 202; *Detroit Daily Post v. McArthur*, 16 Mich. 447, in which cases the court did not seem to draw such a fine distinction as in the later cases.

²⁶ *Hawes v. Knowles*, 114 Mass. 518; 19 Am. Rep. 383. See also *Smith v. Holcomb*, 99 Mass. 552; *Stone v. Heywood*, 7 Allen (Mass.) 119; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Spear v. Hubbard*, 4 Pick. (Mass.) 143.

of the constitutional provision as to two punishments, it is said in the case of *Murphy v. Hobbs*:²⁷ "Courts attempt to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there refers exclusively to criminal procedure, and cannot include civil actions. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed and when the people adopted the constitution both understood the purpose of this clause to be the prevention of double prosecutions for the same offense. Yet under the rule allowing exemplary damages, not only may two prosecutions but also two convictions and punishments be had. What difference does it make to the accused so far as this question is concerned, that one prosecution takes the form of a civil action in which he is called defendant? He is practically harassed with two prosecutions, and subjected to two convictions, while no hypothesis, however ingenious, can cloud in his mind, the palpable fact that for the same tort he suffers two punishments. An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted. But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable, and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended."²⁸ In this case of *Murphy v. Hobbs*,²⁹ other objections to the allowance of such damages were also raised, it being declared that the rule allowing them was an exception to procedure in all other cases, a trial and conviction being had, and punishment by fine inflicted without indictment or sworn information, and also that it rejected the rules of evidence applicable in all criminal cases, the doctrine of reasonable doubt being replaced by the rule controlling in civil actions, allowing a conviction on mere preponderance of evidence and defendant being compelled to testify

²⁷ 7 Colo. 541; 49 Am. Rep. 366; 5 Pac. 119, per Helm, J. This case contains an exhaustive discussion of the subject.

²⁸ See also *Greeley, S. L. & P. Co. v. Yeager*, 11 Colo. 345; 18 Pac. 211.

²⁹ 7 Colo. 541; 49 Am. Rep. 366; 5 Pac. 119.

against himself. Exemplary damages were, however, allowed in Colorado by a subsequent act of the legislature,³⁰ and under this act the general rule prevails that it must appear that there was malice or wantonness in the act complained of, or that it was done under such circumstances as show a reckless disregard of the injured person's rights in order to justify an allowance thereof.³¹ Again, in Nebraska, the decisions are uniformly opposed to the allowance of any damages in excess of those which operate as a compensation for the actual loss or injury sustained.³² So in this connection it is said in an early case in this state that "damages should be equal to the amount of the injury sustained; but upon what principle should they be given in excess of that amount? In law the injured party upon being paid the damages sustained by the injury has received full compensation therefor. Why then should the property of the party causing the injury be taken from him and given to another without compensation? Constitutional guarantees of the rights of private property amount to but little, if courts sanction its practical confiscation, under the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do without regard to the amount of the injury. If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment and not individuals."³³ A similar doctrine also has been affirmed in Washington.³⁴

§ 118. Plaintiff not entitled to as matter of right.—Exemplary damages are given as a punishment upon the defendant for his wrongful conduct towards the plaintiff, and not upon any theory that the latter is entitled to such damages as a matter of right.³⁵

³⁰ See Colo. Acts, 1889, p. 64.

³¹ *Denver Tramway Co. v. Cloud* (Colo. App. 1895), 40 Pac. 779.

³² *Bank of Commerce v. Goos*, 39 Neb. 437; 23 L. R. A. 190; 58 N. W. 84; *Boldt v. Budwig*, 19 Neb. 739; *Roose v. Perkins*, 9 Neb. 315; *Boyer v. Barr*, 8 Neb. 70.

³³ *Riewe v. McCormick*, 11 Neb. 264, 265; 9 N. W. 88, per Maxwell, C. J.

³⁴ *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. St. 45; 25 Pac. 1072; 11 L. R. A. 689; 26 Am. St. Rep. 842.

³⁵ *Wabash, St. L. & Pac. Ry. Co. v. Rector*, 104 Ill. 296; *Hawks v. Ridg-*

§ 119. **Elements necessary to justify.**—The primary purpose of an action for damages is to recover compensation for the actual loss or injury sustained.³⁵ The liability for punitive or exemplary damages, however, being for the purpose of punishment or as an example, rests primarily upon the question of motive.³⁷ And the jury are not at liberty to go beyond the allowance of a compensation unless it be shown that the act was done wilfully, maliciously or wantonly, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them, and where there is no proof that the injury was so inflicted, exemplary damages should not be allowed.³⁸ So it is declared in a recent decision that “ex-

way, 33 Ill. 473; *Schippel v. Norton*, 38 Kan. 567; 16 Pac. 804; *Webb v. Gilman*, 80 Me. 177; 13 Atl. 688; *New Orleans, etc., R. R. Co. v. Burke*, 53 Miss. 200; *Kenyon v. Cameron*, 17 R. I. 122; 20 Atl. 233; *Wade v. Columbia El. St. R. L. & P. Co.*, 51 S. C. 296; 29 S. E. 233; 64 Am. St. Rep. 676; *Snow v. Carpenter*, 49 Vt. 426; *Boardman v. Goldsmith*, 48 Vt. 403.

³⁵ See chapter on damages generally, herein.

³⁶ *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 493; 23 L. Ed. 374; *Wentworth v. Blackman*, 71 Iowa, 255; 32 N. W. 311; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; 56 Am. Dec. 563; *Webb v. Gilman*, 80 Me. 177; 13 Atl. 688; 6 N. Eng. 166; *Haines v. Schultz*, 50 N. J. L. 481; 14 Atl. 1488.

³⁷ *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489; 23 L. Ed. 374; *The Scotland*, 42 Fed. 925; *Miller v. Balt. & O. R. Co.*, Fed. Cas. No. 9,560; *Wiggin v. Coffin*, 3 Story (U. S.), 1; *Garrett v. Sewell*, 108 Ala. 521; 18 So. 737; *Brewer v. Watson*, 65 Ala. 88; *Snow v. Grace*, 25 Ark. 570; *Yerian v. Linkletter*, 80 Cal. 135; *Selden v. Cushman*, 20 Cal. 56; 81 Am. Dec. 93; *Spencer v. Murphy*, 6 Colo.

App. 453; 41 Pac. 841; *Florida S. R. Co. v. Herst*, 30 Fla. 1; 16 L. R. A. 631; 52 Am. & Eng. R. Cas. 409; 11 So. 506; 12 Ry. & Corp. L. J. 218; *Kolb v. O'Brien*, 86 Ill. 211; *Becker v. Dupree*, 75 Ill. 167; *Scott v. Bryson*, 74 Ill. 420; *Miller v. Kirby*, 74 Ill. 242; *Tripp v. Grouner*, 60 Ill. 470; *Stilwell v. Barnett*, 60 Ill. 219; *Pierce v. Millay*, 44 Ill. 189; *Hawk v. Ridgway*, 33 Ill. 475; *Williams v. Reil*, 20 Ill. 147; *Mansur-Tebbetts I. Co. v. Smith*, 65 Ill. App. 319; *White v. Naerop*, 57 Ill. App. 114; *Vangundy v. Berkenmeyer*, 19 Ill. App. 229; *Louisville, N. A. & Chic. Ry. Co. v. Shanks*, 94 Ind. 598; *Moore v. Crose*, 48 Ind. 30; *Linton Coal & M. Co. v. Persons*, 15 Ind. App. 69; 43 N. E. 651; *Waller Bros. v. Waller*, 76 Iowa, 513; 41 N. W. 307; *Inman v. Ball*, 65 Iowa, 543; 22 N. W. 666; *Curl v. Chic., R. I. & P. Ry. Co.*, 68 Iowa, 417; 19 N. W. 308; *Williamson v. Western Stage Co.*, 24 Iowa, 171; *Winstead v. Hulme*, 32 Kan. 568; 4 Pac. 994; *Gripton v. Thompson*, 32 Kan. 367; 4 Pac. 698; *Bell v. Campbell*, 17 Kan. 212; *Potter v. Stamfli*, 2 Kan. App. 788; 44 Pac. 48; *Jacobs v. Louisville & N. R. R. Co.*, 10 Bush (Ky.), 263; *Louisville & Portland Canal Co. v. Murphy*, 9

emplary damages are allowable only where there is misconduct or malice, or such recklessness or negligence as evinces a conscious disregard of the rights of others. But where the act or omission complained of is free from fraud, malice, oppression or other special motives of aggravation, damages by way of punishment cannot be awarded, and compensatory damages only are permissible."³⁹ And an instruction that "if there was some

Bush (Ky.), 522; Louisville, Lex. & Cin. R. R. Co. v Case, 9 Bush (Ky.), 728; Kentucky & Port. R. R. Co. v Smith, 2 Duv. (Ky.) 556; Fush v. Egan, 48 La. Ann. 60; 19 So. 108; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586; Townsend v. Fontenot, 42 La. Ann. 890; 8 So. 616; Leen v. Smith, 35 La. Ann. 518; Massie v. Bailey, 33 La. Ann. 485; Jackson v. Schmidt, 14 La. Ann. 806; Sapp v. Northern Cent. Ry. Co., 51 Ind. 115; Wanamaker v. Bowers, 36 Md. 42; Moore v. Schultz, 31 Md. 423; Schindel v. Schindel, 12 Md. 208; Elliott v. Herz, 29 Mich. 202; Hyatt v. Adams, 16 Mich. 180; Hoffman v. Northern P. R. Co., 45 Minn. 53; 47 N. W. 312; Vicksburg & Meridian R. R. Co. v. Scanlon, 63 Miss. 413; Chic. St. L. & N. O. R. R. Co. v. Scurr, 59 Miss. 456; 42 Am. Rep. 373 (In this decision the case of Memphis R. R. Co. v. Green, 52 Miss. 783, which held that punitive damages might be awarded against a carrier for a mere omission of duty "by way of punishment for the neglect of travelers," citing 2 Redfield on Rys. sec. 182, is criticised as an entire misconception of Judge Redfield's text.); New Orleans J. & G. N. R. Co. v. Statham, 42 Miss. 607; 97 Am. Dec. 478; Brown v. Cape Girardeau Mac. & P. R. Co., 89 Mo. 152; 1 S. W. 129; Engle v. Jones, 51 Mo. 316; Laird v. Chic. & A. R. Co., 78 Mo. App. 273; 2 Mo. A. Rep. 263; Lewis v. Jannoupoulo, 70 Mo. App. 325; Clark v. Fairley, 30 Mo. App. 335; Bohm v. Dumphy, 1 Mont. 333; Waters v. Stevenson, 13 Nev. 157; 29 Am. Rep. 293; Belknap v. Boston & M. R. Co., 49 N. H. 358; Cram v. Hadley, 48 N. H. 191; Powers v. Manhattan Ry. Co., 120 N. Y. 178; 24 N. E. 95; Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25, rev'g 3 J. & S. 118; Wallace v. Williams, 59 Hun (N. Y.), 628; 14 N. Y. Supp. 180; Rawlins v. Vidvard, 34 Hun (N. Y.), 205; Parker v. Long Island R. R. Co., 13 Hun (N. Y.), 319; Wallace v. City of New York, 18 How. Pr. (N. Y.) 169; Auchmuty v. Ham, 1 Denio (N. Y.), 495; Walker v. Wilson, 8 Bosw. (N. Y.) 586; Waters v. Greenleaf, Johnson L. Co., 115 N. C. 648; 20 S. E. 718; Atchison, T. & S. F. R. Co. v. Chamberlain, 4 Okla. 542; 46 Pac. 499; Burk v. Serrill, 80 Pa. (St. 413; Seeley v. Alden, 61 Pa. St. 302; 100 Am. Dec. 642; Heil v. Glanding, 42 Pa. St. 493; Herreshoff v. Tripp, 15 R. I. 92; 23 Atl. 104; Neel v. Deans, 1 Nott & McC. (S. C.) 310; Springer Transp. Co. v. Smith, 16 Lea (Tenn.), 498; 1 S. W. 280; International & G. N. R. Co. v. Greenwood, 2 Tex. C. A. 76; 21 S. W. 559; Neill v. Newton, 24 Tex. 202; Wood v. Amer. Nat. Bank (Va. 1902), 40 S. E. 931; Burns v. Hines, 94 Va. 413; 26 S. E. 875; Peshine v. Shepperson, 17 Gratt. (Va.) 485; 94 Am. Dec. 468; Talbott v. West Va. C. & P. R. Co., 42 W. Va. 560 26 S. E. 311.

³⁹ Wood v. Amer. Nat. Bank (Va.

element of fraud, malice, reckless negligence or oppression, insult, rudeness, or wilful wrong, or other cause of aggravation in the running of defendant's train by Lawrence station without stopping," the jury might allow exemplary damages, is held incorrect, as allowing such damages, if there was some element, however infinitesimally small of any of the above things in the act of the company.⁴⁰

§ 120. Wanton or malicious act.—The rule as supported by authority is that in case of wilful, oppressive, wanton or malicious conduct on the part of the defendant in inflicting the injury complained of, the jury will not be limited to an award of damages which are merely compensatory for such injury, but may allow exemplary or punitive damages against the wrongdoer.⁴¹ So it is declared in a case in the United States supreme

1902), 40 S. E. 931, per White, J.

* *Vicksburg & Meridian R. R. Co. v. Scanlan*, 63 Miss. 413, was objected to by defendant. Similar instruction was given in *Chic. St. L. & N. O. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 373, as however announcing the rule that there should be none but actual damages if there were no wilful wrong.

⁴¹ *Phila. & W. R. R. Co. v. Quigley*, 21 How. (U. S.) 213; *Press Pub. Co. v. Monroe*, 73 Fed. 193; 38 U. S. App. 410; 28 Chic. Leg. News, 248; *Fotheringham v. Adams Exp. Co.*, 36 Fed. 252; 1 L. R. A. 474; *Lieukauf v. Morris*, 66 Ala. 406; *Barlow v. Lowder*, 35 Ark. 492; *Dorsey v. Manlove*, 14 Cal. 553; *Dalton v. Beers*, 38 Conn. 529; *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55; *Dibble v. Morris*, 26 Conn. 416; *Coleman v. Ryan*, 58 Ga. 132; *Illinois & St. L. R. R. & C. Co. v. Cobb*, 68 Ill. 53; *Wanzer v. Bright*, 52 Ill. 35; *Reeder v. Purdy*, 48 Ill. 261; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *McAvoy v. Wright*, 25 Ind. 22; *Millison*

v. Hock, 17 Ind. 227; *Nordhaus v. Peterson*, 54 Iowa, 68; 6' N. W. 77; *Cady v. Case*, 45 Kan. 733; 26 Pac. 448; *Jockers v. Borgman*, 29 Kan. 121; *Tucker v. Green*, 27 Kan. 357; *Hefley v. Baker*, 19 Kan. 9; *Sawyer v. Sauer*, 10 Kan. 466; *Malone v. Murphy*, 2 Kan. 250; *Louisville & N. R. R. Co. v. Ballard*, 85 Ky. 307; *Slater v. Sherman*, 5 Bush (Ky.), 206; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656; 18 So. 707; *Wilkinson v. Drew*, 75 Me. 360; *Pike v. Dilling*, 48 Me. 539; *Atlantic & G. C. Consol. Coal Co. v. Maryland Coal Co.*, 62 Md. 135; *Sloan v. Edwards*, 61 Md. 89; *Zimmerman v. Helser*, 32 Md. 274; *Balt. & O. R. Co. v. Blocker*, 27 Md. 277; *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79; *Storm v. Green*, 51 Miss. 103; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 553; *Green v. Craig*, 46 Mo. 90; *Baldwin v. Fries*, 46 Mo. App. 288; *Bohm v. Dunphy*, 1 Mont. 333; *Towle v. Blake*, 48 N. H. 92; *Hopkins v. At-*

court that, "whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to ascertainment of a simple compensation for the wrong committed against the aggrieved person."⁴² And again it has been said that "when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness or other cause of aggravation in the act or omission causing the injury, punitive damages may be awarded."⁴³ So also in a case in Alabama, the court says: "We deduce from the authorities the doctrine to be that exemplary damages are allowable not only for acts maliciously perpetrated, but also in cases where one knowingly, wantonly and recklessly does an act, fraught with probable injury to person or property and ultimately producing such injury or damages."⁴⁴ And in a Texas decision it is declared that it is "too well settled by the decision of this court in accordance we think with the well established rule of the common law to be now questioned, that where the injury complained of is tainted with fraud, malice or wilful wrong, exemplary damages may be recovered."⁴⁵

lantic Ave. R. R. Co., 36 N. H. 9; Trainer v. Wolff, 58 N. J. L. 381; 33 Atl. 1051; Cable v. Dakin, 20 Wend. (N. Y.) 172; Wallace v. Mayor, 2 Hilt. (N. Y.) 440; 9 Abb. Pr. 40; 18 How. Pr. 169; Reeves v. Winn, 97 N. C. 246; 2 Am. St. Rep. 287; 1 S. E. 448; Holmes v. Railway Co., 94 N. C. 318; Duncan v. Stalcup, 18 N. C. 440; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Day v. Holland, 15 Oreg. 464; 15 Pac. 855; Barnett v. Reed, 51 Pa. St. 190; 88 Am. Dec. 574; Seely v. Alden, 61 Pa. St. 302; 100 Am. Dec. 642; Nagle v. Mullison, 34 Pa. St. 48; Windham v. Rhame, 11 Rich. L. (S. C.) 283; 73 Am. Dec. 116; Wilkins v. Gilmore, 21 Tenn. 140; Bryan v. McGuire, 3 Head (Tenn.), 530; Crawford v. Doggett, 82 Tex. 139; 17 S. W. 929; 27 Am. St. Rep. 859; Shaw v. Brown, 41 Tex. 449; Neil v. New-

ton, 24 Tex. 202; Reed v. Samuels, 22 Tex. 114; Cole v. Tucker, 6 Tex. 266; Edwards v. Leavitt, 43 Vt. 126; Nye v. Merriam, 35 Vt. 438; Borland v. Barrett, 76 Va. 128; Birchard v. Booth, 4 Wis. 67.

⁴² Phila. & W. R. R. Co. v. Quigley, 21 How. (U. S.) 213, 214, per Campbell, J.

⁴³ Holmes v. Railway Co., 94 N. C. 318, per Ashe, J., cited with approval in Knowles v. Norfolk So. R. R. Co., 102 N. C. 86; 9 S. E. 7.

⁴⁴ Lienkauf v. Morris, 66 Ala. 406, per Somerville, J.

⁴⁵ Shaw v. Brown, 41 Tex. 449; per Moore, J. See also Hedgepeth v. Robertson, 18 Tex. 858; Kolb v. Bankhead, 18 Tex. 228; Oliver v. Chapman, 15 Tex. 400; Graham v. Roder, 5 Tex. 141; Smith v. Sherwood, 2 Tex. 460.

§ 121. **Malice sufficient to justify.**—The mere doing of an unlawful or injurious act does not constitute malice as used in the rule allowing exemplary damages, but it implies that the act was conceived in a spirit of mischief or of criminal indifference to civil obligations.⁵¹ So where the condemnation proceedings under which a railroad company took possession of land and proceeded to construct its tracks and use the same were subsequently found to be defective, it was held that the plaintiff was not entitled to recover exemplary damages on such grounds, as the entry was without fraud, malice or evil intent.⁵² But where after one verdict and judgment against defendant he continued to discharge sewage upon land of the plaintiff, such continuance was held to show such malice and wilfulness as would justify an award of exemplary damages.⁵³ And where a wrongful seizure of property is committed in a rude, aggravating or insulting manner, malice may be inferred therefrom and exemplary damages may be awarded,⁵⁴ as express malice need not be proved in all cases to justify such damages.⁵⁵ Again exemplary damages may be recovered for an illegal levy on property, where the officer at the time had knowledge of the fact that such levy was illegal.⁵⁶

§ 122. **Gross negligence.**—It is a general rule that exemplary damages may be allowed where the injury or loss appears to have been the result of gross negligence on the part of the defendant.⁵⁷ The term "gross negligence" as used in this con-

⁵¹ *Phila. W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; 16 L. Ed. 73; *Willis v. Miller*, 29 Fed. 238; *Strickler v. Yager*, 29 Fed. 244; *Brown v. Allen*, 35 Iowa, 306. See *Read v. Case*, 4 Conn. 166; 10 Am. Dec. 110.
⁵² *Balt. & O. R. Co. v. Boyd*, 67 Ind. 32; 10 Atl. 315; 1 Am. St. Rep. 362.

⁵³ *Paddock v. Somes*, 51 Mo. App. 330. See *Long v. Trexler* (Pa.), 8 Atl. 620.

⁵⁴ *Roberts v. Heim*, 27 Ala. 678.

⁵⁵ *Farwell v. Warren*, 51 Ill. 467; *Borland in Barrett*, 76 Va. 128; 44 Am. Rep. 152.

⁵¹ *Willis v. Miller*, 29 Fed. 238; *Strickler v. Yager*, 29 Fed. 244; *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79.

⁵² *Richmond, etc., R. Co. v. Vance*, 93 Ala. 144; *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 60; 2 So. 337; *South & N. A. R. Co. v. McLudon*, 63 Ala. 266; *Kan. Pac. Ry. Co. v. Miller*, 2 Colo. 442; *Gibney v. Lewis*, 68 Conn. 392; 36 Atl. 799; *Chattanooga R. & R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169; 11 S. E. 853; *Cochran v. Miller*, 13 Iowa, 128; *Kansas Pac. Ry. Co. v. Kessler*, 18 Kan. 523; *Leavenworth L. & G. R. Co. v. Rice*,

nection is to be construed as meaning a negligence so gross as to show an entire want of care, and sufficient to authorize the inference or presumption that the person guilty of such negligence was conscious of the probable consequences of his act and was indifferent thereto.⁵³ And such damages should not be awarded in mere cases of negligence or carelessness, where no element of wilfulness or wantonness appears.⁵⁴

10 Kan. 426; Kountz v. Brown, 16 B. Mon. (Ky.) 577; Central Pass. Ry. Co. v. Chatterson (Ky.), 29 S. W. 18; Jackson v. Schmidt, 14 La. Ann. 818; Eliason v. Grove, 85 Md. 215; 36 Atl. 844; Stohrer v. St. Louis, etc., R. R. Co., 91 Mo. 509; 4 S. W. 389; Goetz v. Ambs, 27 Mo. 28; Taylor v. Grand Trunk Ry. Co., 48 N. H. 304; 2 Am. Rep. 229; Whipple v. Walpole, 10 N. H. 130; Brasington v. South Bound R. Co. (S. C.), 40 S. E. 665; East Tennessee, etc., R. Co. v. Lee, 90 Tenn. 570; 18 S. W. 268; Mo. Pac. R. Co. v. Johnson, 72 Tex. 95; 10 S. W. 325; Talbot v. West Va. R. Co., 42 W. Va. 560; 26 S. E. 311.

⁵³ Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489; 23 L. Ed. 374; Alabama, G. S. R. Co. v. Sellers, 93 Ala. 9; Patterson v. South & N. A. R. Co., 89 Ala. 318; 7 So. 437; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600; 2 So. 337; Lienkauf v. Morris, 66 Ala. 406; Yerian v. Linkletter, 80 Cal. 135; Wall v. Cameron, 6 Colo. 275; Gibney v. Lewis, 68 Conn. 392; 36 Atl. 799; Ford v. Charles Warner Co., 1 Marv. (Del.) 88; 37 Atl. 39; Florida C. & P. R. Co. v. Mooney, 40 Fla. 17; 24 So. 148; 12 Am. & Eng. R. Cas. N. S. 721; Florida S. R. Co. v. Hirst, 30 Fla. 1; 16 L. R. A. 631; 52 Am. & Eng. R. Cas. 409; 11 So. 506; 12 Ry. & Corp. L. J. 218; Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482; 11 S. E. 853; 21 Am. St. Rep. 169; Cleverger v. Dunaway, 84 Ill. 367; Louisville, N. A. & C. R. Co.

v. Wurl, 62 Ill. App. 381; Pierce v. Millay, 44 Ill. 189; Chic. K. & W. R. Co. v. O'Connell, 46 Kan. 581; 26 Pac. 947; Kansas City, Ft. S. & G. R. Co. v. Kier, 41 Kan. 671; 21 Pac. 770; Hefley v. Baker, 19 Kan. 19; Kansas Pac. Ry. Co. v. Kessler, 18 Kan. 523; Leavenworth L. & G. R. Co. v. Rice, 10 Kan. 426; McHenry Coal Co. v. Sneddon, 98 Ky. 684; 34 S. W. 228; Claxton v. Lexington & B. S. R. Co., 13 Bush (Ky.), 636; Louisville & N. R. Co. v. Constantine, 14 Ky. L. Rep. 432; Baltimore, etc., Trans. Co. v. Boone, 45 Md. 344; Patterson v. Chic. & G. T. Ry. Co., 49 Mich. 184; 13 N. W. 508; Peterson v. Western Un. Teleg. Co., 72 Minn. 41; 74 N. W. 1022; 40 L. R. A. 661; 8 Am. & Eng. Corp. Cas. N. S. 517; Hoffman v. Northern P. R. Co., 45 Minn. 53; Trauermann v. Lippincott, 39 Mo. App. 478; Edelmann v. St. Louis Transf. Co., 3 Mo. App. 503; Powers v. Manhattan Ry. Co., 120 N. Y. 178; Caldwell v. New Jersey S. B. Co., 47 N. Y. 282; Kuchenmeister v. O'Connor (Ohio), 8 Wkly. L. Bull. 257; 11 Wkly. L. Bull. 170; Day v. Holland, 15 Oreg. 464; Lake Shore & M. S. R. R. Co. v. Rosenzweig, 113 Pa. St. 519; Brooks v. Clark, 57 Tex. 105; Hoadley v. Watson, 45 Vt. 289; Meibus v. Dodge, 38 Wis. 300; 20 Am. Rep. 6; Pickert v. Crook, 20 Wis. 358; 2 Shearman & Redf. on Neg. (5th ed.) sec. 748.

⁵⁴ Floyd v. Hamilton, 33 Ala. 235; Moody v. McDonald, 4 Cal. 297;

§ 123. **Actual damage should be shown.**—A right of action cannot be maintained simply for the purpose of inflicting punishment upon some supposed wrongdoer, and therefore exemplary damages are not recoverable unless there has been some real or actual damage sustained. Exemplary damages are merely incidents of a cause of action to recover damages for some real or substantial loss, and can never constitute the basis of a cause of action independent of such elements, though the act of the defendant may have been wanton or malicious. It therefore follows that if no actual damage has been suffered, or if the damage has been merely nominal, the injury being purely technical, exemplary damages should not be allowed.²⁵ And where the actual damages awarded by a ver-

Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442; *St. Peter's Church v. Beach*, 26 Conn. 355; *McCoy v. Phila. W. & B. R. Co.*, 5 Houst. (Del.) 599; *Toledo, P. & W. Ry. Co. v. Johnston*, 74 Ill. 83; *City of Jacksonville v. Lambert*, 62 Ill. 519; *Toledo, P. & W. R. Co. v. Arnold*, 43 Ill. 418; *Williams v. Real*, 20 Ill. 147; *Louisville, N. A. & C. Ry. Co. v. Shanks*, 94 Ind. 598; *City of Parsons v. Lindsay*, 26 Kan. 426; *Kentucky Cent. R. R. Co. v. Dilla*, 4 Bush (Ky.), 593; *Louisville & Portland R. R. Co. v. Smith*, 2 Duv. (Ky.) 556; *Mud River Coal C. & I. Co. v. Williams*, 15 Ky. L. Rep. 847; *Jackson v. Schmidt*, 14 La. Ann. 806; *Cursler v. Balt. & O. R. Co.*, 60 Md. 358; *Balt. & O. R. Co. v. Breinig*, 25 Md. 378; 90 Am. Dec. 49; *Allison v. Chandler*, 11 Mich. 542; *New Orleans, J. & G. N. R. Co. v. Stratham*, 42 Miss. 607; 97 Am. Dec. 478; *Southern R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332; *Leahy v. Davis*, 121 Mo. 227; 25 S. W. 941; *Goetz v. Amba*, 27 Mo. 28.

²⁵ *Paterson v. Dakin* (D. C. S. D. Ala.), 31 Fed. 682; *Lamb v. Harbaugh*, 105 Cal. 680; 39 Pac. 56; *Kelly v. Valentine*, 17 Ill. App. 87; *Roth v. Eppey*, 80 Ill. 283; *Hackett v. Smelsley*, 77 Ill. 109; *Brautigam v. White*, 73 Ill. 561; *Fentz v. Meadows*, 72 Ill. 540; *Keedy v. Howe*, 72 Ill. 133; *Meidel v. Anthia*, 71 Ill. 241; *Freeze v. Tripp*, 70 Ill. 496; *Boardman v. Marshalltown*, 105 Iowa, 445; 75 N. W. 943; *Kuhn v. Chic. M. & S. P. Ry. Co.*, 74 Iowa, 137; 37 N. W. 116; *First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30; 55 Pac. 277; *Adams v. Salina*, 58 Kan. 246; 48 Pac. 918; *Schippell v. Norton*, 38 Kan. 567; 16 Pac. 804; *Stacy v. Portland Pub. Co.*, 68 Me. 279; *Mattice v. Brinkman*, 74 Mich. 705; 42 N. W. 172; *Carson v. Texas Installment Co. (Tex. Civ. App.)*, 34 S. W. 762; *Jones v. Matthews*, 75 Tex. 1; 12 S. W. 823; *Nickie v. McGehee*, 27 Tex. 134; *Barber v. Kilbourn*, 16 Wis. 485. But see *Press Pub. Co. v. Monroe*, 73 Fed. 196; 19 C. C. A. 429; 38 U. S. App. 410; *Wilson v. Vaughn*, 23 Fed. 229; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9; 9 So. 375; 39 Am. St. Rep. 17; *Blanchard v. Burbank*, 16 Ill. App. 375. In a case in Maine the court says: "It is said in vindication of the theory of punitive damages that the interests of the individual in-

dict are remitted before judgment, the court is deprived of the power to render judgment for the exemplary damages awarded by such verdict;⁵⁶ but where the failure to recover compensatory damages is owing to defects in the pleadings and not to the absence of substantial damages, the right to recover exemplary damages will not be affected.⁵⁷ And if the actual recoverable damage sustained has been settled for under a compromise agreement, no claim for vindictive damages being included in such settlement, it is held that a recovery of actual damages is not a prerequisite to a recovery of vindictive damages.⁵⁸

§ 124. **Actions allowed in.**⁵⁹—It may be stated generally that the allowance of punitive damages is confined to actions of tort,⁶⁰ and that they are not allowable in actions for breach of contract.⁶¹ But to justify an award of punitive damages, it is not necessary that the injury be attended by force. In this connection it has been said: "There is a class of personal injuries such as slander, libel, malicious prosecution and including injuries to a person's health, business and property caused by indirect means unattended with force and for redress of which the remedy is by an action upon the case and not by an action of trespass, for

jured and of society are blended. Such damages are to be awarded against a defendant for punishment. But if all the individual injury is merely technical and theoretical, which is the punishment to be inflicted for? If a plaintiff upon all such elements of injury as were open to him is entitled to recover but nominal damages shall he be the recipient of penalties awarded on account of an injury or supposed injury to others beside himself? . . . Punitive damages are the last to be assessed in the elements of injury to be considered by a jury and should be first to be rejected by facts in mitigation." *Stacy v. Portland Pub. Co.*, 68 Me. 288, per Peters, J.

⁵⁶ *Smith v. Dye*, 21 Tex. Civ. App. 662; 51 S. W. 858, rev'g denied in 52 S. W. 981.

⁵⁷ *Favorite v. Cottrill*, 62 Mo. App. 119.

⁵⁸ *Gregory v. Coleman* (Tex. Civ. App.), 22 S. W. 181.

⁵⁹ Under the heading of the particular injuries for which damages may be recovered, the question as to the allowance of exemplary damages is therein considered where such question has arisen.

⁶⁰ *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

⁶¹ *Chase v. Western Un. Teleg. Co.*, 44 Fed. 554; 3 Am. Elec. Cas. 817; *Ga. Code*, sec. 2943; *Duche v. Wilson*, 37 Hun (N. Y.), 519; *Houston*, etc., *R. R. Co. v. Shirley*, 54 Tex. 125; *Guildford v. Anglo-French S. S. Co.*, 9 Can. 303. An exception to this general rule may be found in chapter on actions for breach of promise of marriage, herein.

which a jury may give exemplary damages as well where the action is in case as when it is in trespass.⁶² Such damages may be allowed under a proper state of facts in actions for assault and battery;⁶³ maiming and disfiguring plaintiff;⁶⁴ seduction;⁶⁵ libel and slander;⁶⁶ fraud;⁶⁷ malicious abuse of process;⁶⁸ wrongfully suing out a writ of replevin;⁶⁹ illegal and wrongful seizure of property;⁷⁰ attachment sued out wrongfully;⁷¹ in actions against sheriff for misconduct of deputy;⁷² against officer who has overstepped his powers;⁷³ for trespass to real property;⁷⁴ and in actions to recover damages under the liquor act.⁷⁵ And under

⁶² *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; 56 Am. Dec. 563, per Hise, J.

⁶³ *Brundy v. Maginness*, 76 Cal. 532; 18 Pac. 668; *Dalton v. Beers*, 38 Conn. 529; *Harrison v. Ely*, 120 Ill. 83; 11 N. E. 334; *Reeder v. Prudy*, 48 Ill. 261; *Foots v. Nichols*, 28 Ill. 486; *Root v. Sturdivant*, 70 Iowa, 55; 29 N. W. 802; *Webb v. Gilman*, 80 Me. 177; 13 Atl. 638; *Green v. Craig*, 47 Mo. 90; *Heneky v. Smith*, 10 Ore. 349; 45 Am. Rep. 143; *Edwards v. Leavitt*, 43 Vt. 126; *Birchard v. Booth*, 4 Wis. 67.

⁶⁴ *Pike v. Dilling*, 48 Me. 539.

⁶⁵ *Robinson v. Burton*, 5 Harr. (Del.) 335; *Ball v. Bruce*, 21 Ill. 161; *Stevenson v. Belknap*, 6 Iowa, 97; *Life v. Eisenleid*, 32 N. Y. 229.

⁶⁶ *Morning Journal Assn. v. Ruth-erford*, 51 Fed. 513; *Binford v. Young*, 115 Ind. 179; 16 N. E. 142; *Blumhardt v. Rohr*, 70 Md. 328; 17 Atl. 266; *Warner v. Press Pub. Co.*, 132 N. Y. 181; 43 N. Y. St. R. 633; 30 N. E. 393; *Holmes v. Jones*, 121 N. Y. 461; *Bergmann v. Jones*, 94 N. Y. 51; *Samuels v. Evening Mail*, 75 N. Y. 604, rev'g 9 Hun, 288; *Til-lotaon v. Cheetham*, 3 Johns. (N. Y.) 56; *Kendall v. Stone*, 2 Sandf. (N. Y.) 269; *Bowden v. Bailles*, 101 N. C. 612; 8 S. E. 342; *Sowers v. Sowers*, 87 N. C. 303.

⁶⁷ *Platt v. Brown*, 30 Conn. 336;

Oliver v. Chapman, 15 Tex. 400. But see *Singleton v. Kennedy*, 9 B. Mom. (Ky.) 222.

⁶⁸ *Barnett v. Reed*, 51 Pa. St. 190. See also *Louder v. Hinson*, 4 Jones, L. (N. C.) 190.

⁶⁹ *Brizsee v. Torrence*, 21 Wend. (N. Y.) 144.

⁷⁰ *Lynd v. Picket*, 7 Minn. 184; *Robinson v. Goings*, 63 Miss. 500.

⁷¹ *Floyd v. Hamilton*, 33 Ala. 235; *McCullough v. Walton*, 11 Ala. 492; *Kirksey v. Jones*, 7 Ala. 622; *Shannon's Annot. Code* (Tenn. 1896), 5291; *Biering v. First Nat. Bank*, 69 Tex. 599; 7 S. W. 90.

⁷² *Hazard v. Israel*, 1 Binn. (Pa.) 228; 2 Am. Dec. 438.

⁷³ *Shaw v. Brown*, 41 Tex. 446; *Rodgers v. Ferguson*, 36 Tex. 544. See also *Nightingale v. Scannell*, 18 Cal. 315; *Phelps v. Owens*, 11 Cal. 22; *Dorsey v. Manlove*, 14 Cal. 553.

⁷⁴ *Waters v. Dumas*, 75 Cal. 564; 17 Pac. 685; *Hefley v. Baker*, 19 Kan. 9; *Union Bank v. Rideau Lum-ber Co.*, 3 Ont. L. Rep. 269.

⁷⁵ *Roth v. Eppy*, 80 Ill. 283; *Hack-ett v. Smelsley*, 77 Ill. 109; *Thill v. Pohlmann*, 76 Iowa, 638; 41 N. W. 385; *Fox v. Wunderlich*, 64 Iowa, 187; *Goodenough v. McGrew*, 44 Iowa, 670; *Richmond v. Schickler*, 57 Iowa, 486; 10 N. W. 882. See Iowa Code, sec. 1557. But see *Freese v. Tripp*, 70 Ill. 496.

the Iowa Code,⁷⁶ it is provided that in actions to recover real property in case of wanton aggression, the jury may award exemplary damages.

§ 125. Instances when allowed.—Punitive damages have been allowed where, without any reasonable cause, the defendant ejected the plaintiff from a house in inclement weather, at night and while she was in a delicate state of health, she being also assaulted and beaten.⁷⁷ So, also, they have been allowed for great and wanton cruelty in beating plaintiff's horse to death.⁷⁸ And where a dead body was disintered in a wanton and malicious manner, or as the result of gross negligence, or the reckless disregard of the rights of others, equivalent to an intentional violation thereof, such damages might, it was declared, be awarded.⁷⁹ Again, the recovery of such damages was permitted where judges of an election wilfully, corruptly and fraudulently refused to receive the vote of a registered voter.⁸⁰ So, also, where a person without authority maliciously cut down a tree on the highway, exemplary damages were allowed;⁸¹ and they were also held allowable in behalf of the government against one who went upon government land and cut trees thereon, when done wilfully or with a reckless disregard of the rights of the government.⁸²

§ 126. Interference with exercise of personal rights.—Certain personal rights and privileges are secured by the constitution of the United States to the individual citizen, and in case of an intentional, malicious and repeated interference with the exercise of such rights, exemplary damages may be awarded.⁸³

⁷⁶ Annot. Code, Iowa (1897), sec. 4200.

⁷⁷ Redfield v. Redfield, 75 Iowa, 435; 39 N. W. 688.

⁷⁸ Wort v. Jenkins, 14 Johns. (N. Y.) 351.

⁷⁹ Jacobus v. Congregation of C. of L., 107 Ga. 518; 33 S. E. 853; 6 Am. Neg. Rep. 437; 49 Cent. 307; 4 Chic. L. J. Wkly. 408. See Meagher v. Driscoll, 99 Mass. 281; Thirkfield

v. Association, 12 Utah, 76; 41 Pac. 574.

⁸⁰ Elbin v. Dean, 33 Md. 135.

⁸¹ Winter v. Peterson, 24 N. J. L. 524.

⁸² United States v. Taylor, 35 Fed. 484.

⁸³ Scott v. Donald, 165 U. S. 58; 41 L. Ed. 632; 17 Sup. Ct. Rep. 265, aff'g 74 Fed. 859; 13 Nat. Corp. Rep. 6.

§ 127. **Instances when not allowed.**—Though a seizure of goods may be illegal, yet this will not be sufficient to justify an award of punitive damages in the absence of any evidence showing fraud, malice, gross negligence or oppression on the part of the defendant,⁸⁴ and such damages were held not recoverable against the owner of a house which was being removed, where, through an error of judgment, he failed to give sufficient notice of danger.⁸⁵ And where the defendant had placed the plaintiff, a little girl, in a buggy, in an action for injuries caused by the horse running away, it was held that exemplary damages should not be allowed, there being no evidence of malice.⁸⁶ So, also, for the sale of property under a judgment, subsequently reversed on appeal, it was held that such damages should not be allowed, where malice on the part of the defendant was negatived by the fact that he acted under legal advice, and also by the other circumstances of the case.⁸⁷

§ 128. **In action on bond.**—Exemplary damages are not recoverable in an action on an attachment bond since such action is regarded as one *ex contractu*,⁸⁸ and a similar rule prevails in an action on a bond executed under the dram shop act in Illinois.⁸⁹

§ 129. **State may fix amount.**—The amount of damages which may be given as a punishment beyond compensation may, in some cases, be fixed by the legislature of a state. Thus it has been so held in the case of a railroad company where such damages were imposed by statute for gross negligence in failing to provide and maintain cattle guards. And that such damages go to the sufferer instead of the state, is no objection.⁹⁰

§ 130. **Where two or more defendants.**—In case an action is brought against two or more defendants to recover damages

⁸⁴ *Snow v. Grace*, 25 Ark. 570; *Winstead v. Hulme*, 32 Kan. 568; 4 Pac. 994; *Bell v. Campbell*, 17 Kan. 212; *Wanamaker v. Bowers*, 36 Md. 42; *Moore v. Schultz*, 31 Md. 423; *Engle v. Jones*, 51 Mo. 316.

⁸⁵ *Jackson v. Schmidt*, 14 La. Ann. 804.

⁸⁶ *Pierce v. Millay*, 44 Ill. 189.

⁸⁷ *Fush v. Egan*, 48 La. Ann. 60; 19 So. 108.

⁸⁸ *Wood v. Barker*, 37 Ala. 60; *Snow v. Grace*, 25 Ark. 570; *McClendon v. Wells*, 20 S. C. 514.

⁸⁹ *Cobb v. People*, 84 Ill. 511.

⁹⁰ *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512; 29 L. Ed. 463. (See *Mo. Laws*, 1875, p. 131.)

for an injury jointly inflicted by them, and it appears that only one is chargeable with malice, or such other conduct as would authorize an allowance of punitive damages, such damages cannot be recovered against both or all the defendants.⁹¹ But in such a case exemplary damages may be recovered from the one chargeable with such conduct, and only compensatory damages from the other or others.⁹²

§ 131. Against persons under legal disability.—The damages recoverable against persons laboring under a legal disability should be limited to those which are compensatory and exemplary damages should not be awarded.⁹³ Thus it has been so held in actions to recover damages for a tort committed by a lunatic.⁹⁴ And such damages were held not recoverable against a child ten years of age for an injury inflicted by him through recklessness or childish indiscretion.⁹⁵

§ 132. Effect of death of wrongdoer.—Exemplary damages being in the nature of a punishment inflicted upon a wrongdoer for his wanton, malicious or grossly negligent act in causing the injury complained of, it follows that though after the death of the wrongdoer the right of action to recover damages for the tort may survive against his estate, yet the right to recover exemplary damages does not survive.⁹⁶ If, however, the death of the wrongdoer does not occur until after verdict against him, it will not affect the recovery of exemplary damages allowed in such verdict. Thus it has been held that where a statute provides that where an action is commenced against the executor or administrator of one originally liable for a tort, ex-

⁹¹ *Becker v. Dupree*, 75 Ill. 167.

⁹² *Clark v. Newsam*, 1 Exch. 131; *Clissold v. Machell*, 26 Up. Can. Q. B. 422. But see *contra*, *McCarthy v. De Armit*, 99 Pa. St. 63, wherein the recovery is limited in such a case to compensatory damages.

⁹³ *O'Brien v. Loomis*, 43 Mo. App. 29; *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647.

⁹⁴ *McIntyre v. Sholty*, 121 Ill. 660; 2 Am. St. Rep. 140; 13 N. E. 239;

Jewell v. Colby (N. H.), 24 Atl. 202.

⁹⁵ *O'Brien v. Loomis*, 43 Mo. App. 29.

⁹⁶ *Sheik v. Hobson*, 64 Iowa, 146; *Edwards v. Ricks*, 30 La. Ann. 926; *Wilkins v. Wainwright*, 173 Mass. 212; 53 N. E. 397; *Mass. Pub. Stat.* ch. 166, sec. 2; *Hewlett v. George*, 68 Miss. 703; 9 So. 885; 13 L. R. A. 682; *Ripley v. Miller*, 11 Ired. L. (N. C.) 247; *Wright v. Donnell*, 34 Tex. 291.

emplary damages shall not be allowed, such statute does not apply to a case where the defendant after a verdict against him has been rendered and nothing remains to be done except to dispose of a motion for a new trial and enter up judgment.⁷⁷

§ 133. *Mitigation of damages.*—The manner or motive of the act causing the injury, that is, whether it is done in a wanton or malicious spirit or in such a manner as evinces a reckless disregard of the consequences, being the ground on which the allowance of exemplary damages is based, it necessarily follows that facts showing the absence of a wrongful, malicious or wanton motive may be introduced in evidence in mitigation of such damages. That the act was done in good faith, in a mutual mistake as to the rights of the parties, or that the defendant acted under the advice of counsel, or that his conduct was due to provocation on the part of the plaintiff, are facts which may always be shown in mitigation of or to prevent the allowance of such damages.⁷⁸ And contributory negligence of the plaintiff may be shown in an action to recover for personal injuries, as a defense to an allowance of punitive damages.⁷⁹

§ 134. *Act done in exercise of a supposed right.*—Although it may be stated as a general rule that exemplary damages may be awarded to a plaintiff who has sustained loss or injury owing to the wilful act of the defendant, yet this may be qualified to the extent that in actions of trespass, involving injury to personal property, the defendant's act may have been wilful, yet

⁷⁷ *Wilkins v. Wainwright*, 173 Mass. 212; 53 N. E. 397. See *Mass. Pub. Stat. ch. 166, sec. 2.*

⁷⁸ *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Ward v. Blackwood*, 41 Ark. 295; 48 Am. Rep. 41; *Walker v. Fuller*, 29 Ark. 448; *Dalton v. Beers*, 38 Conn. 529; *Shores v. Brooks*, 81 Ga. 468; *Cockrane v. Tuttle*, 75 Ill. 361; *Jasper v. Purnell*, 67 Ill. 338; *Fitzgerald v. Chic. Rock Island & P. Ry. Co.*, 50 Iowa, 79; *Brown v. Allen*, 35 Iowa, 306; *Plummer v. Harbut*, 5 Iowa, 308; *Fush v. Egan*, 48 La. Ann. 80; 19 So. 108; *Currier v. Swan*,

63 Me. 324; *Phila. W. & B. R. R. Co. v. Hoeflich*, 62 Md. 300; *Bradner v. Faulkner*, 93 N. Y. 515; *Kiff v. Youmans*, 86 N. Y. 324; *Yates v. New York C. & H. R. R. Co.*, 67 N. Y. 100; *Millard v. Brown*, 35 N. Y. 297; *Upton v. Upton*, 51 Hun (N. Y.), 184; 21 N. Y. St. Rep. 559; 4 N. Y. Supp. 936; *Bennett v. Smith*, 23 Hun (N. Y.), 50; *Carpenter v. Barber*, 44 Vt. 442; *Shay v. Thompson*, 59 Wis. 540.
⁷⁹ *Southern R. Co. v. Smith*, 86 Fed. 292; 52 U. S. App. 708; 40 L. R. A. 746; 30 C. C. A. 58; *Chic., etc., R. R. Co. v. McKean*, 40 Ill. 218.

have been done in good faith with honest intentions and proper prudence and caution in the exercise of a supposed right, in which case the rule has been generally affirmed that exemplary damages are not recoverable.¹⁰⁰ So an officer, who by mistake, seizes property not embraced in a chattel mortgage under which foreclosure proceedings have been instituted, is not liable for exemplary damages where, upon being informed of the mistake, he offers to return the property if the owner will identify it.¹ Nor will a landlord be liable for such damages for levying on property which is in the possession of the lessee but belongs to a stranger, unless he had knowledge as to the ownership of such property.² Nor again, should they be awarded against one who goes upon vacant land and cuts timber therefrom, where he acted in good faith, believing it to be his own land.³

§ 135. Against corporations—Accepted rule.—The question as to the allowance of exemplary or punitive damages in actions against corporations has been presented in various phases and has also been productive of much discussion in the various courts in which it has arisen. It may be stated generally that private corporations may, in a proper case, be subject to an allowance of exemplary damages in actions against them.⁴ A cor-

¹⁰⁰ *Kelly v. MacDonald*, 39 Ark. 387; *Walker v. Fuller*, 29 Ark. 448; *Selden v. Cushman*, 20 Cal. 56; *Yahoola R. & C. C. Hydraulic H. M. Co. v. Irby*, 40 Ga. 479; *White v. Naerob*, 57 Ill. App. 114; *Mackin v. Blythe*, 35 Ill. App. 216; *Gravett v. Mugge*, 89 Ill. 218; *Waldron v. Marcier*, 82 Ill. 550; *Scott v. Byron*, 74 Ill. 420; *Dobbins v. Duquid*, 65 Ill. 464; *Hawk v. Ridgway*, 33 Ill. 473; *Waller v. Waller*, 76 Iowa, 513; 41 N. W. 307; *Wentworth v. Blackman*, 71 Iowa, 255; 32 N. W. 311; *Inman v. Ball*, 65 Iowa, 543; 22 N. W. 666; *Wormald v. Hill*, 4 Ky. Law Rep. 723; *Perrine v. Blanchard*, 15 La. Ann. 133; *Sapp v. Northern Cent. Ry. Co.*, 51 Md. 115; *Jones v. Rahilly*, 16 Minn. 320; *Rayor v. Mims*, 37 Mich. 34; 26 Am. Rep. 493; *Allison v. Chandler*, 11 Mich. 542; *Bruce v. Ulery*, 79 Mo. 322; *Hull v. Sumner*, 12 Mo. App. 583; *Kiff v. Youmans*, 86 N. Y. 324; *Price v. Murray*, 10 Bosw. (N. Y. Super.) 243; *Blewett v. Coleman*, 1 Pears. (Pa.) 516; *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Penn.), 98; *Hillman v. Baumbach*, 21 Tex. 203; *Neese v. Radford*, 83 Tex. 585; 19 S. W. 141.

¹ *Inman v. Ball*, 65 Iowa 543; 22 N. W. 666. See *Hull v. Sumner*, 12 Mo. App. 583.

² *Mackin v. Blythe*, 35 Ill. App. 216.

³ *Walker v. Fuller*, 29 Ark. 448.

⁴ *Alabama G. S. R. Co. v. Hill*, 93 Ala. 54; 47 Am. & Eng. R. Cas. 500; 9 So. 722; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448; 5 So. 864; *Jefferson County Sav. Bank v. Eborn*,

poration, however, can only act through its servants or agents for whose conduct it is, as a general rule, responsible in case of injury to third persons, though the act be wanton or wilful where it is done by such servant or agent within the scope of his employment. The question, however, upon which the courts have disagreed has been whether exemplary damages should be allowed, where the act of the servant or agent was wilful, wanton or with a reckless disregard of the rights of the injured person. In such cases, however, the rule has been recognized, except in those jurisdictions where exemplary damages are not allowed, that they may be awarded against the corporation where they would be allowed against an individual in like circumstances, that is, when the act may be said to be the corporation's own act, as in case it was negligent in hiring the servant, or when there is an authorization or ratification of an act done by a servant or agent within the scope of his employment and such act would justify an award of exemplary damages if the action were against the latter.⁵

84 Ala. 529; 4 So. 386; Central of Ga. Ry. Co. v. Brown (Ga. 1901), 10 Am. Neg. Rep. 30; Chattanooga, R. & C. R. Co. v. Liddell, 85 Ga. 482; 11 S. E. 853; 8 Ry. & Corp. L. J. 296; Frink v. Coe, 4 Greene (Iowa), 555; Atchison, T. & S. F. R. Co. v. Stewart, 55 Kan. 667; 41 Pac. 981; Goddard v. Grand Trunk Ry. Co., 57 Me. 202; 2 Am. Rep. 39; Railroad v. Blocker, 27 Md. 277; Illinois C. R. Co. v. Brookhaven Mach. Co., 71 Miss. 663; 16 So. 252; Higgins v. Louisville, N. O. & Tex. R. R. Co., 64 Miss. 80; 8 So. 176; Vicksburg & Meridian R. R. Co. v. Scanlon, 63 Miss. 413; Stone-seifer v. Sheble, 31 Mo. 243; Caldwell v. New Jersey S. B. Co., 47 N. Y. 282; The Oriental v. Barclay, 16 Tex. Civ. App. 193; 41 S. W. 117; Pittsburg, etc., R. R. Co. v. Slusser, 19 Ohio St. 157; Palmer v. Railroad Co., 3 S. C. 580; 16 Am. Rep. 750.

⁵ Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 111; 37 L. Ed. 97; 13 Sup. Ct. Rep. 261; 7 Am. R. & Corp. Rep. 406; 47 Alb. L. J. 186; Denver & R. G. R. Co. v. Harris, 122 U. S. 608; 30 L. Ed. 1148; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489; 23 L. Ed. 374; Phila. W. & B. R. Co. v. Quigley, 21 How. (U. S.) 210; 16 L. Ed. 75; Beale v. Ry. Co., 1 Dill. (U. S.) 569; Fed. Cas. No. 1,159; Alabama G. S. R. Co. v. Hill, 93 Ala. 54; City Nat. Bank v. Jeffries, 73 Ala. 183; Gasway v. Atlantic & L. P. R. R. Co., 58 Ga. 216; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455; 29 Am. Rep. 43; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350; 13 Pac. 609; 59 Am. Rep. 571; Bowler v. Lane, 3 Metc. (Ky.) 311; Hill v. New Orleans, O. & G. W. R. Co., 11 La. Ann. 292; Varillat v. New Orleans & Carrollton R. R. Co., 10 La. Ann. 88; Phila. W. & B. R. R. Co. v. Larkin, 47 Md. 155; 28 Am. Rep. 442; New Orleans, etc., R. R. Co. v. Bailey, 40 Miss. 395; Gillette v. Mo. Valley R. R. Co., 55 Mo. 315; 17 Am. Rep. 653; Rouse v. Met. St. Ry. Co., 41

§ 136. **Decisions holding authorization or ratification of act necessary.**—Whether a corporation should be subject to exemplary damages for the act of a servant or agent within the scope of his employment, where such act is wilful, wanton, malicious, or done with a reckless disregard of the rights of others, if it has not been previously authorized or subsequently ratified by the corporation, has been the subject of much discussion. That in such a case exemplary or punitive damages should not be allowed is a rule asserted in many jurisdictions. The principles upon which this rule is based by the various decisions is that exemplary damages are in the nature of a punishment and should not be visited upon one who has not participated in the offense, it not being the purpose of the law to punish a person for an offense of which he is not guilty, and that he is not guilty in the absence of proof making him particeps criminis of the servant's act.⁶

Mo. App. 298; *Belknap v. Boston & M. R. R. Co.*, 49 N. H. 358; *Ackerson v. N. Y. L. E. & W. Ry. Co.*, 32 N. J. L. 254; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Townsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295; *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25; *Caldwell v. New Jersey S. B. Co.*, 47 N. Y. 282; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St., 162; 2 Am. Rep. 382; *Hogan v. Prov. & W. R. R. Co.*, 3 R. I. 88; *Quinn v. So. Car. Ry. Co.*, 29 S. C. 381; *Haley v. Louisville, etc., R. R. Co.*, 7 Baxt. (Penn.) 240; *Craker v. Chic. & N. W. Ry. Co.*, 36 Wis. 657; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287; 4 L. T. N. S. 293.

⁶*Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101; 37 L. Ed. 97; 13 Sup. Ct. Rep. 261; 7 Am. R. & Corp. Rep. 406; 47 Alb. L. J. 186; *Denver, R. G. R. Co. v. Harris*, 122 U. S. 608; 30 L. Ed. 1148; *Milwaukee & St. R. Ry. Co. v. Arms*, 91 U. S. 489; 23 L. Ed. 374; *Phila. W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 210;

The Amiable Nancy, 3 Wheat. (U. S.) 546; 16 L. Ed. 75; *Press Pub. Co. v. Monroe*, 73 Fed. 202; 51 L. R. A. 353; *Henning v. Western Un. Teleg. Co.*, 41 Fed. 864; *Potts v. Chic. City Ry. Co.*, 33 Fed. 810; *McGuire v. Golden Gate, McAllister (U. S.)*, 104; *Trabing v. California Nav. & I. Co.*, 121 Cal. 137; 53 Pac. 744; 8 Am. & Eng. Corp. Cas. N. S. 695; *Warner v. So. Pac. R. Co.*, 113 Cal. 105; 45 Pac. 187; *Wardrobe v. Cal. Stage Co.*, 7 Cal. 118; *Colvin v. Peck*, 62 Conn. 155; 25 Atl. 355; *McCoy v. Phila., etc., R. R. Co.*, 5 Houst. (Del.) 599; *Redwood v. Met. R. Co.*, 6 D. C. 302; *Augusta Factory v. Barnes*, 72 Ga. 217; 53 Am. Rep. 838; *Detroit Daily Post v. McArthur*, 16 Mich. 447; *Haver v. Cent. R. R. Co. (N. J. 1900)*, 45 Atl. 593; 7 Am. Neg. Re. 296; *Forhman v. Consol. Tract. Co. (N. J. 1899)*, 43 Atl. 892; 6 Am. Neg. Rep. 601; *Haines v. Schultz*, 50 N. L. 481; 14 Atl. 488; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Townsend v. New York Cent. & H. R. R. Co.*, 56

§ 137. **Same subject—Particular decisions.**—In this connection it has been said by the United States supreme court that "exemplary or punitive damages being awarded not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others can only be awarded against one who has participated in the offense. A principal therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent."⁷ And in this same decision it was declared that the law upon the question is nowhere better stated than in the following: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness or recklessness or wickedness on

N. Y. 285; 15 Am. Rep. 419; *George v. Cypress Hills Cemetery*, 32 App. Div. 281; 52 N. Y. Supp. 1097; *Muckle v. Rochester Ry. Co.*, 79 Hun (N. Y.), 32; *Fisher v. Met. E. R. Co.*, 34 Hun (N. Y.), 433; *Murphy v. Cent. Park N. & E. R. R. Co.*, 16 J. & S. (N. Y.) 96; *Donovan v. Man. Ry. Co.*, 49 N. Y. St. R. 722; *Baldwin v. New York & Harlem Nav. Co.*, 4 Daly (N. Y.), 314; *Sullivan v. Oreg. Ry. & Nav. Co.*, 12 Oreg. 392; 7 Pac. 508; 53 Am. Rep. 364; *Staples v. Schmid*, 18 R. I. 224; 19 L. R. A. 824; 26 Atl. 196; *Hagan v. Prov. & W. R. R. Co.*, 3 R. I. 88; *Nashville & Chattanooga R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52; 24 Am. Rep. 296; *International & G. N. R. Co. v. McDonald*, 73 Tex. 41; 12 S. W. 860; 42 Am. & Eng. R. Cas. 211; *International & G. N. R. Co. v. Garcia*, 70 Tex. 207; 7 S. W. 802; *Western Union Tel. Co. v. Brown*, 38 Tex. 170; 44 Am. Rep. 610; *Willis v. McNeill*, 57 Tex. 465; *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433; 10 S. E. 801; 7 L. R. A. 354; 41 Am. & Eng. R. Cas. 42; 25 Am. St. Rep. 901; *Robinson v. Superior Rapid Trans. R. Co.*, 94 Wis. 345; 34 L. R. A. 205; 68 N. W. 961; *Mace v. Reed*, 89 Wis. 440; 62 N. W. 186; *Bass v. Chic. & N. W. Ry. Co.*, 42 Wis. 654; 24 Am. Rep. 437; *Craker v. Chic. & N. W. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Milwaukee & Miss. R. R. Co. v. Finney*, 10 Wis. 388; *Clark v. Mewsam*, 1 Exch. 131, 140; *Clissold v. Machell*, 26 Up. Can. Q. B. 422; *Bacon's Abr.* (Bouv. 1854) "Damages" (D.) 1, p. 65. The retention of a servant after knowledge of his act has been held to be such a ratification as will render a corporation liable to exemplary damages (*Bass v. Chic. & N. W. Ry. Co.*, 42 Wis. 654; 24 Am. Rep. 437); though in Texas it has been held that it does not amount to a ratification as a matter of law. *Dillingham v. Anthony*, 73 Tex. 47; 3 L. R. A. 634; 11 S. W. 139. See also *Texas & P. R. Co. v. Jones* (Tex. Civ. App.), 29 S. W. 499.

⁷ *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 107; 37 L. Ed. 101, per Mr. Justice Gray.

the part of the party at fault as amounted to criminality which for the good of society and warning to the individual, ought to be punished. If in such cases or in any case of a civil nature it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed where the principal is prosecuted for the tortious act of his servant unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty. . . . Where the proof does not implicate the principal, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."⁸

⁸ *Hogan v. Prov. & W. R. Co.*, 3 R. I. 88, 91, per Mr. Justice Brayton. And in a New York decision it is likewise declared that "for injuries by the negligence of a servant, while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages. But for such negligence, however gross or culpable, he is not liable in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified or that the master employed or retained the servant knowing that he was incompetent, or from bad habits unfit for the position he occupied. Something more than ordinary negligence is requisite. It must be reckless and of a criminal nature and clearly established corporations incur this liability as well as private persons." *Cleghorn v. N. Y. Cent. & H. R. R.*

Co., 56 N. Y. 44; 15 Am. Rep. 37; per Church, C. J. So again in case in Louisiana, it is said that "it is true juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer and not against persons who on account of their relations to the offender are only consequentially liable for his acts as the principal is responsible for the acts of his factor or agent." *Knee v. Lizardi*, 8 La. 233, per Martin, J. And in a case in Oregon, the court after stating that such damages may be justified against a wrongdoer, says: "To attempt to extend the doctrine so as to visit the punishment upon innocent parties is to my mind unreasonable and unjust. I cannot see any principle upon which an employer whether a natural or artificial person

§ 138. **Same subject—Illustrations.**—The rule stated in the preceding section has been applied where the malicious act of the conductor in ejecting a passenger from a train was neither authorized nor ratified by the carrier.⁹ And for the mistreatment of a passenger on a boat by the captain, it was held that punitive damages should not be awarded against the owner where the act was not ratified by the latter.¹⁰ Again, where the servant of a railroad company who was in charge of an engine, blew the whistle and made a great noise which frightened plaintiff's horse and caused injury to the plaintiff, it was held that in the absence of proof that the defendant knew of the reckless character of the servant and with such knowledge still retained him in its service, only compensatory damages were recoverable.¹¹ And a similar rule was applied where a person was injured by contact with a telegraph wire which, owing to the negligence of employees, was negligently allowed to touch electric light wires.¹² And likewise where poison ivy was allowed, by employees of a corporation maintaining a cemetery, to grow upon a grave, causing injuries to the owner of a burial

son can be made liable for the acts of his or its servant beyond compensatory damages, unless the employer directed the doing of the act or ratified it after it was done. . . . The acts of the conductor in the present case may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact he ought to be punished for his wickedness, but by what rule of consistency can that punishment be inflicted upon the company. . . . It is claimed, however, in the decision of the courts which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is pro hac vice to be regarded as the company itself; but this certainly is only a fiction of law. The fact that the company acts through agents in the transaction of its business is no more peculiar than where a natural person trans-

acts his business through agents. The conductor . . . is not punished by the judgment against the company. . . . It is the stockholders . . . who are punished when exemplary damages are awarded in the action and if there is any justice in a rule which allows it in such a case, I am apprehensive I shall never be able to discover it." *Sullivan v. Oregon Ry. & Nav. Co.*, 12 Oreg. 392; 7 Pac. 508; 53 Am. Rep. 364.

⁹ *Robinson v. Superior Rapid Trans. R. Co.*, 94 Wis. 345; 68 N. W. 961; 34 L. R. A. 205. See also *Townsend v. N. Y. Cent. & H. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419.

¹⁰ *Mace v. Reed*, 89 Wis. 440; 62 N. W. 186.

¹¹ *Nashville v. Chattanooga R. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52; 24 Am. Rep. 296.

¹² *Henning v. Western Un. Teleg. Co.*, 41 Fed. 864.

lot, it was held that exemplary damages were not recoverable against the corporation in the absence of notice to it of the condition complained of, or a reasonable opportunity to learn of and obviate such condition.¹³ So, also, where the act of the servant or agent was unauthorized, as where an agent, by fraudulent misrepresentations, induced a person to take passage on a cholera infected steamship, exemplary damages should not be given.¹⁴ And where a salesman who was in charge of a store being suspicious that plaintiff had stolen certain goods therefrom, detained her and caused her to be sent to the police station, it was held that exemplary damages should not be awarded against the master, it not appearing that he had participated in or approved of such act.¹⁵ And a similar rule has been affirmed in the case of a wrongful attachment by an agent or attorney.¹⁶ But if the servant be acting in the execution of an unlawful purpose, of which the master approves, such damages may be allowed.¹⁷ And in case of gross negligence or misconduct of the servant, if the master was aware of such misconduct or had means of knowing that the servant was not prudent or careful, or if proper care was not exercised in his selection, the jury may award exemplary damages.¹⁸ And punitive damages may be recovered against a newspaper proprietor for libelous language inserted in the paper by a reporter upon proof of the approval by the former of the latter's conduct.¹⁹

§ 139. Decisions holding ratification or authorization of act unnecessary. Though the rule has been asserted in many jurisdictions that to hold a corporation responsible in exemplary damages for the act of a servant, it must appear that the corporation was either negligent in the employment of such servant or authorized or ratified his act, yet in a greater number of jurisdictions the contrary doctrine which has been more gen-

¹³ *George v. Cypress Hills Cemetery*, 32 App. Div. 281; 52 N. Y. Supp. 1097.

¹⁴ *The Normannia*, 62 Fed. 469. See also *Colvin v. Peck*, 62 Conn. 155; 25 Atl. 355, as to unauthorized act of agent.

¹⁵ *Staples v. Schmid*, 18 R. I. 224; 19 L. R. A. 824; 26 Atl. 193.

¹⁶ *Willis v. McNeill*, 57 Tex. 465.

¹⁷ *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597; 7 Sup. Ct. 1286; 30 L. Ed. 1146.

¹⁸ *Henning v. Western Un. Tel. Co.*, 41 Fed. 864.

¹⁹ *Haines v. Schultz*, 50 N. J. L. 481; 14 Atl. 488.

erally followed prevails. The rule as established by this class of cases is that if the servant or agent was engaged in furthering the master's business and was acting in the scope of his employment, exemplary damages are allowable against the master for an injury due to the wilful, wanton or malicious act or gross negligence of the servant or agent. The principle underlying these decisions, which may be said to be especially applicable as between carrier and passenger, is that the corporation can only act through natural persons, to whom the care, management and transaction of its business is entrusted, and whether such persons occupy the position of officers, agents or servants, they represent the corporation in the particular employment in which engaged, the entire power of the corporation *pro hac vice* being vested in such persons. Again the doctrine of *respondeat superior*, which makes a corporation liable in compensatory damages for the malicious torts of its servants, should apply equally to exemplary as well as to compensatory damages. The corporation, if we view the servant or agent as distinct from the corporation and assume the relation to be as in the case of natural persons, master or principal, and servant or agent, may be equally innocent of wrong so far as the injury is concerned and yet liable for compensatory damages for the wilful or wanton act of an agent. The doctrine of *respondeat superior* is founded on public policy and equally so is the doctrine of exemplary damages, and both are equally applicable to corporations irrespective of any authorization or ratification on the part of the corporation, of the servant or agent's act.²⁰

²⁰ *Western Un. Teleg. Co. v. Seed*, 115 Ala. 670; 22 S. W. 474; 3 Am. Neg. Rep. 1; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; 9 So. 303; *Citizens Ry. Co. v. Steen*, 42 Ark. 321; *Fannery v. Balt. & O. R. R. Co.*, 4 Mackey (D. C.), 111; *Ga. Ry. Co. v. Dougherty*, 86 Ga. 744; 12 S. E. 747; *Ga. Ry. Co. v. Horner*, 78 Ga. 251; *Chic. B. & Q. R. R. Co. v. Sykes*, 96 Ill. 162; *Chic., etc., R. Co. v. Bryan*, 90 Ill. 126; *Singer Mfg. Co. v. Holdt*, 86 Ill. 455; 29 Am. Rep. 43; *Harmon*, 75 Ill. 298; *Pullman Pal. Car Co. v. Reed*, 75 Ill. 167; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 353; *Rockford, R. I. & St. L. R. Co. v. Wells*, 66 Ill. 321; *Chic. R. I. & P. Ry. Co. v. Herring*, 57 Ill. 59; *St. Louis, Alton & C. R. R. Co. v. Dalby*, 19 Ill. 353; *Illinois Cent. R. Co. v. Ross*, 31 Ill. App. 170; *Citizens St. R. Co. v. Willooby*, 134 Ind. 563; 33 N. E. 627; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Western Un. Teleg. Co. v. Bierhaus*, 8

§ 140. Same subject—Particular decisions.—In this connection it is said in a recent case in Kentucky that “a corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad the safety and comfort of passengers is necessarily committed to them. They act for

Ind. App. 563; 4 Am. Elec. Cas. 723; Atchison, T. & S. F. Ry. Co. v. Henry, 55 Kan. 715; 41 Pac. 952; Lexington Ry. Co. v. Cozine (Ky. 1901), 64 S. W. 848; 10 Am. Neg. Rep. 595; Memphis & C. Packet Co. v. Nagel, 97 Ky. 9; 29 S. W. 743; Louisville & N. R. R. Co. v. Long, 94 Ky. 410; 22 S. W. 747; 11 Am. Neg. Cas. 579; Louisville & N. R. R. Co. v. Ballard, 85 Ky. 307; 7 Am. St. Rep. 600; 3 S. W. 530; Louisville & N. R. R. Co. v. McCoy, 81 Ky. 303; Hawkins v. Riley, 17 B. Mon. (Ky.) 101; City Transfer Co. v. Robinson, 12 Ky. L. Rep. 555; Louisville & N. R. Co. v. Kingman, 18 Ky. L. Rep. 82; 35 S. W. 264; 5 Am. & Eng. R. Cas. N. S. 401; Dawson v. Louisville & N. R. R. Co., 6 Ky. L. Rep. 668; McFee v. Vicksburg, etc., R. R. Co., 42 La. Ann. 791; 7 So. 720; Rutherford v. Shreveport & H. R. Co., 41 La. Ann. 793; 6 So. 644; 41 Am. & Eng. R. Cas. 129; Hanson v. Ry. Co., 62 Me. 84; Phila. Wilm. & B. R. R. Co. v. Larkin, 47 Md. 155; 28 Am. Rep. 442; Balt. & R. R. Co. v. Blocker, 27 Md. 277; Hawes v. Knowles, 114 Mass. 518; 19 Am. Rep. 383; Pullman Pal. Car Co. v. Lawrence, 74 Miss. 782; 22 So. 53; 15 Nat. Corp. R. 124; 1 Miss. Dec. (No. 5) 4; 8 Am. & Eng. R. Cas. N. S. 59; Southern Exp. Co. v. Brown, 67 Miss. 260; 7 So. 318; 19 Am. St. Rep. 306; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242; 75 Am. Dec. 98; Vicksburg & J. R. R. Co. v. Patton, 31 Miss. 198; Canfield v. Chic. R. L. & P. Ry. Co., 59 Mo. App. 354; Kelleys v. R. R. Co., 22 Mo. App. 356; Travers v. Kan. Pac. Ry. Co., 63 Mo. 421; Doss v. Mo., etc., R. R. Co., 5 Mo. 27; 21 Am. Rep. 37; Perkins v. Mo. R. R. Co., 55 Mo. 201; Quigley v. Cent. Pac. R. R. Co., 11 Nev. 350; 21 Am. Rep. 757; Purcell v. Richmond, etc., R. Co., 108 N. C. 404; 1 S. E. 954; 12 L. R. A. 113; 10 Ry. Corp. L. J. 35; Rose v. R. R. Co., 106 N. C. 168; Knowles v. Norfolk So. R. Co., 102 N. C. 59; 9 S. E. 7; Atlantic & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162; 2 Am. Rep. 38; Sullivan v. Oregon R. Co., 12 Oreg. 392; 7 Pac. 508; Phila. Tract. Co. v. Orbann, 119 Pa. St. 37; 12 Atl. 810; 11 Cent. 628; 21 W. N. C. 76; Lakewood Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. St. 519; 6 Atl. 545; Mack v. South Bound R. Co., 52 S. C. 323; 2 S. E. 905; 40 L. R. A. 679; 3 Chic. L. J. Wkly. 272; Rucker v. Smoke, 37 S. C. 377; 16 S. E. 40; 34 Am. St. Rep. 758; Hart v. Charlotte, C. & A. R. Co., 33 S. C. 427; 12 S. E. 9; 10 L. R. A. 794; Quinn v. So. Car. Ry. Co., 29 S. C. 381; 7 S. E. 614; 1 L. R. A. 682; Palmer v. Railroad, 3 S. C. 580; 16 Am. Rep. 750; San Antonio & A. P. R. Co. v. Grier, 20 Tex. Civ. App. 138; 49 S. W. 148; The Oriental v. Barclay, 16 Tex. Civ. App. 193; 4 S. W. 117; Fell v. Northern Pac. R. Co., 44 Fed. 248; Hutchinson v. Carriers, sec. 815a; 5 Thompson on Corp. secs. 6384, 6385, 6388.

it. Its entire power *pro hac vice* is vested in them, and as to passengers in transitu, they should be considered as the corporation itself. It is, therefore, as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. Public interests require this rule,"²¹ And in another decision in Mississippi the court says: "It is argued that vindictive damages are in their nature penal and that no one should be liable to punishment unless the act complained of is his own act made so by his authorization or ratification of it when committed by the servant, and that it is illogical for the courts to do anything punitive in character unless the master is directly and personally responsible for the very act complained of. The sufficient answer to this contention is that the judge-made law of punitive damages is not the result of logic but of public necessity as text-writers and courts have repeatedly shown. If corporations—artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public—can never be held liable in punitive damages for the acts of their servants unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having by the constitution of their being to act solely by agents or servants, they must as matter of sound public policy be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases."²²

²¹ *Louisville & N. R. R. Co. v. Ballard*, 85 Ky. 311; 7 Am. St. Rep. 600; 3 S. W. 530, per Holt, J.

²² *Pullman Pal. Car Co. v. Lawrence*, 74 Miss. 808; 22 So. 53, per Woods, C. J. Again in case in Maine it is declared that "a corporation is an imaginary being. It has

no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief as well as its schemes of public enterprise are conceived by human minds and executed by human hands;

§ 141. Same subject.—Illustrations.—Such damages may be recovered for a violation of duty by an employee in the conduct

and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation. . . . And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks, since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss, it does seem to us that the doctrine of exemplary damages is more beneficial to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. . . . There is but one vulnerable point about these ideal existences called corporations, and that is the pocket of the monied power that is concealed behind them, and if that is reached they will wince." *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; 2 Am. Rep. 39, per Walton, J. A corporation may be subjected to exemplary or punitive damages for tortious acts of its agents or servants done within the scope of their employment in all cases where natural persons acting for themselves if guilty of like tortious acts would be liable to such damages. *Atlantic & Great W. Ry.*

Co. v. Dunn, 19 Ohio St. 162; 2 Am. Rep. 382. In this case the court, after asserting the doctrine of identity of principal and agent and declaring that it rests on sound principles of public policy and applies with peculiar propriety to corporations "which are capable of actions only through the medium of agents and which touch, infringe upon and come in contact with individuals, persons and the public only by means of their agents and servants," puts the question as to whether damages to the extent of exemplary or punitive damages can be given as in cases of natural persons and says "In answer to this query, it is proper to inquire what is the ground of reason and principle on which exemplary damages are allowable in any case? The answer is ready and clear. Nobody will dispute it. It rests not on the ground of abstract or theoretical justice but on the ground of public policy—a policy which seeks to promote the public safety; to punish through the medium of a civil proceeding a fraudulent, malicious, insulting or wilful wrongdoer, and to hold him up as a warning example to others to deter them from offending in like manner. Now why do not the same considerations of public policy apply as well to corporations as to natural persons? I am unable to see why they do not. Corporations, embodying as they often do the concentrated wealth and influence of many individuals, certainly have the power to do injury at least equal to that of natural persons; and it seems to me that the history of corporations affords no satisfactory guaranty that they may not use that power for purposes

of the train causing injury to a passenger when accompanied by oppression, fraud, malice, insult or other wilful misconduct, evincing a reckless disregard of consequences.²³ So they may be allowed for the ejection of a passenger where the act is unprovoked, wilful and malicious and performed in a rude and aggravating manner with the intention of wounding the feelings of the passenger and of bringing him into contempt and disgrace.²⁴ And where a train is wilfully run past a station, those in charge refusing to stop to let off or take on a passenger, such damages may be allowed,²⁵ and similarly in case of such conduct towards a passenger on a boat.²⁶ Again, they have been

inimical to individual and public interest unless restrained by consciousness of amenability to effective legal penalties, . . . unless the public, through the medium of our laws, retain the means to exercise an effective restraint upon any tendency to wrongdoing to which they may be subject, and especially in respect to the care or the want of it with which their servants may be selected. It seems to me there is so much danger of the abuse of power in this direction as to forbid the recognition of a distinction between them, acting through agents and individuals, acting in their own proper persons in respect to the liabilities consequent upon tortious action. The actual management of such corporations is apt to fall into the hands of either a single individual or of a small and closely associated number of individuals; and the danger is that such persons will be led by a spirit of nepotism or personal favoritism or by false notions of economy leading them to fix the compensation for the services of their servants at a rate inadequate to secure the services of competent and trustworthy men, to forget the higher and paramount duty due to the public in this particular, unless the stern but just and

discriminating hand of the law is kept constantly visible before them." Per Brinkerhoff, C. J. In Pennsylvania it is said that "it seems to be settled by the preponderance of authority in this country that in actions against corporations for injuries received through the negligence of their servants, exemplary damages may be recovered when the injuries are wanton and malicious, are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the corporation or not." Phila. Tract. Co. v. Orbann, 119 Pa. St. 42; 12 Atl. 816, per Mr. Justice Clark.

²³ Louisville & N. R. R. Co. v. Ballard, 85 Ky. 307; 3 S. W. 530; 7 Am. St. Rep. 600.

²⁴ Chic. B. & Q. R. R. Co. v. Bryan, 90 Ill. 126; Citizens' St. R. Co. v. Willoeby, 134 Ind. 563; 33 N. E. 627; Rose v. Wilmington & W. R. R. Co., 106 N. C. 168; 11 S. E. 526; Palmer v. Railroad, 3 S. C. 581; 16 Am. Rep. 750.

²⁵ Purcell v. Richmond & Danv. R. Co., 106 N. C. 414; 12 S. E. 954; 12 L. R. A. 113; New Orleans J. & G. N. R. Co. v. Hurst, 36 Miss. 660.

²⁶ Heirn v. McCaughan, 32 Miss. 1.

allowed in the case of gross negligence of the servants of a telegraph company as to the delivery of a telegram.²⁷ So, also, where a sewing-machine was sold, to be paid for in monthly installments, and a lease was delivered and accepted, which authorized the seller upon nonpayment of any installment to enter the premises of the purchaser without process and remove the machine, and payments were made to a certain agent regularly, and other agents of the seller entered the premises of the purchaser forcibly and violently in his absence and removed the machine against the remonstrances of his wife claiming that an installment was unpaid, which was not the fact, it was held that though the machine was returned the next day, exemplary damages might be allowed.²⁸

§ 142. Against municipal corporations.—While a municipal corporation may be liable for compensatory damages, yet it is a general rule that there can be no recovery of exemplary damages against such a corporation²⁹ in the absence of express statutory authority.³⁰ So the treble damages allowed by statute in certain cases are not recoverable against a municipal corporation unless the statute so provides.³¹

§ 143. Evidence as to motives.—Such evidence should be submitted to the jury as may enable them to act intelligently and justly in determining the amount of exemplary damages

²⁷ *Western Un. Tel. Co. v. Seed*, 115 Ala. 670; 22 S. W. 474; 3 Am. Neg. Rep. 1. As to general liability of telegraph companies for delay, error or negligence in the transmission and delivery of telegrams, see *Joyce on Electric Law*, secs. 800-835.

²⁸ *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; 29 Am. Rep. 43.

²⁹ *Mayor v. Lewis*, 92 Ala. 352; 9 So. 243; *Barbour County v. Horn*, 48 Ala. 567; *Chicago v. Kelly*, 69 Ill. 475; *Chicago v. Jones*, 66 Ill. 349; *Ottawa v. Sweely*, 65 Ill. 434; *Chicago v. Langlass*, 52 Ill. 256; 4 Am. Rep. 603; *Chicago v. Martin*, 49

Ill. 241; 95 Am. Dec. 590; *Toledo, Peoria & W. Ry. Co. v. Arnold*, 43 Ill. 419; *Bennett v. City of Marion*, 102 Iowa, 425; 71 N. W. 360; 63 Am. St. Rep. 454; *Wilson v. Wheeling*, 19 W. Va. 350; 42 Am. Rep. 780. In *Myers v. San Francisco*, 42 Cal. 215, exemplary damages were allowed in such a case, but the decision was based on a statutory provision authorizing the allowance of such damages.

³⁰ *Bennett v. City of Marion*, 102 Iowa, 425; 71 N. W. 360; 63 Am. St. Rep. 454.

³¹ *Hunt v. Booneville*, 65 Mo. 630; 27 Am. Rep. 299.

to be allowed. Such damages rest primarily upon the motive of the defendant,²² and, therefore, every fact and circumstance bearing upon his motive or affecting his conduct at the time of the injury, and all the circumstances under which he acted, should be laid before them, and likewise evidence is admissible to explain his motives and conduct.²³

§ 144. Evidence as to financial condition of defendant.—

In those cases where exemplary damages may be recovered, it is proper to receive evidence as to the financial condition of the defendant. The plaintiff may introduce evidence showing the wealth of the defendant, so as to enable the jury to determine what damages shall be assessed against him as a punishment, for what might be a severe and excessive punishment to a person of little or no wealth, might, on the other hand, be very inadequate when awarded against one whose financial standing was high. As such evidence is admissible in behalf of the plaintiff, so likewise the defendant may show that he is poor or a man of little wealth, so that an excessive amount may not be awarded.²⁴ So it is proper to instruct the jury that the same amount of merely penal damages should not be allowed against a man who is poor though he may be found guilty, as in the case of a man who is well off.²⁵ The rule that evidence of the wealth of the defendant is admissible, has been held applicable where the action is against a corporation, and in such a case it was held proper to inquire: 1. What the entire paid up capital stock of the company was? 2. What its liabilities were? 3. What were its assets? 4. What was its surplus over and above liabilities? 5. What dividends had been paid to stock-

²² See secs. 118-120, herein.

²³ *Day v. Holland*, 15 Oreg. 464; 15 Pac. 855.

²⁴ *Mullin v. Spangenberg*, 112 Ill. 140; *Farman v. Lauman*, 73 Ind. 568; *Sloan v. Edwards*, 61 Md. 89; *Beck v. Small*, 35 Minn. 465; 29 N. W. 69; *McCarthy v. Niskern*, 22 Minn. 90; *Pullman Pal. Car Co. v. Lawrence*, 74 Miss. 782; 22 So. 53; *Buckley v. Knapp*, 48 Mo. 152; *Johnson v. Al-*

len, 100 N. C. 132; *Heneky v. Smith*, 10 Oreg. 349; 45 Am. Rep. 143; *Matheis v. Mazet*, 164 Pa. St. 580; 30 Atl. 434; 25 Pitts. L. J. N. S. 169; *Rea v. Harrington*, 58 Vt. 181; 2 Atl. 475; 56 Am. Rep. 561; *Earl v. Tupper*, 45 Vt. 275; *Harman v. Cundiff*, 82 Va. 239; *Hare v. Marsh*, 61 Wis. 435.

²⁵ *Matheis v. Mazet*, 164 Pa. St. 580; 30 Atl. 434; 25 Pitts. L. J. N. S. 169.

holders for five years past and how they were paid?" And the right of the defendant to introduce evidence of his own poverty has been held to exist, though no evidence as to his wealth has been introduced in behalf of the plaintiff.³⁷

§ 145. Amount, matter of discretion with jury.—While it may be stated generally that exemplary damages should be commensurate to the nature of the offense, having due regard to the standing of the parties,³⁸ yet it is a general rule that the amount of such damages is a matter which rests in the discretion of the jury,³⁹ and to award exemplary damages the jury need not be satisfied beyond a reasonable doubt that the injury complained of was maliciously committed.⁴⁰ So, also, where exemplary or punitive damages are clearly warranted by the evidence, it has been held that where the court cannot, as a general rule, say that the jury has awarded a larger sum than is reasonable, proper and necessary to have that statutory effect intended by the law in such cases,⁴¹ unless such sum appear to be grossly excessive, when, as in other cases, the court may set aside the verdict.⁴² While the question as to the amount of such damages is a matter for the discretion of the jury, "yet a court is not bound to turn the matter over to them arbitrarily and without any suggestions as to matters which they ought to consider in their assessment of such damages. It may and indeed ought to call their attention to any matters

³⁶ Pullman Pal. Car Co. v. Lawrence, 74 Miss. 782; 22 So. 53.

³⁷ Johnson v. Smith, 64 Me. 553.

³⁸ Burkett v. Lanata, 15 La. Ann. 337; Hooker v. Newton, 24 Wis. 292.

³⁹ Western Un. Teleg. Co. v. Seed, 115 Ala. 670; 22 So. 474; 3 Am. Neg. Rep. 1; Doremus v. Hennessy, 62 Ill. App. 391; Frankforter v. Bryan, 12 Ill. 549; Colburn v. State, 47 Ind. 310; Root v. Sturdivant, 70 Iowa, 55; 29 N. W. 802; Titus v. Corkins, 21 Kan. 722; Webb v. Gilman, 80 Me. 177; 13 Atl. 688; Goddard v. Grand Trunk Ry. Co., 57 Me. 202; Raynor v. Nims, 3 Mich. 34; 26 Am. Rep. 493; Southern R. Co. v. Ken-

drick, 40 Miss. 374; Canfield v. Chic R. I. & P. Ry. Co., 59 Mo. App. 354; Day v. Holland, 15 Oreg. 464; 15 Pac. 855; Kenyon v. Cameron, 1 R. I. 122; 20 Atl. 233; Borland v. Barrett, 76 Va. 123; Haberman v. Gasser (Wis.), 80 N. W. 105.

⁴⁰ St. Ores v. McGlashen, 74 Cal. 148; 15 Pac. 452.

⁴¹ Webb v. Gilman, 80 Me. 177; 13 Atl. 688; Goddard v. Grand Trunk Ry. Co., 57 Me. 202.

⁴² Cutler v. Smith, 57 Ill. 252; Collins v. Council Bluffs, 35 Iowa, 43; Burkett v. Lanata, 15 La. Ann. 337; McCarthy v. Niskern, 22 Minn. 99; Rogers v. Henry, 32 Wis. 323.

which will tend to prevent any mere arbitrary and thoughtless award, and to make the assessment fair and reasonable considering all the circumstances of the case."⁴⁸ And, generally, the court should in those cases, where the question of exemplary damages is involved, state the rule in reference thereto to the jury, together with such restrictions and limitations as are applicable.⁴⁹ And where, as a matter of fact, there is no evidence to justify the assessment of exemplary damages, the trial court may so instruct the jury.⁵⁰ Again, while the amount is to be determined by the jury in its discretion, it is, however, subject to this restriction, that its verdict should not exceed the sum claimed as damages by the plaintiff.⁵¹

§ 146. Instructions as to exemplary damages.—An erroneous instruction as to exemplary damages will not be a ground for disturbing a verdict for the plaintiff, where it clearly appears that only compensatory damages were awarded,⁵² nor can the refusal of an instruction as to such damages be complained of where the jury find that plaintiff is not entitled to recover at all, and there is consequently no ground for an award of exemplary damages.⁵³ And where no claim is made for punitive damages, an instruction is harmless to defendant which merely limits the recovery to compensatory damages, though it omits to expressly state that the jury are not to give anything by way of vindictive damages.⁵⁴ But where a charge improperly permits the recovery of such damages, and it is impossible to determine whether the jury allowed such damages in its verdict or not, a judgment for plaintiff may be reversed.⁵⁵

⁴⁸ *Titus v. Corkins*, 21 Kan. 722, per Brewer, J.

⁴⁹ *Kutner v. Fargo*, 20 Misc. (N. Y.) 207; 45 N. Y. Supp. 753. See also *Haberman v. Gasser* (Wis.), 80 N. W. 105.

⁵⁰ *Bullock v. Del. L. & W. R. Co.*, 61 N. J. L. 550; 40 Atl. 650; 11 Am. & Eng. R. Cas. N. S. 837; 4 Am. Neg. Rep. 419.

⁵¹ *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45; 9 So. 303; 30 Am. St. Rep. 28.

⁴⁷ *Siegle v. Rush*, 173 Ill. 559; 50 N. E. 1008, aff'g 72 Ill. App. 485; *Wright v. Donnell*, 34 Tex. 291; *Fitzpatrick v. Blocker*, 23 Tex. 352.

⁴⁸ *Jones v. Cooper*, 97 Iowa, 735; 65 N. W. 1000; *Erickson v. Pomerank*, 66 Minn. 376; 69 N. W. 39.

⁴⁹ *Norton v. Third Ave. R. Co.*, 26 App. Div. (N. Y.) 60; 49 N. Y. Supp. 898.

⁵⁰ *Central of Ga. R. Co. v. Windham*, 120 Ala. 231; 24 So. 843.

CHAPTER VI.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

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§ 147. Generally.—It is not the purpose of the authors in this work to enter into a detailed discussion or consideration of the principles of law governing in all cases of negligence and of contributory negligence. Damages and the measure of dam-

ages, however, are in such a vast number of cases so closely allied to or dependent upon the questions of negligence or of contributory negligence, that a presentation of the general rules of law in such cases is here given, together with a brief discussion of the general duties imposed in certain relations and of the degree of care required of persons under certain conditions.

§ 148. **Negligence defined.**—The word “negligence” has been declared to be “a word of very undefined signification.”¹ In the many cases which have arisen numerous definitions of it have been given by the courts.² Thus it has been declared to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.³ And again, it is declared to be the omission to do something that a reasonable man would do, or the doing something that a reasonable man would not do—not intentionally;⁴ the absence of due care under the circumstances;⁵ a want of that degree of care which an ordinarily prudent man would have exercised under the circumstances;⁶ the want of care and diligence;⁷ the want of ordinary care in the discharge of a duty;⁸ a failure to exercise that degree of care which ordinarily prudent persons would exercise under the same circumstances;⁹ the doing of an act, or the omission to act, which results in damage;¹⁰ the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have

¹Submarine Teleg. Co. v. Dickson, 15 C. B. (N. S.) 759; 10 Jur. N. S. 211; Allen's Teleg. Cas. 229, 247.

²See cases cited in Joyce on Electric Law, sec. 734.

³McGraw v. Chicago, R. I. & P. Ry. Co. (Neb. 1899), 81 N. W. 306.

⁴Blyth v. Birmingham Water Co., 11 Exch. 781, per Alderson, B.

⁵Patton v. Southern R. Co. (U. S. C. C. App. 4th C.), 42 U. S. App. 567; 27 C. C. App. 287; 82 Fed. 979.

⁶Galveston, H. & S. A. R. Co. v. Simon (Tex. Civ. App. 1899), 54 S. W. 309.

⁷Hodgson v. Dexter, 1 Cranch (U. S. C. C.), 111.

⁸Murphy v. City of Dayton, 8 Ohio S. & C. P. Dec. 354.

⁹Greef v. Brown, 7 Kan. App. 394; 51 Pac. 926.

¹⁰Electric Co. v. Bowers, 110 Ala. 331; 20 So. 346.

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done;¹¹ the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect, assuming that he was acting in his own interest or affairs;¹² a failure to exercise such care as an ordinary prudent man would exercise under similar circumstances;¹³ and such an omission by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as in a natural and continuous sequence causes unintended damage to the latter.¹⁴ It will be observed that in many of these definitions the terms "ordinary care" and "ordinary prudent man" are used. No inflexible rule as to the exact degree of care to be used can be framed so as to apply in all cases in the determination of whether negligence exists or not. The degree of care which a person should exercise will vary according to the circumstances of each particular case.¹⁵ So negligence may only be defined as the omission to do an act which an ordinary prudent man in the exercise of ordinary care would do, or the doing of an act which an ordinary prudent man in the exercise of ordinary care would not do.¹⁶

§ 149. Ordinary care.—The term "ordinary care" is a relative one, depending upon the circumstances of time, place and person. The terms "ordinary care," "reasonable prudence," and

¹¹ *Railroad Co. v. Jones*, 95 U. S. 442.

¹² *Ahern v. Oregon Teleph. Co.*, 24 Oreg. 276; 4 Am. Elec. Cas. 361.

¹³ *Texas & Pacific Ry. Co. v. Cody* (U. S. S. C. 1897), 1 Am. Neg. Rep. 763.

¹⁴ *Shearman & Redfield on Neg.* (5th ed.) sec. 3.

¹⁵ *Texas & Pacific Ry. Co. v. Cody* (U. S. S. C. 1897), 1 Am. Neg. Rep. 763; *Richardson v. Kier*, 34 Cal. 63.

¹⁶ See *Hunter v. Kansas City & M. R. & Bridge Co.* (C. C. App. 8th C.), 54 U. S. App. 653; 29 C. C. A. 206; 85 Fed. 379; *Rosen v. Chicago G. W. R. Co.* (C. C. App. 8th C.), 49 U. S. App. 647; 83 Fed. 300; 27 C. C. A.

534; *Grant v. Mosely*, 29 Ala. 302; *Bizzell v. Booker*, 16 Ark. 308; *Richardson v. Kier*, 34 Cal. 63; *Wabash R. Co. v. Miller*, 18 Ind. App. 549; 48 N. E. 663; *Webster v. Symes*, 109 Mich. 1; 66 N. W. 580; 2 Det. L. N. 982; *Geist v. Missouri Pac. R. Co.* (Neb. 1901), 10 Am. Neg. Rep. 414, 424, and cases cited; *Mowrey v. Central City Ry. Co.*, 66 Barb. (N. Y.) 43; S. C., 51 N. Y. 666; *Pakalinsky v. New York Central R. R. Co.*, 82 Barb. (N. Y.) 424; *Woolley v. Grand Street & Newton R. R. Co.*, 83 Barb. (N. Y.) 121. See also *Milligan v. Tex. & N. O. R. Co.* (Tex. Civ. App. 1902), 66 S. W. 896.

similar terms have a relative significance and are dependent upon the special circumstances and surroundings of the particular case.¹⁷ It may be defined generally as such care as ordinarily prudent men, under similar circumstances, would exercise.¹⁸ And where such care has been exercised, though an injury may result to another, negligence cannot be said to exist. So where a person performs a lawful act in a lawful manner and without any carelessness on his part, he is not responsible to another for an injury resulting therefrom,¹⁹ since no man is an insurer that acts which are lawful and done by him with care, shall not injuriously affect others.²⁰ But acts which are lawful in themselves may be done in such a careless or negligent manner as to render the doer of such acts liable to a third person in damages for an injury caused thereby.²¹ And where absence of ordinary care has been shown, evidence that the person was a careful, prudent and cautious man is not admissible to negative his want of such care.²²

§ 150. Presumption of negligence.—As a general rule negligence will not be presumed from the mere happening of

¹⁷ *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 108; 1 *Russell & Winslow's Sylabus Digest*, U. S. Sup. Ct. Rep. 1587, and cases there cited.

¹⁸ *Asbury v. Charlotte Electric Ry. L. & P. Co.* (N. C. 1899), 84 S. E. 654; *Houston & T. C. R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107; 46 S. W. 113; *Olwell v. Milwaukee Street R. Co.*, 92 Wis. 330; 66 N. W. 362; *Joyce on Electric Law*, sec. 571. "Ordinary care is the care ordinarily exercised by the great mass of mankind or its type the ordinarily prudent person under the same or similar circumstances." *Yerkes v. Northern Pac. R. Co.* (Wis. 1901), 88 N. W. 33, 36, per Dodge, J.; *Tully v. Phila. W. & B. R. R. Co.* (Del. 1901), 50 Atl. 95, 96. "The expressions, 'great care,' 'due and reasonable care,' 'ordinary care and vigilance,' 'reasonable and proper care,' 'reason-

able degree of care and diligence,' 'care and diligence adequate to the business which they undertake,' 'with skill, care and with attention,' 'a high degree of responsibility,' said to be various forms of expressing what is known as ordinary care." *Joyce on Electric Law*, sec. 17n, citing *Fowler v. Western Union Teleg. Co.*, 80 Me. 381; 2 *Am. Elec. Cas.* 612; *Birney v. Wash. Print. Teleg. Co.*, 18 Md. 341; 81 *Am. Dec.* 607; *Allen's Teleg. Cas.* 195, 212.

¹⁹ *Ulshowski v. Hill*, 61 N. J. L. 375; 39 *Atl.* 904; 4 *Am. Neg. Rep.* 318.

²⁰ *Marshall v. Wellwood*, 38 N. J. L. 339, 343, per Bensley, C. J.

²¹ *Seabrook v. Hicker*, 4 *Rob. (N. Y.)* 344.

²² *Tenney v. Tuttle*, 1 *Allen (Mass.)*, 185.

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an accident, but there are some cases where an accident occurs which, in ordinary course of things does not happen if proper care is exercised, and in such cases the presumption of negligence arises, the doctrine *res ipsa loquitur* being applied. Thus in an early case in New York,²⁴ it was said as to carriers of passengers that where it was shown that an accident had occurred "through some defect in the vehicle or other apparatus used by the carrier, a strong presumption of negligence arises, founded upon the improbability of the existence of any defect which extreme vigilance, aided by science and skill, could not have detected." And where a seaman who was employed on a vessel from which ore was being unloaded by means of a crane was injured by ore falling on him caused by the breaking or slipping of a bolt which held the bucket, it was said by the court that the accident "was of such a character as to raise a presumption of negligence, either in the character of the machinery used, or in the care with which it was handled."²⁵ So the presumption of negligence has been held to arise where a person walking along the street was struck by a chisel falling from a building, upon which work was being done;²⁶ where under similar conditions a person was struck by a piece of wood falling;²⁷ and where a person was injured by ice and snow falling from a roof.²⁸ So, also, such presumption has been held to arise

²⁴ *Dixon v. Pluns*, 98 Cal. 384; *Gannon v. Wilson*, 69 Cal. 541; *Fairbanks Canning Co. v. Innes*, 24 Ill. App. 33, *aff'd* 125 Ill. 410; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa, 530; *Western Union Tel. Co. v. State*, 82 Md. 293; *Manning v. West End Ry. Co.*, 166 Mass. 230; *Barnowski v. Helson*, 89 Mich. 52; *Wiser v. Chesley*, 53 Mo. 547; *Graves v. Tichnor*, 6 N. H. 537; *Suburban Elec. Co. v. Nugent*, 58 N. J. L. 658; *Seybold v. New York, Lake Erie, etc., R. Co.*, 95 N. Y. 562; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418; *Dunn v. Ballantyne*, 5 App. Div. 483; *Butler v. Cushing*, 46 Hun (N. Y.), 521; *Earl v. Crouch*, 131 N. Y. 613; *Fields v. New York Central R. Co.*, 32 N. Y.

346; *Pixley v. Clark*, 35 N. Y. 52; *Mullen v. St. John*, 57 N. Y. 56; *Haynes v. Raleigh Gas Co.*, 114 N. 203; *Graham v. Davis*, 4 Ohio St. 36; *Shafer v. Lacock*, 168 Pa. 497; *Snyder v. Wheeling Electrical Co.*, 43 Va. 661; 28 S. E. 733; 39 L. A. 499; *Scott v. London Dry Dock Co.*, 3 Hurlst. & C. 596; *Briggs Oliver*, 4 Hurlst. & C. 403.

²⁵ *Curtis v. Rochester, etc., R. Co.* 18 N. Y. 534.

²⁶ *Cummings v. National Furnace Co.*, 60 Wis. 601.

²⁷ *Cahalin v. Cochran*, 1 N. Y. 5; *R. 583*; *Dixon v. Pluns*, 98 Cal. 384.

²⁸ *Clare v. National City Bank, Sw. (N. Y.) 539.*

²⁹ *Shepard v. Creamer*, 160 Mass. 4

in the case of a building falling;²⁹ of walls falling;³⁰ where switch tracks were in disrepair as a result of which an employee was injured;³¹ where goods were broken while in the possession of a carrier;³² where a bolt from an elevated railway fell into the street;³³ where dangerous structures are erected in the streets or in public places, as a result of which injury ensues;³⁴ where a person is injured by the fall of an elevator;³⁵ or of a scaffold;³⁶ by the upsetting of a stage coach,³⁷ and where injury is caused by rocks falling upon adjoining land as a result of blasting.³⁸

§ 151. Burden of proof—Negligence.—We have stated in the preceding section that under certain conditions negligence will be presumed. This, however, is an exception to the general rule, which is that where a person has received some injury which he claims is the result of negligence upon the part of another, the burden of proof is upon him to establish such negligence.³⁹ So where it was claimed that death was due to the in-

²⁹ *Giles v. Diamond, etc., Co.* (Del.), 6 Cent. 684.

³⁰ *Mullen v. St. John*, 57 N. Y. 567; *Vincent v. Cook*, 4 Hun (N. Y.), 318.

³¹ *Ind. B. & C. R. Co. v. Bonehart* (Ind.), 13 West. 425.

³² *Ketchum v. Merchants Union Transf. Co.*, 52 Mo. 390.

³³ *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418. See also *Brooks v. Kings Co. El. R. Co.*, 4 Misc. 288, aff'd 144 N. Y. 647.

³⁴ *Dunn v. Ballantyne*, 5 App. Div. (N. Y.) 483; *Earl v. Crouch*, 131 N. Y. 613.

³⁵ *Fairbanks Canning Co. v. Innes*, 24 Ill. App. 33, aff'd 125 Ill. 410; *Moran v. Racine Wagon Co.*, 74 Hun (N. Y.), 454; 26 N. Y. Super. 852.

³⁶ *Flynn v. Gallagher*, 52 N. Y. Super. 524.

³⁷ *Stokes v. Salstontall*, 13 Peters (U. S.), 181; 7 Am. Neg. Cas. 297.

³⁸ *Hay v. The Cohoes Co.*, 2 N. Y. 159.

³⁹ *Dolby v. Hearn*, 1 Marv. (Del.) 153; 37 Atl. 45; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; 40 N. E. 269, rev'g 60 Ill. App. 525; *Illinois, etc., R. Co. v. Cragin*, 71 Ill. 177; *Ziech v. Hebard*, 67 Ill. App. 97; *State, Brady v. Consolidated Gas Co.*, 85 Md. 637; *Brown v. Congress St. R. Co.*, 49 Mich. 153; *Deserant v. Cerillos Coal R. R. Co.* (New Mexico, 1898), 5 Am. Neg. Rep. 206; *McMahon v. New York Elev. R. R. Co.*, 18 J. & S. (N. Y.) 507; *Deyo v. New York Central R. R. Co.*, 34 N. Y. 9; *Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271; *Painton v. New York Central Ry. Co.*, 83 N. Y. 7; *Allen v. State Steamship Co.*, 132 N. Y. 91; 30 N. E. 482; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, aff'g 56 Barb. 425; *Coley v. Statesville*, 121 N. C. 30; 28 S. E. 482; *Carson v. Bromley*, 184 Pa. 549; 39 Atl. 1115; *Jenkins v. McCarthy*, 45 S. C. 278; 22 S. E. 883; *Montreal Rolling Mills Co. v. Corcoran*, 26 Can. S. C. 596; *Bridges*

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haling of gas which the gas company negligently allowed to escape from its pipes, it was held that the plaintiff must establish negligence on the part of the defendant.⁴⁰ And where a widow was suing for the death of her husband, it was held that the burden of proof was upon her to establish negligence either by direct evidence or by weighty, consistent and precise presumptions arising from the facts proved.⁴¹ And again, where a person died while in prison and it was alleged that his death was due to the improper condition of the prison, it was held in an action against the town to recover damages, that the burden of proof was on the testatrix to show that the defendant had neglected its duty as to such prison.⁴² So, also, in an action to recover damages for injuries to a cellar due to alleged percolation from defendant's stable, it was held that the burden of proof was on the plaintiff to show that the defendant was guilty of negligence.⁴³ And in another case where a person had met his death by falling over the railing of a stairway of an elevated railway station, it was held that the complaint had been properly dismissed, there being no evidence showing negligence on the part of the defendant.⁴⁴ Circumstantial evidence may be sufficient for the purpose of establishing negligence on the part of a defendant, but it must be such evidence as will lead directly to the conclusion that the negligence complained of was attributable to some act of commission or omission on the part of the defendant.⁴⁵

§ 152. Negligence—For jury.—Where from the facts in a case all reasonable men must necessarily draw the same conclusion, the question of negligence may then be said to be one of law for the court, but where the facts are such that reasonable men may fairly differ upon the question whether there has been negligence or not, the determination of such question is for

v. North London R. Co., L. R. 6 Q. B. 377; 7 H. L. 232.

⁴⁰ State-Brady v. Consolidated Gas Co., 85 Md. 637; 37 Atl. 263.

⁴¹ Montreal Rolling Mills Co. v. Corcoran, 26 S. C. 595.

⁴² Coley v. Statesville, 121 N. C. 301; 28 S. E. 482.

⁴³ Carson v. Bromley, 184 Pa. 546; 39 Atl. 1115.

⁴⁴ McMahon v. New York Elev. R. Co., 18 J. & S. (N. Y.) 507.

⁴⁵ Robbins v. Mount, 4 Rob. (N. Y.) 553; S. C., 33 How. Pr. 24; Fagan v. Thomas, 6 J. & S. 133.

the jury.⁴⁶ In order, however, to authorize the court to withdraw from the jury the decision of the question of negligence, it is said that the facts must not only be undisputed, but there must also be only one set of inferences to be drawn from the facts, and that such inferences must lead to only one conclusion.⁴⁷ Where negligence is alleged, a mere scintilla of evidence in support of the allegation is not sufficient for the submission of such question to the jury.⁴⁸ If, however, there is some evidence, though slight and such as may cause reasonable men to differ as to the question of negligence, then it is for the jury to determine whether there was negligence or not.⁴⁹ So where from the evidence an inference might be drawn either

⁴⁶ *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408; 1 Russell & Winslow's Syllabus Digest; U. S. Sup. Ct. Rep. 1586; *Mynning v. Detroit*, etc., R. Co., 59 Mich. 257; 26 N. W. 514; *Newark*, etc., R. Co. v. *Block*, 55 N. J. 605; 27 Atl. 1067; *Howett v. Penn.*, etc., R. Co., 166 Pa. St. 607; 31 Atl. 306. See the following cases where question of negligence was left to the jury: *Louisville*, etc., R. Co. v. *Woods*, 105 Ala. 561; 17 So. 41; *Hayes v. Williams*, 17 Colo. 465; 30 Pac. 352; *Fiske v. Forsythe*, etc., Bleaching Co., 57 Conn. 118; 17 Atl. 356; *Gagg v. Vetter*, 41 Ind. 228; *Wise v. Covington*, etc., R. Co., 91 Ky. 537; 16 S. W. 351; *Balhoff v. Michigan C. R. Co.*, 106 Mich. 606; 65 N. W. 592; 2 Det. L. N. 723; 28 Chic. L. N. 166; *Callahan v. Warne*, 40 Mo. 131; *Chicago B.*, etc., R. Co. v. *Oleson*, 40 Neb. 889; 59 N. W. 354; *Comben v. Belleville Stone Co.*, 59 N. J. L. (30 Vroom) 226; 36 Atl. 473; *O'Harra v. New York Cen. & H. R. R. Co.*, 92 Hun (N. Y.), 56, aff'd 153 N. Y. 690; *McGovern v. Standard Oil Co.*, 11 App. Div. (N. Y.) 588; S. C., 42 N. Y. Supp. 665; *Dwyer v. Buffalo General Elec. Co.*, 30 App. Div. (N. Y.) 124; 46 N. Y. Supp. 874; *Wallace v. Third Ave.*

R. R. Co. (S. C. N. Y. App. Div. 1899), 5 Am. Neg. Rep. 215; *Hurley v. New York & B. Brew. Co.*, 13 App. Div. (N. Y.) 167; 43 N. Y. Supp. 259; *Smith v. Metropolitan Street R. Co.*, 7 App. Div. (N. Y.) 253; 74 N. Y. St. R. 706; 40 N. Y. Supp. 148; *Ellerbee v. Carolina C. R. Co.*, 118 N. C. 1024; 24 S. E. 808; *Call v. Easton Transit Co.*, 180 Pa. 618; 37 Atl. 89; *Washington v. Missouri, K. & T. R. Co.*, 90 Tex. 314; 38 S. W. 764, rev'g 36 S. W. 778.

⁴⁷ *Eastwood v. Retsoff Mining Co.*, 86 Hun (N. Y.), 91, aff'd 152 N. Y. 651.

⁴⁸ *Powers v. New York Cent. & H. R. R. Co.*, 60 Hun (N. Y.), 19; 38 N. Y. St. R. 558; 14 N. Y. Supp. 408; 128 N. Y. 659. See also *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226; 1 Atl. 217; *Casey v. New York Central R. R. Co.*, 25 Wkly. Dig. 568; *Murray v. Forty-Second Street M. & St. N. R. Co.*, 9 App. Div. (N. Y.) 610; 41 N. Y. Supp. 620.

⁴⁹ *Cumberland*, etc., *Iron Co. v. Scally*, 27 Md. 589; *Erickson v. Twenty-Third St. R. Co.*, 71 Hun (N. Y.), 108; 24 N. Y. Supp. 603; *Painton v. Northern Central R. Co.*, 83 N. Y. 7.

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that the master did not exercise the proper degree of care as to machinery, appliances, and place to work in for his servant, or that the servant's death was due to a failure on his part to exercise ordinary care, or that it was the result of obvious danger or risk, it was held that the question was one for the jury.⁵⁰ And again, where from the facts of the case it was doubtful whether the death of a driver was due to contributory negligence on his part, or to negligence of the gripman, the question was held to be one for the jury.⁵¹ But where in answer to the defense of contributory negligence on the part of plaintiff's intestate, it was claimed that the defendant could have avoided the injury by the exercise of ordinary care and prudence, it was held that in the absence of evidence that the injury could have been avoided by the exercise of reasonable care after such contributory negligence had intervened, such issue should not be submitted to the jury.⁵²

§ 153. "Inevitable accident"—"Act of God."—Accidents are generally classified as (1) those which are the "act of God." (2) as "inevitable," and (3) as "avoidable." The terms "act of God" and "inevitable accident" are frequently used as equivalent expressions. There is, however, in the majority of the cases, a distinction made, the term "inevitable accident" being considered as of a broader meaning than the term the "act of God." So it has been said that "every 'act of God' is an 'inevitable accident' because no human agency can resist it; but it does not follow that every inevitable accident is an act of God. Damage done by lightning is an inevitable accident and also an act of God, but the collision of two vessels in the dark is an inevitable accident and not an act of God."⁵³ "Act of God" may be said as a general rule to denote such accidents as arise from natural causes and are not due to and cannot be avoided by human agency. In those cases where loss or injury is due to the act of God, damages therefor cannot be

⁵⁰ *Comben v. Belleville Stone Co.*, 59 N. J. L. (30 Vroom) 226; 36 Atl. 473.

⁵¹ *Smith v. Metropolitan St. R. Co.*, 7 App. Div. (N. Y.) 253; 74 N. Y. St. R. 706; 40 N. Y. Supp. 148.

⁵² *Ellerbee v. Carolina C. R. Co.*, 118 N. C. 1024; 24 S. E. 808.

⁵³ *Anderson's Dict. of L.*, citing *Ferguson v. Brent*, 12 Md. 33, *La Grand C. J.* See also *The Charlotte*, 9 Ben. 6-16; cases, 10 id. 310, 312, 320.

recovered. In such cases the act of God must be the sole and immediate cause of the injury. If, however, there be any human intervention which operates to produce the injury, then it cannot be said, in a legal sense, to be an act of God.⁵⁴ So where a vessel was sunk by running upon the mast of a sloop which had been sunk by a squall but was visible, it was held not to be a loss occasioned by the act of God.⁵⁵ But damages due to storms of unusual violence;⁵⁶ to extraordinary floods;⁵⁷ or snowstorms;⁵⁸ or to sudden freezing⁵⁹ are within the clause, "act of God."⁶⁰ That a loss or damage is due to the act of God is frequently set up by carriers in defense to an action against them for damages where goods entrusted to them for transportation have been lost or injured. It is not sufficient, however, as a defense in such cases unless it appear that the goods were not by any act of commission or omission negligently exposed by the carrier to the danger of loss by such act of God,⁶¹ for if it appear that the carrier's negligence contributed to the loss, he may then be liable for the damages to the goods though

⁵⁴ *Michaels v. New York Central R. R. Co.*, 30 N. Y. 564; *Merritt v. Earle*, 31 Barb. (N. Y.) 38, aff'd 29 N. Y. 117; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *King v. Shepherd*, 3 Story, 349.

⁵⁵ *Merritt v. Earle*, 29 N. Y. 117.

⁵⁶ *Nichols v. Marsland*, L. R. 10 Ex. 255; *Compton v. Long Island R. Co.*, 12 N. Y. St. R. 554.

⁵⁷ *Morris v. Savannah, etc., R. Co.*, 23 Fla. 182; *Withers v. North Kent. R. Co.*, 3 Hurlst. & N. 969; *Morrison v. Davis*, 20 Pa. St. 171.

⁵⁸ *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527.

⁵⁹ *Lowe v. Moss*, 12 Ill. 477; *West v. Steamboat Berlin*, 3 Iowa. 532; *Worth v. Edmonds*, 52 Barb. (N. Y.) 40; *Missouri Pac. Ry. Co. v. Johnson*, 72 Tex. 95; 10 S. W. 325.

⁶⁰ See also the following cases for construction of the phrase, "Act of God." *Smith v. Western R. Co. of Ala.*, 91 Ala. 455; *Williams v. Grant*,

1 Conn. 487; *Central R., etc., Co. v. Kent*, 87 Ga. 402; 13 S. E. 502; *Lowe v. Moss*, 12 Ill. 477; *Plaisted v. B. & K. Steam Nav. Co.*, 27 Me. 132; *Piedmont, etc., R. Co. v. McKenzie*, 75 Md. 458; 24 Atl. 157; *Wendell v. Pratt*, 12 Allen (Mass.), 464; *Harris v. Rand*, 4 N. H. 259; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457; *Read v. Spaulding*, 5 Bosw. (N. Y.) 395, aff'd 30 N. Y. 630; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215; *Price v. Hartsborn*, 44 Barb. (N. Y.) 655, aff'd 44 N. Y. 94; 4 Am. Rep. 645; *Slater v. South Carolina R. Co.*, 29 S. C. 96; *McCall v. Brock*, 5 Strobb. (S. C.) 119; *Friend v. Woods*, 6 Gratt. (Va.) 189.

⁶¹ *Crosby v. Fitch*, 12 Conn. 410; *Read v. Spaulding*, 5 Bosw. (N. Y.) 395, aff'd 30 N. Y. 630; *Bostwick v. Balt. & Ohio R. R. Co.*, 45 N. Y. 712, rev'g 55 Barb. 137; *Klauber v. American Express Co.*, 21 Wis. 21.

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the act of God was the immediate cause thereof.⁶² The burden of proof is, however, upon a carrier, claiming that goods in his care have been injured by such accident, to show that no act or neglect of his contributed to the injury.⁶³

§ 154. "Inevitable accident"—"Unavoidable accident."—The terms "inevitable accident" and "unavoidable accident" appear to be used by the courts generally as equivalent expressions,⁶⁴ and may be defined as such accidents as arise unexpectedly from some unknown source, or from some known source, and which cannot be avoided by a person exercising the requisite degree of care and skill in the premises, and in such cases, as a general rule, there can be no recovery for any injury sustained.⁶⁵

§ 155. Inevitable or unavoidable accident—Illustrations.

—Where a horse becomes unmanageable without any fault on the part of the driver, and as a result thereof a child is run over and injured, the driver is not liable therefor.⁶⁶ Nor is a street

⁶² *Heyl v. Inman Steamship Co.*, 14 Hun (N. Y.), 564. See also cases cited in preceding note and throughout this section.

⁶³ *Michaels v. New York Central R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630; *Wing v. New York & Erie R. R. Co.*, 1 Hilt. (N. Y.) 235.

⁶⁴ Mr. Anderson, however, in his Dictionary of Law distinguishes between "inevitable accident" and "unavoidable accident." He speaks of inevitable accidents as those which are absolutely unavoidable because effected or influenced by the uncontrollable operations of nature, and unavoidable accidents as such as result from human agency alone, but are unavoidable under the circumstances. The words "inevitable" and "unavoidable" are similarly defined and given as synonyms in Webster's Dictionary. Inevitable is defined "not

evitable, incapable of being avoided; admitting of no escape or evasion; unavoidable;" and unavoidable is defined as "not avoidable; not to be shunned; necessary; inevitable; as unavoidable evils."

⁶⁵ *Ryan v. Armour*, 166 Ill. 568; 47 N. E. 60, aff'g 67 Ill. App. 102; *Nave v. Flack*, 90 Ind. 205; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103; 38 N. Y. St. R. 842; 28 N. E. 24; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 33 N. Y. St. R. 287; 25 N. E. 259; *Conger v. Hudson River R. Co.*, 6 Duer (N. Y.), 375; *Crutchfield v. Richmond, etc., R. R. Co.*, 76 N. C. 320; *Wakeman v. Robinson*, 8 Moore, 63; 1 Bing. 213; *Blythe v. Birmingham Water Co.*, 11 Exch. 781.

⁶⁶ *Trow v. Thomas*, 70 Vt. 580; 41 Atl. 652.

railway company liable for the death of a child caused by his unexpectedly and suddenly appearing on the track so closely in front of an approaching car, that it was impossible to stop it in time to avoid the accident.⁶⁷ So an electric light company is not liable for the death of a person caused by the breaking of a live electric light wire, where the breaking was due to an accident which no reasonable human care could prevent.⁶⁸ And a carrier having no knowledge that a package which it receives contains nitroglycerine is not liable for damages caused by an explosion thereof.⁶⁹ Nor is an owner of real property, who is making excavations upon his land, liable for injuries to adjoining buildings caused by such excavations, where he has been guilty of no negligence.⁷⁰ Nor is a person who is lawfully operating a steam boiler upon his own premises with all reasonable care liable to an adjoining owner for an injury sustained by him as a result of the boiler exploding.⁷¹ So it has been held that a person lawfully using fire on his own premises is not liable for an injury to adjoining premises caused by the fire communicating thereto, where there has been no negligence or fault on his part.⁷²

§ 156. **Avoidable accident.**—An avoidable accident is one which might have been averted by the exercise on the part of a person performing an act, of such care as under the circumstances of the occasion would have been required. So though a person may be guilty of contributory negligence in being upon the tracks of a railroad company, yet if the employees of the company in charge of the engine knew of his danger in time to have avoided the injury by the exercise of reasonable care, and negligently failed to use the means at their command to prevent it, the company will be liable in damages, for the injury so sus-

⁶⁷ *Callary v. Easton Transit Co.*, 185 Pa. 176; 39 Atl. 813; *Kierzenkowski v. Philadelphia Traction Co.*, 184 Pa. 459; 39 Atl. 220; 9 Am. & Eng. R. Cas. N. S. 533.

⁶⁸ *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661; 39 L. R. A. 499; 28 S. E. 733. See *Joyce on Electric Law*, secs. 450-454, 606, 607, 612.

⁶⁹ *Parrot v. Wells*, 15 Wall. 524.

⁷⁰ *Bailey v. Gray*, 53 S. C. 503; 31 S. E. 354.

⁷¹ *Losee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 476.

⁷² *Bizzell v. Booker*, 16 Ark. 308; *Clark v. Foot*, 8 Johns. (N. Y.) 422; *Lansing v. Stone*, 37 Barb. (N. Y.) 15; *Simons v. Monier*, 29 Barb. (N. Y.) 419; *Hinds v. Barton*, 25 N. Y. 544.

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tained.⁷³ And it is not essential that the employees should actually know of the danger to which a person is exposed upon the track in order to render the company liable, but it is sufficient if they have such notice or belief as will put a prudent man on the alert,⁷⁴ and the fact that a person is a trespasser does not change the rule;⁷⁵ and an instruction as to the effect of contributory negligence was held to be properly refused where it failed to state the phase of the case tending to show that the defendant could have prevented the accident by the exercise of reasonable care after having discovered the plaintiff's danger.⁷⁶ Contributory negligence to defeat recovery in such cases must, it is held, intervene between the failure of the defendant to exercise the necessary care to avoid the injury and the accident.⁷⁷ In the application of the rule that though a person may have contributed to an injury yet if the person inflicting it could, after discovering the other's danger, have avoided it, recovery may be had, it is held that prior negligence of the defendant cannot be invoked or considered.⁷⁸

§ 157. Avoidable accident—Illustrations.—Where a trespasser on a railroad track, while attempting to rescue a child, was struck by the train, it was held that the company was liable where the engineer saw his danger but failed to exercise reasonable care to prevent the injury.⁷⁹ And a street railway

⁷³ *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341; 33 S. W. 960; *Pierce v. Walters*, 164 Ill. 560; 45 N. E. 1068, aff'g 63 Ill. App. 562; *Neet v. Burlington, C. R. & N. R. Co.*, 106 Iowa, 248; 76 N. W. 677; 5 Am. Neg. Rep. 26; *Baltimore, etc., R. R. Co. v. Mulligan*, 45 Md. 486; *Mathews v. Chicago, R. I. & P. R. Co.*, 63 Mo. App. 569; 2 Mo. App. Rep. 866; *Lloyd v. Albermarle & R. R. Co.*, 118 N. C. 1010; 24 S. E. 805; *Blankenship v. Galveston, H. & S. A. R. Co.*, 15 Tex. Civ. App. 82; 38 S. W. 216. See also *McCreery v. Ohio River R. Co.* (W. Va. 1901), 10 Am. Neg. Rep. 500, 506.

⁷⁴ *Tucker v. Norfolk & W. R. Co.*, 92 Va. 549; 24 S. E. 229. But see

Louisville & N. R. Co. v. Vittitoe, 19 Ky. L. Rep. 612; 41 S. W. 269.

⁷⁵ *Peirce v. Walters*, 164 Ill. 560; 45 N. E. 1068, aff'g 63 Ill. App. 562; *Mathews v. Chicago, R. I. & P. R. Co.*, 63 Mo. App. 569; 2 Mo. App. Rep. 866; *Tucker v. Norfolk & W. R. Co.*, 92 Va. 549; 24 S. E. 229.

⁷⁶ *Sheehan v. Citizens R. Co.*, 72 Mo. App. 524.

⁷⁷ *International & G. N. R. Co. v. Sain*, 11 Tex. Civ. App. 386; 33 S. W. 558.

⁷⁸ *Dull v. Cleveland, C. C. & St. L. Co.*, 21 Ind. App. 571; 52 N. E. 1013; 1 Repr. 676.

⁷⁹ *Pierce v. Walters*, 164 Ill. 560; 45 N. E. 1068, aff'g 63 Ill. App. 562.

company is liable for the death of a person killed on its track where the accident is due to the failure of the motorman to keep watch over the track, or to his neglect to use the proper means for stopping the car after he has discovered the presence of such person upon the track.⁸⁰ So, also, where an engineer of a train saw a man upon the track approaching a trestle about three quarters of a mile away, and made no attempt to check the speed of the train or to give any warning of its approach until about two hundred yards from the trestle, it was held that, notwithstanding any negligence on the part of the person in going upon the trestle, the negligence of the engineer in making no effort to avoid the accident was the proximate cause of the death for which the company was liable.⁸¹ And where a person lying at the side of a track was struck and killed by a train, it was held that the company was liable if the engineer, by the exercise of a reasonable and proper lookout, could have discovered him in time to have avoided the accident.⁸² But the fact that the employees in charge of a train see an object upon the track at a point where they have no reason to suspect the presence of children, and which appears to be no living object, or anything of substantial value to be injured or to cause injury to the train or passengers, does not put them under any obligation or duty to stop until its nature can be ascertained; and where a train did not stop under such circumstances, but when it was too late the object was discovered to be a child, and with the aid of every appliance and the exercise of the greatest effort and skill on their part it was impossible to avoid injury, the company was not liable.⁸³

§ 158. Duty to use ordinary care to avoid consequences of another's negligence.—The following discussion from a recent case⁸⁴ ably considers the point indicated by the head line. The

⁸⁰San Antonio Street R. Co. v. Benken, 15 Tex. Civ. App. 229; 38 S. W. 829.

⁸¹McLamb v. Wilmington & W. R. Co., 122 N. C. 862; 29 S. E. 894.

⁸²Pharr v. Southern R. Co., 119 N. C. 751; 26 S. E. 140. See Sullivan v.

St. Louis S. W. R. Co. (Tex. Civ. App.), 36 S. W. 1020.

⁸³Missouri Pac. Ry. Co. v. Prewitt (S. C. Kan. 1898), 5 Am. Neg. Rep. 29.

⁸⁴Western & Atlantic R. Co. v. Ferguson (Ga.), 39 S. E. 306; 10 Am. Neg. Rep. 228 et seq., per Cobb, J.

court says: "In the case of *Railroad Co. v. Luckie*,⁸⁶ Mr. Justice Lumpkin uses the following language: 'It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could, by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to himself of that negligence.' This language can convey no other impression than that, in cases of the character referred to, the duty on the part of the plaintiff to use ordinary care for his protection against the consequences of the defendant's negligence does not arise 'until after the negligence began or was existing.' The ruling in the *Luckie* case⁸⁶ was approved in terms in the case of *Brunswick & W. R. Co. v. Gibson*,⁸⁷ where Mr. Chief Justice Simmons used the expression above referred to, saying that 'the plaintiff in an action against a railroad company for personal injuries cannot recover even though the company may have been negligent, if after the negligence of the defendant began or was existing, the person injured could by ordinary care have avoided the consequences to himself of that negligence.' In the case of *Railroad Co. v. Attaway*,⁸⁸ the present chief justice used the following language: 'The rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger or has reason to apprehend it.' In the case of *Comer v. Barfield*,⁸⁹ Mr. Justice Fish says in substance that if one who was injured by the negligence of another used proper diligence as soon as his peril was apparent to avert the catastrophe, it could not be said that by ordinary care he might have avoided the consequences of the other's negligence. In *Macon & I. S. Elec. St. R. Co. v. Holmes*,⁹⁰ Mr. Justice Lewis says: "A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see, and cannot fore-

⁸⁶ 87 Ga. 7; 13 S. E. 105.

⁸⁶ *Railroad Co. v. Luckie*, 87 Ga. 7; 13 S. E. 105.

⁸⁷ 97 Ga. 497; 25 S. E. 484; 11 Am. Neg. Cas. 351n.

⁸⁸ 90 Ga. 661; 16 S. E. 958.

⁸⁹ 102 Ga. 489; 31 S. E. 90.

⁹⁰ 103 Ga. 658; 30 S. E. 565; 4 Am.

Neg. Rep. 251.

tell. The rule, therefore, which requires one to exercise ordinary care and diligence to avoid the consequences of another's negligence, necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun and has become apparent.' From the expressions used and the rulings made in the cases cited, and there are many others where similar expressions are used and similar rulings made, the rule of force with reference to the subject under investigation seems to be well settled, and may be thus stated: The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases (that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when, as an ordinarily prudent person, it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person) such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages in proportion to the amount of default attributable to' the person injured." . . . At common law if the negligence of the plaintiff contributed to the injury, he could not recover. This doctrine, referred to usually as that of 'contributory negligence,' is not the law of this state; but the doctrine referred to often as that of 'comparative negligence,' is the rule of force here.⁹² This rule authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by

⁹¹ *Comer v. Barfield*, 102 Ga. 489; *Co. v. Johnson*, 38 Ga. 409; 11 Am. 31 S. E. 90; *Railroad Co. v. Holmes*, Neg. Cas. 292.
⁹² See note on Comparative Negligence, 9 Am. Neg. Rep. 249-252.
 106 Ga. 658; 4 Am. Neg. Rep. 251; See also sec. 168, herein.
 30 S. E. 565; *Macon & Western R. R.*

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the exercise of ordinary care on his part, he could not have avoided the consequences of the defendant's negligence.⁸⁸ If the plaintiff knows of the defendant's negligence, and fails to exercise that degree of care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled that he cannot recover.⁸⁹ If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the defendant's negligence, and when discovered could, by the exercise of a like degree of care, have avoided the same, then he cannot recover.⁹⁰ If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred and so apprehending the probability of the existence of such negligence, could have taken steps to have prevented the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed.⁹¹ If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the proba-

⁸⁸ See Civ. Code, secs. 2322, 3830.

⁸⁹ See *Railroad Co. v. Neily*, 56 Ga. 544; *Railroad Co. v. Harris*, 76 Ga. 508; *Railroad Co. v. Luckie*, 87 Ga. 6; 13 S. E. 105; *Briscoe v. Southern Ry. Co.*, 103 Ga. 224, 227; 3 Am. Neg. Rep. 360; 28 S. E. 638; *Railroad Co. v. Dorsey*, 106 Ga. 826, 828; 32 S. E. 873; *Hopkins v. Railroad Co.*, 110 Ga. 85, 88; 35 S. E. 307.

⁹⁰ See *Atl. & W. P. R. R. Co. v. Loftin*, 86 Ga. 43, 45; 12 S. E. 186; 11 Am. Neg. Cas. 350n; *Railroad v. Luckie*, 87 Ga. 6; 13 S. E. 105; *Brunswick & Western R. R. Co. v. Gibson*,

97 Ga. 489; 25 S. E. 485; 11 Am. Neg. Cas. 351n; *Cain v. Railway Co.*, 97 Ga. 298; 22 S. E. 918; *Railroad Co. v. Bradford* (Ga.), 38 S. E. 823.

⁹¹ See *Railroad Co. v. Bloomingdale*, 74 Ga. 604, 611; *Smith v. Railroad Co.*, 82 Ga. 801; 10 S. E. 111; *Jenkins v. Railroad Co.*, 89 Ga. 756; 15 S. E. 655; *Railroad Co. v. Attaway*, 90 Ga. 657, 661; 16 S. E. 956; *Macon & Indian Springs Electric St. Ry. Co. v. Holmes*, 103 Ga. 655; 4 Am. Neg. Rep. 251; 30 S. E. 563; *Lloyd v. City & Suburban Ry. Co.*, 110 Ga. 167; 11 Am. Neg. Rep. 591; 35 S. E. 170.

bility, even if not the possibility of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained, and if he fails to do this and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury. A railroad track is a place of danger, and one who goes thereon is bound to know that he is going into a place where he is subject to the dangers incident to the operation of trains upon that track.⁷⁷ This is true without regard to the place where the track is,—whether in the country, where pedestrians are not expected to be, or at a public road crossing, or at a street crossing, or at the stations and depots of railroad companies, where persons are expected and invited to be present. No matter where the track is located, any person who goes upon the same is bound to know that he is going upon a place where his presence would be attended with more or less danger. What would or would not amount to negligence in the manner in which a person entered upon a railroad track would depend to a large extent upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend. In *Railroad Co. v. Smith*,⁷⁸ it was in effect held that one is not bound to anticipate negligence when the law commands diligence for his protection at the hands of another; Mr. Chief Justice Bleckley in the opinion of that case saying: ‘If (the plaintiff) had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety.’ We do not understand this rule to mean that it is an

⁷⁷ See *Comer v. Shaw*, 98 Ga. 545; 110 Ga. 167; 7 Am. Neg. Rep. 591; 23 S. E. 733; 11 Am. Neg. Cas. 351n; 35 S. E. 170.
⁷⁸ *Lloyd v. City & Suburban Ry. Co.*, 78 Ga. 700; 3 S. E. 899.

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act of ordinary prudence for a person to go blindly into a place which may or may not be dangerous, simply because the law has commanded those in charge of such place to do certain things, which, if faithfully performed, would render improbable if not impossible, injury to any one at that place. Ordinary care would itself require the use of the senses to ascertain whether there was at the particular time any danger in going into the place. An ordinarily prudent person would necessarily apprehend the possibility of danger, and would always act on such apprehension, and use his senses to determine whether or not it was safe to go into the place at the time that he was seeking to enter the same."

§ 159. Gross negligence.—The distinction generally made as to the different degrees of negligence has not in all cases received favorable consideration from the court. So it was said in an English case that no matter by what epithet we may call negligence, whether we term it plain negligence or gross negligence, it is really only the "failure to bestow the care and skill which the situation demands."⁹⁹ And in a case in the United States supreme court it was declared that the term "gross negligence" was a relative term "doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of the care that was requisite under the circumstances." It was also said in this case that "the law furnishes no definitions which can be applied in practice, but leaves it to the jury to determine in each case what the duty was and what omissions amounted to a breach of it."¹⁰⁰ So in a case in New York it is said that the distinction as to the different degrees of negligence is neither founded upon any principle, nor is it capable of any certain and satisfactory application to individual cases as they arise. The court further says: "Attempts have been made to fix a liability

⁹⁹ Wilson v. Brett, 11 M. & W. 113, per Rolfe, B.

¹⁰⁰ Milwaukee, etc., R. Co. v. Arms, 91 U. S. 494, per Davis, J. See also Steamboat New World v. King, 16 How. 474; Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371;

State v. Manchester, etc., R. Co., 52 N. H. 557; Wells v. New York Central R. R. Co., 24 N. Y. 181; Briggs v. Taylor, 28 Vt. 180; Hinton v. Dibbin, 2 Q. B. 646; Beal v. South Devon Ry. Co., 3 H. & C. 337.

upon the distinction between gross negligence and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence does not change its character and become anything but negligence by the application of any epithet to it."¹ Though the utility in practice of any classification or definition of different degrees of negligence may be doubtful, yet the fact remains that there are different degrees of negligence. Under the same state of facts in two cases, we might in one have a person guilty of negligence in only a slight degree, while there might be on the part of the person in the other case, negligence of a much greater degree. So, again, a given course of conduct in one case might be no negligence at all, or possibly only slight negligence, while in an another case under different conditions the same course of conduct would be an aggravated degree of negligence. Thus it was that negligence was originally divided into three classes, known as slight, ordinary and gross, corresponding to the different degrees of care known as slight, ordinary and great. In this connection it has been said that, "strictly speaking, it is not correct to divide negligence into degrees at all, because there can be no negligence, within the legal meaning of the term, except where the degree of care required by law in the particular case has not been given. . . . But . . . these terms are in familiar use and are perfectly well understood, and any attempt to dispense with them will cause far more confusion than it clears away. We adhere, therefore, to a classification of negligence, corresponding with the classification of care."² Gross negligence has been defined as the "omission of that care which even inattentive and thoughtless men never fail to take of their own property or interests."³ And again we have it defined as a "great and aggravated degree of negligence as distinguished from negligence of a lower de-

¹ *Smith v. New York Central R. R. Co.*, 24 N. Y. 222.

² *Shearman & Redfield on Negligence* (5th ed.), sec. 48. See also *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 50; *Burlington, etc., R. R. Co. v. Wendt*, 12 Neb. 76; *Dudley v. Camden, etc., Ferry Co.*, 13 Vr.

(N. J.) 25; *Dallas City R. R. Co. v. Beeman*, 74 Tex. 291; *Cremer v. Town of Portland*, 36 Wis. 100; *Const. Texas*, 1876, art. 16, sec. 26, and cases cited in last note of this section.

³ *Anderson's Dictionary of Law* (1893).

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gree,"⁴ as "that entire want of care which would raise a presumption of a conscious indifference to consequences,"⁵ as "the want of slight care,"⁶ and as negligence "amounting to wilful injury."⁷ The element of wilfulness does not, however, in our mind, enter into the determination of the question to this extent. Gross negligence being, as we view it, the absence of a slight degree of care or diligence not amounting to wilful injury.⁸

§ 160. Wilful injury—Wanton negligence.—The terms "wilful injury" and "wanton negligence" are used in some cases as equivalent or synonymous terms.⁹ Thus it is said in one case: "Then there is that reckless indifference or disregard of the natural or probable consequence of doing an act, designated whether accurately or not in our decisions as 'wanton negligence' to which is imputed the same degree of culpability and held to be equivalent to wilful injury."¹⁰ It may be questioned whether a wilful act can also be classed as a negligent act, since it is claimed that in negligence there is no intent to do wrong which will injure another, the injury being due in case of negligence to a mere absence of care. The terms, however, "wilful neglect," "wilful negligence," and "wanton negligence," are used in many of the cases so that though such a phrase may appear incorrect, yet the courts have recognized such terms by using them and their use by the courts has been in an equivalent sense. In the sense in which any one of them is used, they being considered synonymous, it may be defined as

⁴ *Doorman v. Jenkins*, 2 Ad. & El. 261.

⁵ *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587.

⁶ *Shearman & Redfield on Negligence* (5th ed.), sec. 49.

⁷ *St. Louis, etc., R. R. Co. v. Todd*, 36 Ill. 409.

⁸ See *Richmond, etc., R. Co. v. Farmer*, 97 Ala. 141; 12 So. 86; *Jacksonville, etc., R. Co. v. Southworth*, 32 Ill. App. 307, aff'd 135 Ill. 250; 25 N. E. 1093; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596; 29 N. E. 692; *Galbraith v. West End R. Co.*, 165 Mass. 572; 43 N. E. 501;

Smith v. New York Cent. R. Co., 24 N. Y. 222; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *First Nat. Bank v. Graham*, 85 Pa. St. 91; *Austin, etc., R. Co. v. Beatty*, 73 Tex. 592; 115 S. W. 858; *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165; *Wright v. Clark*, 50 Vt. 130. See also *Chesapeake & O. R. Co. v. Dodge* (Ky. 1902), 66 S. W. 606.

⁹ *Louisville & N. R. Co. v. Webb*, 97 Ala. 308; 12 So. 374 and other cases in this state cited in this section.

¹⁰ *Electric Co. v. Bowers*, 110 Ala. 331; 20 So. 346.

the intentional act or failure to act of a person who is conscious of his own conduct and who, from his knowledge of existing circumstances and conditions, is also conscious of the fact that such conduct will naturally or probably result in injury.¹¹ Thus it is said: "A mere error of judgment, as the result of doing an act, or the omission of an act having no evil purpose or intent, a consciousness of probable injury, may constitute simple negligence, but cannot rise to the degree of wanton negligence or wilful wrong."¹² And again: "To constitute wilful injury there must be design, purpose, intent to do wrong and inflict the injury."¹³ The words "wanton" and "wilful" are of very similar meaning. Wanton means unrestrained, reckless, regardless of consequences, and in some cases a wanton act may be a wilful one or committed with evil intent. Wilful means intentional as distinguished from accidental, with a bad purpose, or with evil intent.¹⁴ So it will be seen that if the terms "wanton negligence," "wilful negligence," and "wilful injury" are to be used as equivalent in meaning, there must be in each the intent to act or omit to act with a consciousness that such conduct will result in probable injury.¹⁵

§ 161. Contributory negligence—Defense to action.—It may be stated as a general rule that in actions to recover damages for an injury, the contributory negligence of the plaintiff is a defense thereto provided, however, that such negligence con-

¹¹ *Memphis & C. R. Co. v. Martin*, 117 Ala. 367; 23 So. 231; *Louisville & Nashville R. R. Co. v. Webb*, 97 Ala. 306; 12 So. 374; *Electric Co. v. Bowers*, 110 Ala. 328; 20 So. 345; *Railroad Co. v. Markee*, 103 Ala. 160; 15 So. 511; *Peoria Bridge Co. v. Loomis*, 20 Ill. 235; *Kentucky Central R. R. Co. v. Gastineau*, 83 Ky. 119. The term "wilful neglect" is used in the Kentucky statutes. See *Kentucky Gen. Stats.* ch. 57, sec. 3.

¹² *Electric Co. v. Bowers*, 110 Ala. 331; 20 So. 346; *Railway Co. v. Lec.* 92 Ala. 272; 9 So. 230; *Al-*

abama Great Southern R. Co. v. Moorer, 116 Ala. 642; 22 So. 900; 9 Am. & Eng. R. Cas. N. S. 742; 3 Am. Neg. Rep. 320; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235. But see *Kansas City, etc., R. R. Co. v. Campbell*, 6 Kan. App. 417.

¹³ *Electric Co. v. Bowers*, 110 Ala. 328; 20 So. 345.

¹⁴ *Anderson's Dictionary of Law*, 1099, 1114.

¹⁵ *Electric Co. v. Bowers*, 110 Ala. 331; 20 So. 346, and other cases in Alabama cited in this note; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235. But see *Kansas City, etc., R. R. Co. v. Campbell*, 6 Kan. App. 417.

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tributed directly to and was the proximate cause of the injury.¹⁶ So it is declared by the United States supreme court that if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appear that the defendant might, by the exercise of reasonable care and prudence have avoided the consequences of the injured party's negligence.¹⁷ So it has been held that contributory neg-

¹⁶ *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408; *Little v. Hackett*, 116 U. S. 371; *Sheffer v. Railroad Co.*, 105 U. S. 249; *St. Louis & S. F. R. Co. v. Whittle*, 20 C. C. A. 196; 40 U. S. App. 23; 74 Fed. 296; *Fernandez v. Sacramento, etc., R. Co.*, 52 Cal. 45; *Flynn v. San Francisco, etc., R. Co.*, 40 Cal. 14; 6 Am. Rep. 595; *Isbell v. New York, N. H. & R. Co.*, 27 Conn. 393; *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199; 40 Atl. 945; *Lyman v. Philadelphia, etc., R. R. Co.*, 4 Houst. (Del.) 583; *Indianapolis v. Caldwell*, 9 Ind. 297; *Atwood v. Bangor, O. & O. T. R. Co.*, 91 Me. 399; 40 Atl. 67; *Bigelow v. Reed*, 51 Me. 325; *Kennedy v. Cecil Co.*, 69 Md. 65; 14 Atl. 524; *Murphy v. Deane*, 101 Mass. 455; *Williams v. Edmonds*, 75 Mich. 92; 42 N. W. 534; *Barbee v. Reese*, 60 Miss. 906; *Schaabs v. Woodburn Sarven Wheel Co.*, 56 Mo. 173; *Dickson v. Omaha, etc., R. Co.*, 124 Mo. 140; 27 S. W. 476; *Guthrie v. Mo. Pac. R. Co.*, 51 Neb. 746; 71 N. W. 722; *O'Connor v. North Truckee Co.*, 17 Nev. 245; 30 Pac. 882; *Winship v. Enfield*, 42 N. H. 197; *Delaware, etc., R. R. Co. v. Toffey*, 38 N. J. L. 525; *Dudley v. Camden, etc., Ferry Co.*, 45 N. J. L. 368; *Griffen v. N. Y. Central R. R. Co.*, 40 N. Y. 34; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Den. 255; *Cunan v. Warren Chemical & Mfg. Co.*, 36 N. Y. 153; *Gray v. Second Ave. R. R. Co.*, 2 J. & S. 519, *aff'd* 65 N. Y. 561; *Suydam v. Grand St. & Newton R. R. Co.*, 41 Barb. (N. Y.) 375; 17 Abb. Pr. 304; *Terry v. New York Central R. R. Co.*, 22 Barb. (N. Y.) 574; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 618; 30 L. R. A. 257; 23 S. E. 264; *Gunter v. Wicker*, 85 N. C. 310; *Schweinfurth v. Cleveland, C. & St. L. R. Co.*, 60 Ohio St. 215; 54 N. E. 89; 15 Am. & Eng. R. Cas. N. S. 73; 42 Ohio L. J. 2; *Wolf v. Lake Erie & W. R. Co.*, 55 Ohio St. 517; 45 N. E. 708; 36 L. R. A. 812; 37 Ohio L. J. 23; *Ford v. Umatilla Co.*, 15 Oreg. 813; *Drake v. Philadelphia, etc., R. R. Co.*, 51 Pa. St. 240; *Thirteenth St. R. Co. v. Boudron*, 92 Pa. St. 475; *Martin v. Southern R. Co.*, 51 S. C. 150; 28 S. E. 303; *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922; *District of Columbia v. Brewer*, 23 Wash. L. Rep. 724; 7 App. D. C. 113; *Towler v. Baltimore, etc., R. Co.*, 18 W. Va. 579.

¹⁷ *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408. See also *McPeck v. Central Vt. R. Co.*, 79 Fed. 596; *Boston & M. R. Co. v. McDuffey*, 79 Fed. 942; *Baltimore & O. R. Co. v. Hellenenthal*, 88 Fed. 120; *Gilbert v. Erie R. Co.*, 97 Fed. 751, cited in *Russell & Winslows' Syllabus Digest*, U. S. Sup. Ct. Rep. (ed. 1900), in support of above proposition; *Culbertson v. Halliday*, 50 Neb. 229; 69 N. W. 853; *Thompson v. Salt Lake Rap. Trans.*

ligence in any degree which immediately conduces to the injury is a defense,¹⁸ but that it must refer to the direct occasion of the injury and not to a remote cause of it;¹⁹ and that though the plaintiff may be guilty of negligence, yet if such negligence in no way contributed to the injury, it is no defense to an action to recover damages therefor.²⁰ In determining the question of contributory negligence, it is held that the standard, by which the conduct of the person sought to be charged therewith, is to be judged, is that of an ordinarily careful prudent man.²¹ And that when a person is approaching or is in a dangerous place, he should use his faculties to avoid injury, but that he is not required under this rule to exercise the best judgment or to make use of the most available means for his safety.²² And the mere fact that a person is at a point or place of danger is not of itself sufficient to charge him with contributory negligence in case of injury to him since he has the right to assume that any other person who may also be, or have the right to be, at such point will conduct himself in accordance with the rights of both.²³ Where contributory negligence is set up as a defense to an action for an injury received in another state, the effect to be given

Co., 16 Utah, 281; 52 Pac. 92; 40 L. R. A. 172.

¹⁸ *Bunn v. Delaware, L. & W. R. R. Co.*, 6 Hun (N. Y.), 303; *Gray v. Second Ave. R. R. Co.*, 65 N. Y. 561; 2 J. & S. 519.

¹⁹ *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459; 46 Barb. 264.

²⁰ *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88; 37 Atl. 39; *Hawks v. Winans*, 10 J. & S. 451; 74 N. Y. 609; *Travis v. Carolton*, 26 N. Y. St. R. 821; 7 N. Y. Supp. 231; *Haley v. Earle*, 30 N. Y. 208; *Martin v. Southern R. Co.*, 51 S. C. 150; 28 S. E. 303; *McCreery v. Ohio River R. Co.* (W. Va. 1901), 10 Am. Neg. Rep. 500, 506.

²¹ *Salter v. Utica & Black River R. Co.*, 88 N. Y. 42.

²² *Wright v. Boller*, 20 N. Y. St. R. 874; 3 N. Y. Supp. 742, *aff'd* 123 N. Y. 630; 33 N. Y. St. R. 1028;

25 N. E. 952. See secs. 158, 168, herein.

²³ *Newson v. New York Central R. R. Co.*, 29 N. Y. 383. See also *Gonzales v. New York & Harlem R. R. Co.*, 39 How. Pr. 407, *rev'g* 1 Sw. 506; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230, *rev'g* 31 Barb. 419; 36 Barb. 217; *Grippen v. New York Central R. R. Co.*, 40 N. Y. 34; *New York, Lake Erie, etc., R. Co. v. Atlantic Refg. Co.*, 129 N. Y. 597; 42 N. Y. St. R. 348; 29 N. E. 829; *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 23 N. Y. St. R. 692; 23 N. E. 304; *Murphy v. New York Central, etc., R. Co.*, 118 N. Y. 527; 23 N. E. 812; *Bullock v. Wilmington, etc., R. Co.*, 105 N. C. 180; 10 S. E. 988; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454.

thereto is to be determined by the law of the place and not by the law of the forum.²⁴

§ 162. Contributory negligence as defense not affected by statute giving right of action for death.—Under the Ohio statute²⁵ providing that when death is caused by such wrongful act, neglect or default as would if death had not ensued, entitle the party injured to maintain an action for damages, the one causing the injury shall be liable to the personal representatives in behalf of specified persons, it has been decided that in an action for damages contributory negligence on the part of a person killed by such wrongful act, neglect or default is a defense to an action to recover for such death.²⁶ And under the same statute it is held that the contributory negligence of the beneficiaries, but not of the administrator, constitutes a defense to such an action in behalf of themselves, but not as to beneficiaries free from negligence.²⁷ So, also, under a similar provision in the Kentucky constitution²⁸ it was held that the right which previously existed to rely upon contributory negligence as a defense to an action to recover for death resulting from an injury due to the wrongful or negligent act of another was not taken away.²⁹

§ 163. Negligence—Open and visible defects—Contributory negligence.—In a late decision of the supreme court, appellate division, of New York,³⁰ the action was brought for death occasioned by a claimed defective platform of a toboggan slide

²⁴ *Louisville & N. R. Co. v. Whitlow*, 43 S. W. 711; 41 L. R. A. 614; 10 Ky. L. Rep. 1931.

²⁵ Ohio Rev. Stat. secs. 6134, 6135.

²⁶ *Wolf v. Lake Erie & W. R. Co.*, 55 Ohio St. 517; 36 L. R. A. 812; 45 N. E. 708; 37 Ohio L. J. 23. See also *Cameron v. Great Northern Ry. Co.* (N. D.), 80 N. W. 885.

²⁷ *Wolf v. Lake Erie & W. R. Co.*, 55 Ohio St. 517; 36 L. R. A. 812; 45 N. E. 708; 37 Ohio L. J. 23. See also in this connection, *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Wymore v. Mahaska Co.*, 78 Iowa,

396; 6 L. R. A. 545; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543; *Westerberg v. Kinzua Creek & K. R. Co.*, 142 Pa. 471; *Bamberger v. Citizens St. R. Co.*, 95 Tenn. 18; 23 L. R. A. 486; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267.

²⁸ Ky. Const. sec. 241.

²⁹ *Passamaneck v. Louisville R. Co.*, 98 Ky. 195; 32 S. W. 620; 17 Ky. L. Rep. 763.

³⁰ *Barrett v. Lake Ontario Imp. Co.*, 68 App. Div. 601; 74 N. Y. Supp. 301.

from which the deceased fell ; a verdict for the plaintiff was set aside.²¹ The court said : " It may be admitted that the question whether there was evidence to sustain the jury's verdict of negligence in the construction of the platform and the railing thereon is not entirely free from doubt. It, of course, would have been a simple and inexpensive matter to have put one or even more additional railings around the platform, and to thus have made impossible an accident such as happened. It also would be very easy to say, in the light of the unfortunate occurrence which did happen, that it would have been well to have done this. This, however, is not the method by which we are to determine this question. We are rather to say whether before this accident happened there was anything which should have led the person responsible for the structure, in the exercise of ordinary care and caution and thoughtfulness, to apprehend that there was a probability of its happening. As was said in *Crafter v. Railway Co.*,²² and quoted with approval in *Larkin v. O'Neill*,²³ ' a line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence such as ought reasonably and properly to be left to a jury. It is difficult in some cases to determine where the line is to be drawn.' . . . In *Larkin v. O'Neill*,²⁴ plaintiff fell upon the stairway in defendant's store. The steps were used by a great number of people and it was claimed that they were negligently constructed, in that there were no footholds, brass plates or rubber pads thereon to keep one from slipping. The court, referring to the fact that these steps had been used daily in safety by a great number of people who passed up and down, say, with reference to plaintiff's accident : ' There is nothing in the manner in which the stairs were constructed, used, or kept from which such a result could reasonably be anticipated. It is quite probable that the accident occurred from slipping or from a misstep by the plaintiff.' In *Hart v. Grennell*,²⁵ where it was held that defendant was not liable because plaintiff had tripped and fallen over a truck handle in the latter's store, it was said that the rule of liability in such a case ' has reference

²¹ *Williams, J., dissented.*

²² *L. R. 1 C. P. 300.*

²³ *119 N. Y. 221-225; 23 N. E. 563, 564.*

²⁴ *119 N. Y. 221; 23 N. E. 563.*

²⁵ *122 N. Y. 371; 25 N. E. 354.*

to such dangers as might reasonably be anticipated by a prudent and careful man . . . the question is, could the mischief have been reasonably foreseen?' In *Burke v. Wetherbee*,⁸⁶ an accident was caused by the slipping of a hook from the bail of a car which was used in defendant's mine. The plaintiff claimed that there should have been a bolt through the hook, and there was no question that such an appliance could have been easily used and would have prevented the accident. The car had been used, however, for a long time safely, and without any such accident. In speaking of this test by actual experience, the court say: 'What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or different tests could it have been subjected to before a mine owner could use it without the imputation of negligence?' In *Dougan v. Transportation Co.*,⁸⁷ the deceased was attempting to secure his hat, which had blown off, and in so doing he slipped and went through one of the openings in the rail of defendant's boat and was drowned. There was proof that the boat had run in the same condition for a long time, and that the same situation existed upon other boats, and that no accident had occurred before. The court said: 'Had there been proof tending to show that any such danger would be apprehended by a reasonably prudent person, the evidence should have been submitted to the jury.' But it held that, in the light of the experiences had with the boat, there was no such evidence. In *Loftus v. Ferry Co.*,⁸⁸ the plaintiff's intestate, a child six years old, while passing from the ferryboat to the dock, fell through an opening, 22 inches high, between the bottom and second rail of the float or bridge over which passengers passed in going upon or leaving the boat. The proof was that this bridge had been in service five or six years, was similar to bridges of other ferries, and that no similar accident had previously happened. In holding that there was no proof of negligence upon the part of defendant, the court say: 'The rule does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter

⁸⁶ 98 N. Y. 562.

⁸⁷ 56 N. Y. 1.

⁸⁸ 84 N. Y. 455; 38 Am. Rep. 533.

no possible danger, and meet with no casualty in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this would not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child, or even a man to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty.'³⁹ Within the rules laid down by and the reasoning of these and other cases, and in view of the fact that it had safely and securely served all of the purposes for which it was designed for years, we think it was improper to permit a jury to say that this platform and railing was not constructed with reasonable care and that it was not sufficient to guard against any contingencies which could be reasonably apprehended. We think this case can clearly be distinguished from that of *Donnelly v. City of Rochester*,⁴⁰ especially relied upon by plaintiff. . . . Some of the cases to which we have already referred, like that of *Larkin v. O'Neill* and *Hart v. Grinnell*, in holding the defendant not liable, especially refer to the fact that the person injured was not exposed to any unreasonable or concealed danger; that the conditions complained of were obvious to every one as to risks, and were well known to the plaintiff, and that the defendant did not expose anyone 'to hidden or unforeseen danger.' We think also that, within the rule laid down in *Koehler v. Manufacturing Co.*,⁴¹ *Hickey v. Taaffe*,⁴² and *Buckley v. Manufacturing Co.*,⁴³ it is proper to hold that the intestate, although an infant, was to be charged with knowledge

³⁹ See also *Laffin v. Railroad Co.*, 106 N. Y. 136; 12 N. E. 599; 60 Am. Rep. 433; *Craighead v. Railroad Co.*, 123 N. Y. 391; 25 N. E. 387.

⁴⁰ 166 N. Y. 315; 59 N. E. 969.

⁴¹ 12 App. Div. 50; 42 N. Y. Supp. 182, 1105.

⁴² 105 N. Y. 26; 12 N. E. 286.

⁴³ 113 N. Y. 540; 21 N. E. 717.

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of the construction which was open to his view, and of the risks which were incident thereto, and to the use of the platform. As stated before, the conclusion reached upon these questions lead us to the belief that the order appealed from should be reversed without considering the question of defendant's liability as a lessor."

§ 164. Wilful injury—Contributory negligence no defense.

—As a general proposition it may be stated that though a person may himself have been guilty of contributory negligence, yet this is no defense to an action for damages for wilful injury.⁴⁴ And it is declared that no matter how gross the contributory negligence may be, it does not exempt one from liability for an injury wilfully and intentionally inflicted after knowledge of the peril to which one has exposed himself by such negligence.⁴⁵ But in an action to recover for the death of a person under a recent Kentucky statute, which provided for recovery, where the death resulted from "negligence or wrongful act," and which provided for punitive damages if the "act is wilful or the negligence gross," but which did not provide as prior statutes did for recovery in case of "wilful neglect," contributory negligence was held to be a defense thereto.⁴⁶

§ 165. Contributory negligence — Burden of proof.—In several of the states the rule prevails that, in an action to recover damages for an injury due to the negligence of another, the burden of proof is upon the plaintiff to show an absence of

⁴⁴ *Schumaker v. Mather*, 38 N. Y. St. R. 542; 14 N. Y. Supp. 411, aff'd 133 N. Y. 590; 44 N. Y. St. R. 754; 30 N. E. 755; *Martin v. Wood*, 23 N. Y. St. R. 457; 5 N. Y. Supp. 274; 1 *Silv. S. C.* 212, aff'd 18 N. Y. St. R. 274; 4 N. Y. Supp. 208; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343. See also *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Denver & R. G. Co. v. Spencer*, 25 Colo. 9; 10 Am. & Eng. R. Cas. N. S. 536; 52 Pac. 211; *Central R. Co. v. Newman*, 94 Ga. 560; 21 S. E. 219; *Wabash R.*

Co. v. Zerwick, 74 Ill. App. 670; *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250; *Pittsburg, etc., R. R. Co. v. Smith*, 26 Ohio St. 124; *Holstine v. Oregon, etc., R. Co.*, 8 Oregon, 163; *Barre v. Reading R. Co.*, 155 Pa. St. 170; 26 Atl. 99.

⁴⁵ *Denver & R. G. Co. v. Spencer*, 25 Colo. 9; 10 Am. & Eng. R. Cas. N. S. 536; 52 Pac. 211.

⁴⁶ *Clark v. Louisville & N. R. Co.*, 101 Ky. 34; 39 S. W. 840; 36 L. R. A. 123; 8 Am. & Eng. R. Cas. N. S. 355; 18 Ky. L. Rep. 1082.

contributory negligence.⁴⁷ In New York, where the rule is followed, it is declared that no presumption arises one way or the other as to the absence of contributory negligence, but that the burden is on the plaintiff to establish such absence, or he fails in his case.⁴⁸ So where there was sufficient evidence on the question of negligence of the defendant to have justified the submission of such question to the jury, it was held that the case was not entitled to go to the jury, there being no evidence upon the question of decedent's freedom from contributory neg-

⁴⁷ *Park v. O'Brien*, 23 Conn. 339; *Ryan v. Bristol*, 63 Conn. 26; 27 Atl. 309; *Augusta S. R. Co. v. McDade*, 105 Ga. 134; 31 S. E. 420; 12 Am. & Eng. R. Cas. N. S. 548; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; 40 N. E. 269, rev'g 60 Ill. App. 525; *Chicago, etc., R. Co. v. Levy*, 160 Ill. 385; 43 N. E. 357; *Dyer v. Talcott*, 16 Ill. 300; *West Chicago St. R. Co. v. Boeker*, 70 Ill. App. 67; *Young v. Citizens St. R. Co.*, 148 Ind. 54; 44 N. E. 927, reh'g denied in 47 N. E. 142; *Richmond Gas Co. v. Baker*, 146 Ind. 600; 39 N. E. 552; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408; 44 N. E. 311; 37 L. R. A. 378; 5 Am. & Eng. R. Cas. N. S. 500; *Penn. Co. v. Finney*, 145 Ind. 551; 42 N. E. 816; *Kauffman v. Cleveland, C. C. & St. L. R. Co.*, 144 Ind. 456; 43 N. E. 446; *Lamport v. Lake Shore & M. S. R. Co.*, 142 Ind. 269; 41 N. E. 586; *Whitesell v. Hill*, 66 N. W. 894, aff'd on reh'g in 101 Iowa, 629; 70 N. W. 750; 37 L. R. A. 830; *Benton v. Central City R. R. Co.*, 42 Iowa, 192; *Ryan v. Louisville, etc., R. Co.*, 44 La. Ann. 806; *Perkins v. Eastern, etc., R. Co.*, 29 Me. 307; *Allyn v. Boston, etc., R. R. Co.*, 105 Mass. 77. (See, however, *Walsh v. Boston & M. R. Co.*, 171 Mass. 52; 50 N. E. 453); *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236; *Mich. Cent. R. Co. v. Coleman*, 28 Mich. 440; *Central, etc., R. Co. v. Mason*, 51 Miss. 234; *Jencks v. Lehigh Valley R. Co.*, 33 App. Div. 635; 53 N. Y. Supp. 625; *Schafer v. New York*, 12 App. Div. 384; 42 N. Y. Supp. 744; *Fejdouski v. Delaware & H. Canal Co.*, 12 App. Div. 589; 43 N. Y. Supp. 84; *Dorr v. McCullough*, 8 App. Div. 327; 40 N. Y. Supp. 806; *Durkee v. Del. & H. Canal Co.*, 88 Hun, 471; 69 N. Y. St. R. 39; *Eastwood v. Retzoff Min. Co.*, 86 Hun (N. Y.), 91; 68 N. Y. St. R. 38; 34 N. Y. Supp. 196, aff'd 152 N. Y. 651; 47 N. E. 1106; *Newdell v. Young*, 80 Hun (N. Y.), 384; 61 N. Y. St. R. 824; *Sutherland v. Troy & Boston R. R. Co.*, 74 Hun (N. Y.), 162; 56 N. Y. St. R. 397; *Pearslee v. Chatham*, 69 Hun (N. Y.), 389; 52 N. Y. St. R. 695; *Whalen v. Citizens Gas Light Co.*, 151 N. Y. 70; 45 N. E. 363, rev'g 10 Misc. 281; 63 N. Y. St. R. 317; 30 N. Y. Supp. 1077; *Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369; 40 N. E. 507, aff'g 3 Misc. 224; 51 N. Y. St. R. 868; 22 N. Y. Supp. 749; *Wiwirouski v. Lake Shore & Mich. South Ry. Co.*, 124 N. Y. 420; 36 N. Y. St. R. 405; 26 N. E. 1023; *Walker v. Herron*, 22 Tex. 55.

⁴⁸ *Eastwood v. Retzoff Min. Co.*, 86 Hun (N. Y.), 91; 68 N. Y. St. R. 38; 34 N. Y. Supp. 196, aff'd 152 N. Y. 651; 47 N. E. 1106.

ligence which would have authorized a finding on such issue in favor of the decedent, and accordingly a nonsuit was ordered.⁴⁹ As to the character of evidence necessary to authorize the submission of such question to the jury, it is declared by the court in one of the New York cases that "the true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such, as if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof, touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove *prima facie* the whole issue; or the case may be such as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself. No more certain rule can be laid down."⁵⁰ And it may be said to be the rule in most of the other states which hold that the burden of proof as to contributory negligence is on the plaintiff that affirmative proof by the plaintiff of the absence of contributory negligence is not necessary or essential in all cases, since in many cases the facts and circumstances may be such that its absence may be inferred.⁵¹ In a case in Maine it is declared that if it is sought to establish the absence of contributory negligence by inference, "it must be by inference from the facts in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely

⁴⁹ *Peaslee v. Chatham*, 69 Hun (N. Y.), 389; 52 N. Y. St. R. 695. See also *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; 40 N. E. 269, rev'g 60 Ill. App. 525; *Kauffman v. Cleveland*, C. C. & St. L. R. Co., 144 Ind. 456; 43 N. E. 446.

⁵⁰ *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, aff'g 6 Duer, 633, per Denio, J. See also *Boyle v. Degnon-McLean Const. Co.*, 61 N. Y. St. R.

1043, and other New York cases cited in this section.

⁵¹ *Illinois Cent. R. R. Co. v. Cragin*, 71 Ill. 177; *Illinois C. R. Co. v. Cozby*, 69 Ill. App. 266; *Nelson v. C. R. I. Co.*, 38 Iowa, 564; *Mayo v. Boston, etc., R. R. Co.*, 104 Mass. 137; *Mynning v. Detroit, etc., R. R. Co.*, 64 Mich. 93, and cases cited in first note in this section.

to be careful in danger."⁵² While it is held that no presumption arises one way or the other as to the absence of contributory negligence, yet it is also held in New York that the law will always presume that every man is desirous of preserving his life and keeping his body from harm.⁵³

§ 166. Contributory negligence—Burden of proof—Continued.—While, as we have stated in the preceding section, in several states, the rule is that the burden of the proof is upon the plaintiff to show the absence of contributory negligence, yet this is not the rule which prevails in the majority of the states and in the federal courts, where it is held that the question of contributory negligence is a matter of defense, the burden of supporting which is upon the defendant.⁵⁴ So in an

⁵² *McLane v. Perkins* (Maine, 1898), 42 Atl. 256.

⁵³ *Eastwood v. Retzoff Min. Co.*, 86 Hun (N. Y.), 91; 68 N. Y. St. R. 38; 34 N. Y. Supp. 196, aff'd 152 N. Y. 651; 47 N. E. 1106.

⁵⁴ *Chesapeake & O. R. Co. v. Steele* (C. C. App. 6th C.), 84 Fed. 93; 54 U. S. App. 550; 29 C. C. A. 81; *Fitchburg R. Co. v. Nichols* (C. C. App. 1st C.), 50 U. S. App. 297; 29 C. C. A. 500; 85 Fed. 945; *Toledo, P. & W. R. Co. v. Chisholm* (C. C. App. 8th C.), 49 U. S. App. 700; 27 C. C. A. 663; 83 Fed. 652; *Union P. R. Co. v. O'Brien*, 161 U. S. 451; 40 L. Ed. 766; 16 Sup. Ct. Rep. 618; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; 13 Sup. Ct. R. 557; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Railroad Co. v. Gladman*, 15 Wall. (U. S.) 401; *Western Ry. of Alabama v. Williamson*, 114 Ala. 131; 21 So. 827; *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161; 20 So. 317; *Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464; *Little Rock, etc., R. Co. v. Eubanks*, 48 Ark. 460; 3 S. W. 808; *Texas, etc., Ry. Co. v. Orr*, 46 Ark. 182; *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *Denver, etc., R. Co.*

v. Ryan, 17 Colo. 98; 28 Pac. 79; *Jefferson v. Brady*, 4 Houst. (Del.) 626; *Louisville, etc., R. Co. v. Yniestra*, 21 Fla. 700; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; 11 Pac. 408; *Paducah, etc., R. R. Co. v. Hoehl*, 12 Bush (Ky.), 41; *Mo. Pac. Ry. Co. v. McCally*, 41 Kan. 639; *Lexington, etc., County Min. Co. v. Stephens*, 20 Ky. L. Rep. 696; 47 S. W. 321; *Baltimore, etc., R. R. Co. v. State*, 60 Md. 449; *Frech v. Philadelphia, etc., R. R. Co.*, 39 Md. 574; *Michigan v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Hocum v. Weitherich*, 22 Minn. 152; *Lane v. Missouri P. R. Co.*, 132 Mo. 4; 33 S. W. 645; *Thompson v. North Mo. R. R. Co.*, 51 Mo. 190; 11 Am. Rep. 443; *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356; *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372; 43 Pac. 81; *Omaha St. R. Co. v. Martin*, 48 Neb. 65; 66 N. W. 1007; 4 Am. & Eng. R. Cas. N. S. 1; *New Jersey Ex. Co. v. Nichols*, 32 N. J. L. 166; *Moore v. Central R. Co.*, 24 N. J. L. 268; *Cameron v. Great Northern R. Co.*, 8 N. D. 124; 77 N. W. 1016; 12 Am. & Eng. R. Cas. N. S. 520; 5 Am. Neg. Rep. 454; *Wood v. Bartholamew*, 122 N. C. 177; 29 S. E. 959;

action to recover damages for the death of a person upon a railroad track at a point where he had a right to go upon the track, it was held that after having given proof of negligence on the part of the railroad company sufficient to account for the accident without any fault on the part of the deceased, the plaintiff was not under the burden of showing lack of contributory negligence.⁵⁵ But if in such an action contributory negligence is disclosed by the evidence of the plaintiff, or may be fairly inferred from the circumstances of the case, then the burden may be shifted upon the plaintiff to show the lack of such negligence.⁵⁶ If, however, there is no evidence tending to show contributory negligence, it is held that the presumption is that due care was exercised.⁵⁷ Thus it was so held where there was no evidence of how an accident occurred.⁵⁸ And where there was no eyewitness to a railroad accident by which a person met his death, it was held that it would be presumed that due care was exercised by the deceased at the time of the accident until the contrary was made to appear by the evidence.⁵⁹ The

Norton v. North Carolina R. Co., 122 N. C. 910; 29 S. E. 886; White v. Suffolk & Carolina R. R. Co. (N. C. 1897), 5 Am. Neg. Rep. 457; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Robinson v. Gary, 28 Ohio, 241; Ford v. Umatilla Co., 15 Oreg. 313; Hays v. Gallagher, 72 Pa. St. 136; Penn. R. R. Co. v. Weber, 76 Pa. St. 157; Cassidy v. Angell, 12 R. I. 447; Carter v. Columbia, etc., R. Co., 19 S. C. 22; Danner v. South Carolina R. R. Co., 4 Rich. (S. C.) 329; Texas, etc., R. R. Co. v. Murphy, 46 Tex. 356; Walker v. Westfield, 39 Vt. 246; Southern R. Co. v. Bryant, 95 Va. 212; 28 S. E. 183; Kimball v. Friend, 95 Va. 125; 27 S. E. 901; 8 Am. & Eng. R. Cas. N. S. 451; 3 Va. Law Reg. 650; Northern Pac. R. R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. 32; Johnson v. Chesapeake, etc., R. Co., 36 W. Va. 73; 14 S. E. 432; Hoyt v. Hudson, 41 Wis. 105; 22 Am. Rep. 714.

⁵⁵ Toledo P. & W. R. Co. v. Chia-

holm (C. C. App. 8th C.), 49 U. S. App. 700; 83 Fed. 652; 27 C. C. A. 663.

⁵⁶ Southern R. Co. v. Bryant, 95 Va. 212; 28 S. E. 183; Kimball v. Friend, 95 Va. 125; 27 S. E. 901; 8 Am. & Eng. R. Cas. N. S. 451; 3 Va. Law Reg. 650; Durrell v. Johnson, 31 Neb. 796; 48 N. W. 890.

⁵⁷ Norton v. North Carolina R. Co., 122 N. C. 910; 29 S. E. 886. See also Chicago, etc., R. R. Co. v. Sanderson, 174 Ill. 495; Salyers v. Monroe, 104 Iowa, 74; Northern Cen. R. Co. v. State, 29 Md. 420; Mynning v. Detroit, etc., R. R. Co., 64 Mich. 95; Flynn v. Kansas City, etc., R. R. Co., 78 Mo. 195; Cameron v. Great Northern R. R. Co., 8 N. D. 124; 77 N. W. 1016; 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. N. S. 520; Schum v. Penn. R. R. Co., 107 Pa. St. 8; Cassidy v. Angell, 12 R. I. 447.

⁵⁸ Schum v. Penn. R. R. Co., 107 Pa. St. 8.

⁵⁹ Cameron v. Great Northern R.

rule that the question of contributory negligence is a matter of defense, the burden of supporting which rests upon the defendant is not varied, it is declared, by the fact that plaintiff alleges that he was in the exercise of due care or by any other state of the pleadings.⁶⁰ Although the rule adopted and followed by the Massachusetts courts is that followed by the minority of the states,⁶¹ yet in that state it is held in a late case that, in an action to recover damages for death caused by negligence under a Massachusetts statute,⁶² the burden is upon a defendant railroad company to show that the deceased was guilty of gross or wilful negligence, and that such negligence contributed to the injury, and that plaintiff need not negative such negligence.⁶³

§ 167. Contributory negligence—Burden of proof—Conclusion.—In the preceding sections we have stated the two different rules which prevail as to the burden of proof in connection with the question of contributory negligence. It will be noticed that in several of those states which hold that the burden to establish its absence is on the plaintiff, it is also declared that the law will always presume that every man is desirous of preserving his life or his body from injury until the contrary is proved, and that the absence of contributory negligence may in many instances be inferred from the facts and circumstances in each case, and that where it may be inferred, affirmative proof of its absence is not necessary. In those states where the opposite rule prevails, it is generally held that due care will always be presumed until the contrary is proved, but that contributory negligence may be inferred from the facts in a case, without direct proof thereof, thus casting the burden on the plaintiff to show its absence. The prevailing rule to-day as clearly supported by the great weight of authority is that the question of contributory negligence is a matter of defense, and that in the absence of facts and circumstances from which its

R. Co., 8 N. D. 124; 77 N. W. 1016;
5 Am. Neg. Rep. 454; 12 Am. & Eng.
R. Cas. N. S. 520.

⁶⁰ Fitchburg R. Co. v. Nichols (C.
C. App. 1st C.), 50 U. S. App. 297;
85 Fed. 945; 29 C. C. A. 500.

⁶¹ See preceding section.

⁶² Mass. Pub. Stat. § 213.

⁶³ Walsh v. Boston & M. R. Co.,
171 Mass. 52; 50 N. E. 453.

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existence may be inferred, the burden is on the defendant to show its existence by affirmative proof.

§ 168. **Doctrine of comparative negligence.**—In a recent Wisconsin case,⁶⁴ the court⁶⁵ says that the doctrine of comparative negligence does not prevail in that state and adds: "The doctrine of this court like that of all courts that entirely discountenance comparative negligence, is that contributory negligence of the plaintiff, however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been. In this we do not refer to wilful misconduct of a wrongdoer, which has come to be spoken of as gross negligence, meaning however intent, actual or constructive, to do the injury, and not negligence at all, strictly so-called. The doctrine of contributory negligence applied here has the sanction of the common law from time immemorial, the support of most of the courts and standard text-writers, and half a century of the adjudications of this court. To change it otherwise than by legislative enactment would be judicial usurpation. Therefore, it is idle to urge upon our attention authorities that cannot be applied except by such transgression. Cases supporting each of the lines of comparative negligence and the other rules to which we have referred, are presented here as bearing on the plaintiff's right to recover, and many more might be found, especially in the inferior appellate courts of some of the states. Upon the faith of such authorities it is believed much money has been uselessly expended and false, unattainable hopes built up. Other courts have found it necessary, by vigorous language, to stay the tendency of such mischief. In a very recent case in Missouri the court used these emphatic words: 'There is no comparative negligence in this state. The rule that the negligence of the plaintiff (want of ordinary care was undoubtedly meant) which contributed directly to the cause of the injury will prevent a recovery, is without exception or qualification.' The court was speaking of where recovery is sought on the ground of defendant's want of ordinary care."⁶⁶

⁶⁴ *Tesch v. Milwaukee Elec. R. & L. Co.*, 108 Wis. 593; 84 N. W. 823.

⁶⁵ Per Marshall, J.

⁶⁶ *Hogan v. Citizens Railway Co.*,

§ 169. Error of judgment—Sudden emergency—Contributory negligence.—If a person owing to the negligence of another is placed in a position of peril where he is obliged instantly to choose a line of conduct in the hope of escaping the impending danger, and he makes such a choice as a man of ordinary prudence would make under similar circumstances, and is injured thereby, the fact that if he had chosen another line of action the injury might have been avoided will not render him guilty of contributory negligence.⁶⁷ Thus it was so held where a

150 Mo. 36, 51 S. W. 473. Doctrine of comparative negligence does not exist in Kentucky. *Sandy River C. C. Co. v. Candill* (Ky. App. 1901), 60 S. W. 180. Not error to charge "If the defendant was less negligent than the plaintiff, plaintiff could not recover." *Willingham v. Macon & B. R. Co.* (113 Ga. 374), 38 S. E. 843, approved in *Brunswick & W. R. Co. v. Wiggins* (Ga. 1901), 39 S. E. 551. where the court per Little, J., says "as a matter of law, the plaintiff cannot recover for injuries inflicted by the negligence of an agent of a railroad company in the operation of its trains, if both the agent and the person injured are equally negligent at the time the injury was sustained. Section 2322 of the Civil Code declares that no person shall recover damages from a railroad company for injuries to himself where the same is caused by his own negligence, but if the complainant and the agents of the company are both at fault, the former may recover, but the damages may be diminished by the jury in proportion to the amount of default attributable to him." See also opinion in sec. 158, herein, and note 22, thereto. If injury is inflicted wilfully, contributory negligence does not preclude recovery. *Bolin v. Chicago, St. P. M. & O. R. Co.*, 108 Wis. 333; 84 N. W. 446.

⁶⁷ *Southwestern R. Co. v. Paulk*, 24

Ga. 356; *Smith v. Wrightsville, etc., R. R. Co.*, 83 Ga. 671; 10 S. E. 361; *Peoria, etc., R. Co. v. Rice*, 144 Ill. 227; 33 N. E. 951; *Muldowney v. Illinois, etc., R. Co.*, 36 Iowa, 462; *Knapp v. Sioux City R. Co.*, 65 Iowa, 91; 21 N. W. 198; *Barton v. Springfield*, 110 Mass. 131; *Richfield v. Mich. C. R. Co.*, 110 Mich. 406; 68 N. W. 218; 3 Det. L. N. 425; *Chicago, etc., R. Co. v. Miller*, 46 Mich. 532; 9 N. W. 841; *Benoit v. Troy & Lansingburgh R. R. Co.*, 154 N. Y. 223; 48 N. E. 524, rev'g 9 App. Div. 622; 40 N. Y. St. R. 1140; *Wynn v. Central Park, North & East River R. R. Co.*, 133 N. Y. 575; 44 N. Y. St. R. 673; 30 N. E. 721; *Twomley v. Railroad Co.*, 69 N. Y. 158; *Dyer v. Erie R. R. Co.*, 71 N. Y. 228; *Read v. Brooklyn H. R. Co.*, 32 App. Div. (N. Y.) 503; 53 N. Y. Supp. 209; *Floettel v. Johnson Engineering Co.*, 19 App. Div. (N. Y.) 136; 45 N. Y. Supp. 980; *Heath v. Glens Falls, Sandy Hill & Fort Edward St. Ry. Co.*, 90 Hun (N. Y.), 560; 71 N. Y. St. R. 29; *Cowen v. Knickerbocker Ice Co.*, 6 N. Y. St. R. 612, aff'd 112 N. Y. 664; 20 N. Y. St. R. 978; 20 N. E. 413; *Quill v. New York Cent. R. R. Co.*, 16 Daly (N. Y.), 313; 11 N. Y. Supp. 80; 32 N. Y. St. R. 612; *Blackwell v. Lynchburg, etc., R. Co.*, 111 N. C. 151; 16 S. E. 12; *Vallo v. United States Exp. Co.*, 147 Pa. St. 404; 23 Atl. 594; *Gibbons v. Wilkes-*

woman, who was a passenger in a car, upon seeing the danger of an impending collision, arose from her seat with the intention of escaping from the car, and was thrown out and injured.⁶⁸ And again, where a person was, by the negligence of those in charge of a locomotive placed in a position of danger, and in rising from the seat of his wagon was struck by the engine and killed, while if he had remained seated he would have escaped uninjured.⁶⁹ So, also, where horses commenced to run away and the driver in attempting to direct their course, though exercising his best judgment, erred, it was held to be an error of judgment, and that there was no ground for the imputation of negligence.⁷⁰ The rule above stated, however, is held not to apply to a person who, by his own negligence, has placed himself in a position of peril.⁷¹

§ 170. Error of judgment—Sudden emergency—Negligence.—In many cases also where it is sought to charge a person with negligence, the fact that the person sought to be charged therewith was confronted with imminent peril and made a mistake of judgment will relieve him of such charge. This may frequently happen in the case of those in charge of cars and other public and private conveyances. Thus in the case of motormen in charge of electric cars, the rule is that where a motorman in the presence of imminent danger has two or more lines of action open to him, and he chooses one of them in good faith, the fact that it may subsequently appear that by the adoption of another line of action the danger might have been better avoided will not of itself constitute negligence on

Barre, etc., R. R. Co., 155 Pa. St. 279; 26 Atl. 417; International & G. N. R. Co. v. Sein, 11 Tex. Civ. App. 386; 33 S. W. 558.

⁶⁸ Heath v. Glens Falls, Sandy Hill & Fort Edward St. Ry. Co., 90 Hun (N. Y.), 560; 71 N. Y. St. R. 29.

⁶⁹ International & G. N. R. Co. v. Sein, 11 Tex. Civ. App. 386; 33 S. W. 558. See also Smith v. New York Central & H. R. R. Co., 4 App. Div. (Y. Y.) 493; 38 N. Y. Supp. 666; Wiley v. Long Island R. R. Co.,

76 Hun (N. Y.), 29, aff'd 144 N. Y. 717, cases of attempting to cross railroad tracks to escape threatened peril.

⁷⁰ Benoit v. Troy & Lansingburgh R. R. Co., 154 N. Y. 223, rev'g 9 App. Div. 622; 40 N. Y. St. R. 1140.

⁷¹ Richfield v. Michigan C. R. Co., 110 Mich. 406; 68 N. W. 218; 3 Det. L. N. 425; Austin, etc., R. Co. v. Beatty, 73 Tex. 592; 11 S. W. 858; Baltzer v. Chicago & R. Co., 83 Wis. 459; 53 N. W. 885.

his part, or render the company liable.⁷² So in a case in New York it was declared that where an employee of a railroad is confronted with a sudden emergency, the failure on his part to exercise the best judgment possible does not establish lack of care and skill.⁷³ So where a motorman, after having started his car across a street, saw a runaway horse coming towards the track, and he had but a brief instant to decide on what course to pursue, it was held that though he may have erred in judgment in continuing to cross the street, yet this of itself did not constitute negligence rendering the company liable.⁷⁴

§ 171. Contributory negligence—Stop, look and listen.—

"In some jurisdictions the mere failure to stop, look and listen by one who is about to cross a railroad track is negligence per se, and this is true notwithstanding that at the place where the person was about to cross, there is imposed upon the railroad company, by statute or otherwise, the duty of giving signals as to the approach of trains to such places. In other jurisdictions it is held that the mere failure to stop, look and listen will not amount to negligence per se, but the question whether it is such negligence as will defeat a recovery is one of fact, to be determined by a jury after taking into consideration all of the circumstances of the case," and the court adds that even in certain jurisdictions referred to in the opinion, "the rule is settled that

⁷² Joyce on Electric Law (ed. 1900), sec. 574, citing *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; 50 N. E. 277, rev'g 89 Hun, 609; *Bittner v. Crosstown St. Ry. Co.*, 153 N. Y. 76; 46 N. E. 104; 1 Am. Neg. Rep. 642, rev'g 12 Misc. (N. Y.) 514; 67 N. Y. St. R. 367; 33 N. Y. Supp. 672; *Phillips v. Peoples' Pass. R. Co.*, 190 Pa. St. 222; 42 Atl. 686; 43 Wkly. N. of Cas. 531; 5 Am. Neg. Rep. 719; *Lockwood v. Belle City R. Co.*, 92 Wis. 97; 65 N. W. 866; *Bishop v. Belle City R. Co.*, 92 Wis. 139; 65 N. W. 733.

⁷³ *Wynn v. Central Park, North & East River R. R. Co.*, 133 N. Y. 575; 44 N. Y. St. R. 673; 30 N. E. 721. In this case it appeared that while

descending a down grade the brake chain on a car broke causing the car to descend of its own weight and to collide with another car, and that the driver remained on his car until it was within four feet of the other, when he jumped. The court held that it appearing that the driver having used his best judgment and having done all that could have been done, it was error to leave the question to the jury to determine whether the car had been managed with the care and skill required by law.

⁷⁴ *Phillips v. Peoples' Pass. R. Co.*, 190 Pa. St. 222; 42 Atl. 686; 43 Wkly. N. of Cas. 531; 5 Am. Neg. Rep. 719.

one about to cross a railroad track must use his senses in a way that an ordinarily prudent person would under similar circumstances use them, in order to determine whether it would be safe to cross at that time and place; and this is true notwithstanding the company may be by law required to give signals, slacken speed, or do such other acts as would, if faithfully performed, render improbable, if not impossible, injury to any one crossing the track.”⁷⁵ “There has been an endeavor in a large number of cases, in behalf of electric street railway companies, to obtain an enforcement with the same degree of strictness of the rule which requires persons about to cross the tracks of a steam railroad to ‘stop, look and listen,’ and making failure to do so negligence per se. The courts, however, have not inclined to a strict application of this rule in the case of electric railway tracks, owing to the difference in the character of the roads, their rights in reference to their tracks, and the general conditions affecting and surrounding their operation. An electric street railway is within the purposes for which a street is dedicated or taken, while a steam railroad is not. The right of the company in the street is merely a right in common with that of the public. It possesses no proprietary interest in or to the right of way, and the cars are not run at such a high rate of speed and are more easily and quickly stopped. On account of these distinctions and differences in the character and operation of the roads, the rule that persons must ‘stop, look and listen’ before crossing the tracks of a steam railroad does not apply as strictly in the case of crossing the tracks of an electric street railway.”⁷⁶

⁷⁵ *Western & Atlantic R. Co. v. Ferguson* (Ga.), 39 S. E. 306; 10 Am. Neg. Rep. 230, per Cobb, J. See note as to “stop, look, and listen,” 9 Am. Neg. Rep. 408-416. See also notes, 11 L. R. A. 385; 9 L. R. A. 157; 7 L. R. A. 316; notes, 90 Am. Dec. 780-787.

⁷⁶ *Clark v. Bennett*, 123 Cal. 275; 55 Pac. 908; 5 Am. Neg. Rep. 299; *Davidson v. Denver Tramway Co.*, 4 Col. App. 283; 4 Am. Elec. Cas. 534; *Capital Traction Co. v. Lusby*, 26 Wash. L. Rep. 163; 12

App. D. C. 295; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408; 44 N. E. 311, 37 L. R. A. 378; 5 Am. & Eng. R. Cas. N. S. 500; *Orr v. Cedar Rapids & M. C. Ry. Co.* (Iowa, 1895), 5 Am. Elec. Cas. 445; *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30; 6 Am. Elec. Cas. 495; *Hohngren v. St. Paul City Ry. Co.* (Minn. 1895), 5 Am. Elec. Cas. 499; *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395; 4 Am. Elec. Cas. 481; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 6 Am. Elec. Cas. 616;

§ 172. *Imputed negligence.*—In many cases, although an injured party may be guilty of no direct act of negligence on his part contributing to the injury, yet by reason of some relation existing between such injured party and a third person, an act of such third person contributing to the injury may be imputed to the person injured so as to prevent the recovery of damages. This question of imputable negligence frequently arises where a person riding in a vehicle or conveyance driven by another is injured owing to some negligence or carelessness on the part of the person driving. In these cases, in order to impute the negligence of the driver to the person injured, it is necessary that the latter must have taken some part in the control or management of the vehicle, such as directing the management of the horse or instructing the driver in this particular.

Consolidated Traction Co. v. Behr, 59 N. J. L. 477; 37 Atl. 142; 2 Am. Neg. Rep. 189; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577; 37 Atl. 135; 2 Am. Neg. Rep. 192; *Brozek v. Steinway Ry. Co.*, 10 N. Y. App. Div. 360; 6 Am. Elec. Cas. 542; *Ehrisman v. East Harrisburg City Pass. Ry. Co.*, 150 Penn. St. 180; 4 Am. Elec. Cas. 486; *Citizens' Rapid Trans. Co. v. Seigrist*, 96 Tenn. 119; 6 Am. Elec. Cas. 583; *Hall v. Ogden City St. Ry. Co.*, 13 Utah, 243; 44 Pac. 1046; 6 Am. Elec. Cas. 598; 4 Am. & Eng. R. Cas. N. S. 77. See *Joyce on Elec. Law* (ed. 1900), secs. 625-650 where this subject is exhaustively discussed in connection with electric railroads and where the conclusion is as follows: "We think we are justified in stating the rule that it is the duty of a person about to cross the tracks of an electric street railway to look and listen for approaching cars, and that failure to do so is *prima facie* contributory negligence, not necessarily precluding recovery, but dependent as to its effect upon the circumstances of each particular case.

Those operating electric railways are held to the exercise of ordinary care to prevent injury to persons crossing their tracks, that is, a degree of care such as an ordinarily prudent man would exercise, under the same circumstances, commensurate with the necessities arising from the use of the instrument operated, the possibility of danger, and the circumstances of each particular case. They have no right to recklessly run down pedestrians, or persons in vehicles, who may be crossing their tracks. The latter have an equal right with the company to the use of the portion of the street occupied by the tracks, subject only to the limitation that they must not necessarily obstruct the passage of the cars. Though a person may by his own negligence, be in a position of danger on the tracks of an electric street railway, yet his act will not preclude recovery, if those in charge of the car, after having become aware of his danger, could, by proper care and diligence, have avoided the injury." See *Russell v. Minneapolis St. R. Co.* (Minn. 1901), 86 N. W. 346.

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If he has not so done, then whether he be in a public vehicle as a passenger or in a private vehicle riding upon the invitation of another, the rule, as clearly supported by the authorities, is that no negligence on the part of the driver will be imputed to him.⁷⁷ He must also exercise due care himself to avoid injury and is not relieved from the consequences of his failure to do so,⁷⁸ and if he participates in the negligence of the driver he will be chargeable with such negligence so as to prevent recovery of damages for any injury sustained.⁷⁹ So, also, will the negligence of the driver be imputed to him if, with a knowledge of the

⁷⁷ *Union P. R. Co. v. Lapsley* (C. App. 8th C.), 51 Fed. 174; 4 U. S. App. 542; 2 C. C. A. 149; 16 L. R. A. 800; 32 Am. L. Reg. 373; *Georgia P. R. Co. v. Hughes*, 87 Ala. 610; 6 So. 413; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163; 4 Pa. 1165; *Roach v. Western & A. R. Co.*, 93 Ga. 785; 21 S. E. 67; *Carnis v. Erwin*, 59 Ill. App. 555; *Brannan v. Kokomo, etc., R. Co.*, 115 Ind. 115; 17 N. E. 202; *Larkin v. Burlington, etc., R. Co.*, 85 Iowa, 492; 52 N. W. 480; *Cahill v. Cincinnati, etc., Ry. Co.*, 92 Ky. 345; *Randolph v. O'Riordan*, 155 Mass. 331; 29 N. E. 583; *Alabama & V. R. Co. v. Davis*, 69 Miss. 444; 13 So. 693; *Dickson v. Missouri P. R. Co.*, 104 Mo. 491; 16 S. W. 381; *Noyes v. Hoscawen*, 64 N. H. 361; 10 Atl. 690; *Consol. Tract. Co. v. Behr*, 59 N. J. L. 477; 37 Atl. 142; *Consol. Tract. Co. v. Holmark*, 60 N. J. L. 456; 38 Atl. 684; 9 Am. & Eng. R. Cas. N. S. 370, aff'g 59 N. J. L. 297; 36 Atl. 100; *Kleiner v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 191; 55 N. Y. Supp. 394; *De Loge v. New York Cent. & H. R. R. Co.*, 92 Hun (N. Y.), 149; 71 N. Y. St. R. 720; *McCallum v. Long Island R. Co.*, 38 Hun (N. Y.), 96; 103 N. Y. 686; *Masterson v. New York Central R. Co.*, 84 N. Y. 247; *Pettingill v. Town of Olean*, 48 N. Y. St. R. 96; 20 N. Y. Supp. 367, aff'd 141 N. Y. 573; *McCormack v.*

Nassau Elec. R. Co., 18 App. Div. (N. Y.) 33; 46 N. Y. Supp. 230, denying reh'g 16 App. Div. (N. Y.) 24; 44 N. Y. Supp. 684; *Robinson v. New York Central R. R. Co.*, 66 N. Y. 11; 65 Barb. 146; *Kessler v. Brooklyn Heights R. R. Co.*, 3 App. Div. (N. Y.) 426; 74 N. Y. St. R. 140; 38 N. Y. Supp. 799; *Strauss v. Newburgh Elec. Ry. Co.*, 6 App. Div. (N. Y.) 264; 39 N. Y. Supp. 998; *Gaylor v. Syracuse, B. & N. Y. R. R. Co.*, 105 N. Y. 647; 23 Wkly. Dig. 396; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *St. Clair St. R. Co.; Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Carr v. Easton City*, 142 Pa. St. 139; 21 Atl. 822; *Borough of Carlisle v. Brisbane*, 113 Pa. St. 554; 6 Atl. 372; *Markham v. Houston, etc., Nav. Co.*, 73 Tex. 247; 11 S. W. 131; *New York, etc., R. Co. v. Cooper*, 85 Va. 939. See also *Joyce on Electric Law* (ed. 1900), sec. 596. But see *Omaha, etc., R. Co. v. Talbot*, 48 Neb. 627; 67 N. W. 569; *Ritger v. Milwaukee*, 99 Wis. 190; 74 N. W. 15.

⁷⁸ *Bergold v. Nassau Elec. R. Co.*, 30 App. Div. (N. Y.) 438; 52 N. Y. Supp. 11; *Johnson v. Superior Rapid Trans. R. Co.*, 91 Wis. 233; 64 N. W. 753.

⁷⁹ *De Loge v. Hudson & New York Central & H. R. R. R. Co.*, 92 Hun (N. Y.), 149; 71 N. Y. St. R. 720.

danger about to be incurred, he neither objects nor makes any effort to avoid it.⁸⁰ Thus it was so held where a person was riding in another's conveyance at the latter's request and the owner drove so recklessly that the other should have perceived his carelessness but failed to do so or to make any remonstrance. Under the conditions in this case it was held that there could be no recovery of damages for an injury sustained by reason of collision with a railroad train.⁸¹ And it is held that a passenger in a public conveyance may be chargeable with the negligence of the driver, where he has exercised control over such driver beyond the mere giving of directions as to his place of destination if, as a result of such control, the injury results therefrom either in whole or in part.⁸² But the negligence of the driver will not be imputed to him merely because of suggestions as to the line of route to be taken,⁸³ or of a caution to "ride slow" in approaching a crossing.⁸⁴

§ 173. Imputed negligence—Cases generally.—Where a person in an unconscious condition without any fault of his own was placed in a wagon, the negligence of the driver was held not imputable to him so as to prevent recovery for injuries caused both by the negligence of the driver and the condition of the highway.⁸⁵ So negligence of a gripman on a cable car in crossing the tracks of another road at excessive speed is not imputable to the conductor so as to prevent recovery by him for injuries sustained;⁸⁶ nor is the negligence of the driver of a hose cart imputable to a fireman riding on the cart;⁸⁷ nor of one policeman, detailed to drive an ambu-

⁸⁰ *Miller v. Louisville, etc., R. R. Co.*, 128 Ind. 97; 27 N. E. 339; *Donnelly v. Brooklyn City R. R.*, 109 N. Y. 16; 14 N. Y. St. R. 29; 15 N. E. 733; 28 W. D. 250; *Brickell v. New York Central & H. R. R. Co.*, 120 N. Y. 290, aff'g 12 N. Y. St. R. 450.

⁸¹ *Smith v. New York Central, etc., R. R. Co.*, 38 Hun (N. Y.), 33.

⁸² *Baltimore and O. R. Co. v. Adams*, D. C. App. 25 Wash. L. Rep. 167; 1 App. D. C. 97.

⁸³ *Zimmerman v. Union Ry. Co.*

(App. Div. N. Y. 1898), 4 Am. Neg. Rep. 665.

⁸⁴ *Bergold v. Nassau Elec. R. Co.*, 30 App. Div. (N. Y.) 438; 52 N. Y. Supp. 11.

⁸⁵ *Foley v. East Flamborough Twp.*, 26 Ont. App. 43.

⁸⁶ *Minster v. Citizens Ry. Co.*, 53 Mo. App. 276.

⁸⁷ *Houston City St. R. Co. v. Richart*, 87 Tex. 539; 29 S. W. 1040, rev'g 27 S. W. 918.

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lance, to another riding on the inside of same;⁸⁸ nor can the negligence of a tugboat, acting as an independent contractor in the towing of a vessel, and having entire control of her movements, be charged to the vessel.⁸⁹ So, also, where a person was with others in a rowboat which was run down by a schooner, it was held that the negligence of the others could not be imputed to deceased, where it did not appear that he was in any way responsible for their conduct.⁹⁰

§ 174. Imputed negligence—Husband and wife.—In the case of a woman riding with her husband, it has been held that she is not chargeable with his negligence where they are not engaged in a joint enterprise and he is not her servant or agent,⁹¹ unless she does some act to encourage his carelessness.⁹² She is not, however, excused from using reasonable care herself. So in crossing railroad tracks she should use reasonable and prudent effort herself to see that the crossing is safe, and if she observes that her husband is about to commit a negligent act in driving across such tracks, her silence may not, as a matter of law, constitute negligence, but the inferences arising from such facts will present a question for the jury to determine.⁹³ And this may be said to be the general rule as to the right of a wife to recover for injuries sustained under such circumstances, except in those states where enabling statutes have not materially changed the status of the wife from her position under the common law, or where the common-law form of action is still maintained.⁹⁴ In an action by the husband and wife, however, it is

⁸⁸ *Bailey v. Jourdan*, 18 App. Div. (N. Y.) 387; 46 N. Y. Supp. 399.

⁸⁹ *Vessel Owners Towing Co. v. Wilson*, 11 C. C. A., 308; 63 Fed. 626.

⁹⁰ *Reich v. Peck*, 83 Hun (N. Y.), 214; 63 N. Y. St. R. 806; 31 N. Y. Supp. 391, aff'd 152 N. Y. 640; N. E. 1151.

⁹¹ *Finley v. Chicago, M. & St. P. R. Co.*, 71 Minn. 471; 74 N. W. 174.

⁹² *Platz v. Cohoes*, 24 Hun (N. Y.), 101.

⁹³ *Hoag v. New York Central R.*

Co., 111 N. Y. 199; 19 N. Y. St. R. 80; 18 N. E. 648, rev'g 21 Wkly. Dig. 506.

⁹⁴ So this rule prevails in the following states: Louisville, etc., *R. Co. v. Creek*, 130 Ind. 139; 29 N. E. 481; *Reading v. Telfer*, 57 Kan. 798; *Finley v. Chicago, M. & St. P. R. R. Co.* 71 Minn. 471; N. W. 474; *Hoag v. New York Central R. R. Co.*, 111 N. Y. 199; 19 N. Y. St. R. 80; 18 N. E. 648, rev'g 21 Wkly. Dig. 506; *Hedges v. Kansas City*, 18 Mo. App. 26. But see following states where

held that the contributory negligence of the husband will be a defense to the action.⁵⁵ In a case in the federal courts it has been declared that although the statutes may have emancipated a woman from many common-law disabilities and relieved the husband from responsibility for civil injuries committed by her, yet contributory negligence on the part of the wife may constitute a defense to an action by the husband for the loss of her society and the expense of her cure.⁵⁶

§ 175. Contributory negligence of parent as affecting recovery for injury to child—Recovery by parent.—In an action by a parent, to recover damages for his own use and benefit, where his child has been injured, the contributory negligence of the parent or of an agent entrusted by him with the custody of such child, will be a defense to the action⁵⁷ as will also the

the wife may not recover: *Peck v. New York, N. H. & H. R. R. Co.*, 50 Conn. 379; *Yahn v. Ottumwa*, 60 Iowa, 429; *Davis v. Guarnieri*, 45 Ohio St. 470; *Nanticoke v. Warne*, 106 Pa. St. 373; *Carlisle v. Sheldon*, 38 Vt. 440.

⁵⁵ *Penn. R. Co. v. Goodenough*, 55 N. J. L. (26 Vroom) 577; 28 Atl. 3; 22 L. R. A. 460.

⁵⁶ *Chicago, B. & Q. R. R. Co. v. Honey* (C. C. App. 8th C.), 12 C. C. A. 190; 63 Fed. 39; 26 L. R. A. 42. See, however, *Honey v. Chicago, B. & Q. R. R. Co.*, 59 Fed. 423.

⁵⁷ *Alabama, etc., R. R. Co. v. Burgess*, 116 Ala. 509; 22 So. 913; *Daley v. Norwich, etc., R. R. Co.*, 26 Conn. 591; *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370; *Chicago v. Hesing*, 83 Ill. 204; *Westbrook v. Mobile, etc., R. R. Co.*, 66 Miss. 560; *Hogan v. Citizens R. Co.*, 150 Mo. 36; 51 S. W. 473; *Wiese v. Remme*, 140 Mo. 289; 41 S. W. 797; *Juskowitz v. Dry Dock, E. B. & B. R. Co.*, 53 N. Y. Supp. 992; 25 Misc. 64; *Bellefontaine, etc., R. Co. v. Snyder*, 18 Ohio St. 399; *Cincinnati v. Gregory*, 3 Ohio N. P. 142; 1 Ohio L. D. 223; *Johnson*

v. Reading City Pass. R. Co., 160 Pa. St. 647; 28 Atl. 1001; 34 W. N. C. 203; *Smith v. Hestonville, etc., R. Co.*, 92 Pa. St. 450; *Bamberger v. Citizens St. R. Co.*, 95 Tenn. 18; *Ploof v. Burlington Traction Co.*, 70 Vt. 509. In Missouri it has been held that if the parents of a child are guilty of negligence in permitting it to go upon the streets unattended, they cannot recover for an injury caused by a street car, even though the driver might have prevented the injury by the exercise of ordinary care, since in the case of two directly negligent acts the court will not endeavor to sever, apportion and discriminate between them for the purpose of determining which act caused the injury. *Hogan v. Citizens R. Co.*, 150 Mo. 36; 51 S. W. 473. Neither the contributory negligence of the parent nor of the infant is available as a defense to an action brought against a railroad company under Ala. Code, sec. 2589, for negligent homicide of the child. *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509; 22 So. 913. In New Jersey it has been held that the fact that the

negligence of the child where there is no presumption of incapacity.⁹⁸ But it is held that the contributory negligence of a parent is no defense to an action by him if the child exercised that degree of care which an adult of reasonable prudence would have exercised.⁹⁹

§ 176. Contributory negligence of parent as affecting recovery for injury to child—Recovery by child.—Upon the question whether in case of an injury to a child the negligence of the parent of such child contributing to the injury may be imputed to the latter, so as to prevent recovery by him of damages, the decisions are not in harmony. The prevailing rule, however, as sustained by the courts of the majority of the states, is that where a child has been injured, the contributory negligence of the parent will not be imputed to the child, so as to prevent the latter from recovering for such injury.¹⁰⁰

death of a minor son was partly due to the contributory negligence of the father, yet this would be no defense to an action by the father suing as administrator and sole next of kin. *Consol. Traction Co. v. Howe*, 30 Vr. (N. J. L.) 275.

⁹⁸ *Pratt Coal, etc., Co. v. Brawley*, 116 Ala. 509; 22 So. 913.

⁹⁹ *Wiswell v. Doyle*, 160 Mass. 42; 35 N. E. 107. See *McGarry v. Loomis*, 63 N. Y. 104.

¹⁰⁰ *Chicago G. W. R. Co. v. Kowalski* (C. C. App. 8th C.), 34 C. C. A. 1; 92 Fed. 310, aff'g 84 Fed. 586; *Berry v. Lake Erie & W. R. Co.* (C. C. D. Ind.), 70 Fed. 679; *Pratt Iron Co. v. Brawley*, 83 Ala. 371; 3 So. 555; *Daley v. Norwich, etc., R. R. Co.*, 26 Conn. 591; *Atlanta, etc., Airline Co. v. Gravitt*, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. Rep. 145; *Evansville v. Senhenn*, 151 Ind. 42; 47 N. E. 634; 41 L. R. A. 728; 2 Chic. L. J. Wkly. 568, reh'g denied in 151 Ind. 61; 52 N. E. 88; 41 L. R. A. 734; *Wymore v. Mahasko Co.*, 78 Iowa, 396; 6 L. R. A. 545,

South Covington & C. St. R. Co. v. Herrklotz, 47 S. W. 265; 20 Ky. L. R. 750; 4 Chic. L. J. Wkly. 153; *Barnes v. Shreveport City Ry. Co.*, 47 La. Ann. 1218; 5 Am. Elec. Cas. 452; *Schindler v. Milwaukee, etc., R. Co.*, 87 Mich. 400; 49 N. W. 670; *Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509; 6 L. R. A. 536; *Bisaillon v. Blood*, 64 N. H. 565; 15 Atl. 147; *Newman v. Phillipsburg Horse Car R. Co.*, 52 N. J. L. 446; 19 Atl. 1102; 8 L. R. A. 842; *Bottoms v. Seaboard & R. R. Co.*, 114 N. C. 699; 19 S. E. 730; 25 L. R. A. 784; *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412; 37 Am. Rep. 471; *Western Un. Tel. Co. v. Hoffman*, 80 Tex. 424; 15 S. W. 1048; *Allen v. Texas & P. R. Co.* (Tex. Civ. App.), 27 S. W. 943; *Robinson v. Cone*, 22 Vt. 224; 54 Am. Dec. 67; *Ploof v. Burlington Traction Co.*, 70 Vt. 509; 43 L. R. A. 108; 41 Atl. 1017; 13 Am. & Eng. R. Cas. N. S. 702; *Norfolk & W. R. Co. v. Gross-*

While the weight of authority supports this rule and it is more clearly in consonance with the principles of law and justice, yet there are several states in which it is dissented from, the rule in the dissenting and minority courts being based either on the ground of the identification of the infant with the parent or of the agency of the parent. In these states it is declared that where a child is non sui juris though it may be incapable by its own negligence of forfeiting its legal rights, yet the carelessness of its parents may be imputed to it so as to prevent a recovery of damages by or in behalf of the child for such injury.¹ Where this rule prevails, however, it has been held that the negligence of the parent must concur with the negligence of the child in order to constitute contributory negligence.² So, also, it has been declared that the negligence of the parents is no defense

close, 88 Va. 267; 13 S. E. 254; Roth v. Union Depot Co., 13 Wash. 525; 31 L. R. A. 855; 43 Pac. 641; 44 Pac. 253. In a New Jersey case it was said: "An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part of his own injury. There is no injustice, nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance." Newman v. Phillipsburg Horse Car R. Co., 52 N. J. L. 446; 19 Atl. 1102; 8 L. R. A. 842, per Beasley, C. J.

¹ Meeks v. Southern R. Co., 52 Cal. 602; Chicago & A. R. Co. v. Logue, 158 Ill. 621; 42 N. E. 53, aff'g 58 Ill. App. 142; Baltimore & O. S. W. R. Co. v. Pletz, 61 Ill. App. 161; Brown v. European & W. A. R. Co., 58 Me. 384; Gibbons v. Williams, 135 Mass. 333; Fitzgerald v. St. Paul M. & M. R. Co., 29 Minn. 336; 43

Am. Rep. 212; Dudley v. Westcott, 44 N. Y. St. R. 882; 18 N. Y. Supp. 130, rev'g 40 N. Y. St. R. 506; Foley v. New York Central & H. R. R. Co., 78 Hun (N. Y.), 248; 60 N. Y. St. R. 6; Canavan v. Stuyvesant, 12 Misc. (N. Y.) 74; 66 N. Y. St. R. 687; 33 N. Y. Supp. 53, mod'd 154 N. Y. 84; 47 N. E. 967; Mangam v. Brooklyn City R. R. Co., 36 Barb. (N. Y.) 239; 38 N. Y. 455; Burke v. Broadway & Seventh Ave. R. R. Co., 49 Barb. (N. Y.) 529; 34 How. Pr. 239; McLain v. Van Zandt, 48 How. Pr. (N. Y.) 80; Callahan v. Sharp, 27 Hun (N. Y.), 85; 95 N. Y. 672; Schindler v. N. Y. L. E. R. R. Co., 1 N. Y. St. R. 289; Doran v. Troy, 22 Wkly. Dig. 230; 104 N. Y. 684; Hartfield v. Roper, 21 Wend. (N. Y.) 615 (This last case in New York may be said to be the leading case in that state, at least, if not the leading case in support of the dissenting doctrine in all the states, and is cited in the majority of the opinions.); Parish v. Eden, 62 Wis. 272.

² Foley v. New York Central & H. R. R. Co., 75 Hun (N. Y.), 455; 57 N. Y. St. R. 679.

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to an action in behalf of the child to recover damages for an injury to him where he has neither committed or omitted any act which would constitute negligence on the part of a person *sui juris*, and that where he has exercised the care required of a person *sui juris*, any negligence on the part of the parents is immaterial.³ And, again, that where the person causing the injury is guilty of gross negligence, the negligence of the parents is no defense.⁴ And that where the child is in the immediate custody of one of its parents, the negligence of the other will not be imputed to it.⁵

§ 177. Contributory negligence—Degree of care required of children.—Although the doctrine of contributory negligence is applicable to children as well as to adults,⁶ yet the former are not held to the exercise of the same degree of prudence and caution as would be expected and required of the latter. The degree of care and caution required of children must be graduated according to the age, experience and knowledge of the child in each particular case, and the question whether a child has been guilty of contributory negligence in a particular instance can only be determined by a consideration of circumstances of that case in connection with the above rule.⁷ Under this

³ *McGarry v. Loomis*, 63 N. Y. 104; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669; 21 Abb. N. C. 1; 5 N. Y. St. R. 737; 10 N. E. 855; 25 Wkly. Dig. 506, aff'g 38 Hun (N. Y.), 362. See also *Lynch v. Smith*, 104 Mass. 52.

⁴ *Connery v. Slavin*, 23 Wkly. Dig. (N. Y.) 545.

⁵ *Hennessy v. Brooklyn City R. Co.*, 6 App. Div. (N. Y.) 206; 39 N. Y. St. R. 805.

⁶ *Honegsberger v. Second Ave. R. R. Co.*, 1 Keyes (N. Y.), 570; 2 Abb. Dec. 378, rev'g 1 Daly, 89; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302; *Burke v. Broadway & Seventh Ave. R. R. Co.*, 49 Barb. (N. Y.) 529; 34 How. Pr. 239.

⁷ *Railroad Co. v. Gladman*, 15 Wall. (U. S.) 401; *Mobile, etc., R. Co. v.*

Crenshaw, 65 Ala. 566; *Pueblo Elec. St. R. Co. v. Sherman*, 25 Colo. 114; 53 Pac. 322; *Birge v. Gardiner*, 19 Conn. 509; *Western, etc., R. Co. v. Young*, 81 Ga. 397; 7 S. E. 912; *Norton v. Volzke*, 158 Ill. 402; 41 N. E. 1085; 49 Am. St. Rep. 167; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Consol. City & Chelsea Park Ry. Co. v. Carlson*, 58 Kan. 62; 48 Pac. 635; 2 Am. Neg. Rep. 536; 7 Am. & Eng. R. Cas. N. S. 274; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; 18 Pac. 730; *Paducah v. Memphis, etc., R. Co.*, 12 Bush (Ky.), 41; *McLaughlin v. New Orleans, etc., R. Co.*, 48 La. Ann. 23; 18 So. 703; *Baltimore City P. R. Co. v. Cooney*, 87 Md. 261; 39 Atl. 859; 11 Am. & Eng. R. Cas. N. S. 759; *Collins v. South Boston, etc., R. Co.*, 142 Mass.

rule, age alone is not the determining factor, but experience, knowledge and ability to discern danger are also elements to be considered. So it follows that while in one case a child of eleven or twelve might be held not guilty of contributory negligence, yet in another case, under similar facts and surroundings and pursuing a similar line of conduct, a child of eight or nine, possessing a higher degree of experience, knowledge and ability to discern danger, might be chargeable with negligence contributing to the injury. After the question of contributory negligence on the part of a child has been determined, the same general rules as to its being a defense control as in the case of adults, and if it appear, though a child has been guilty of contributory negligence, that the accident could have been avoided by the exercise of ordinary care on the part of the person causing the injury, it is no defense in an action to recover damages therefor.⁸ As a general rule the question whether a child is guilty of contributory negligence is for the jury,⁹ although in some cases very

301; *Wright v. Detroit*, etc., R. Co., 77 Mich. 123; 43 N. E. 765; *Ecliff v. Wabash R. Co.*, 64 Mich. 196; *Lynch v. Metropolitan*, etc., R. Co., 112 Mo. 420; 20 S. W. 642; *Duffy v. Mo. R. Co.*, 19 Mo. App. 380; *Consol. Tract. Co. v. Scott*, 58 N. J. L. 682; 34 Atl. 1094; *Penny v. Rochester R. Co.*, 7 App. Div. (N. Y.) 595; 40 N. Y. Supp. 172; 74 N. Y. St. R. 732, *aff'd* 154 N. Y. 770; *Muller v. Brooklyn H. R. Co.*, 18 App. Div. (N. Y.) 177; 45 N. Y. Supp. 954; *Keller v. Haaker*, 2 App. Div. (N. Y.) 245; 73 N. Y. St. R. 374; 37 N. Y. Supp. 792; *Haycroft v. Lake Shore & Mich. S. R. Ry. Co.*, 2 Hun (N. Y.), 489; *Thurber v. Railroad Co.*, 60 N. Y. 326; *Kunz v. Troy*, 104 N. Y. 344, *rev'g* 36 Hun, 615; *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.), 376; 27 N. Y. St. R. 801; 7 N. Y. Supp. 666; *Brown v. Syracuse*, 77 Hun (N. Y.), 411; 60 N. Y. St. R. 16; *Guichard v. New*, 84 Hun (N. Y.), 54; 65 N. Y. St. R. 20; *Goff v. Akers*, 49 N. Y. St. R. 615, *aff'd* 139 N. Y. 653; *Manly v.*

Wilmington, etc., R. Co., 74 N. C. 655; *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370; 29 L. R. A. 757; 41 N. E. 980; 34 Ohio L. J. 259; *Penn., etc., R. Co. v. Kelley*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; *Bridges v. Asheville*, etc., R. Co., 27 S. C. 456; 3 S. E. 860; *Queen v. Dayton Coal & I. Co.*, 95 Tenn. 458; 30 L. R. A. 82; 32 S. W. 460; 49 Am. St. Rep. 935; *San Antonio Waterworks Co. v. White* (Tex. Civ. App.), 44 S. W. 181; *Reed v. Madison*, 83 Wis. 171; *Merritt v. Hepenstal*, 25 Can. S. C. 150.

⁸ *Mallard v. Ninth Ave. R. R. Co.*, 15 Daly, 376; 27 N. Y. St. R. 801; 7 N. Y. Supp. 666.

⁹ *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370; *Kane v. West End St. R. Co.*, 169 Mass. 64; 47 N. E. 501; *Consol. City & Chelsea Park Ry. Co. v. Carlson*, 58 Kan. 62; 48 Pac. 635; 2 Am. Neg. Rep. 536; 7 Am. & Eng. R. Cas. N. S. 274; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; 22 N. Y. St. R. 675; *Stone v.*

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young children have been declared to be, as a matter of law, incapable of contributory negligence.¹⁰

Dry Dock E. B. & B. R. R. Co., 115 N. Y. 104, rev'g 46 Hun, 184; *Garoni v. Compagnie Nationale de Navigation*, 89 N. Y. St. R. 63; 14 N. Y. Supp. 797; *Jones v. Utica & Black River R.R. Co.*, 36 Hun (N. Y.), 115; *Hyland v. Burns*, 10 N. Y. Supp. 386; 41 N. Y. Supp. 873.

¹⁰ So held in case of child four and one half years old, *Crawford v.*

Southern R. Co., 106 Ga. 870; 33 S. E. 826; 6 Am. Neg. Rep. 459; 4 Chic. L. J. Wkly. 436; and in case of one a little less than four years of age, *Covington, etc., Street R. Co. v. Herrklotz*, 47 S. W. 265; 20 Ky. L. R. 75; 4 Chic. L. J. Wkly. 153. See in this connection *Joyce on Electric Law* (ed. 1900), sec. 585.

PHYSICAL INJURIES.

TITLE III.

WRONGS AFFECTING RIGHTS OF PERSONS.

CHAPTER VII.

PHYSICAL INJURIES.

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§ 178. Physical injuries—Substantial and nominal damages—Generally.—As a general rule every injury to a person imports a damage sustained by him, and the fact of an injury having been inflicted entitles the person injured to at least nominal damages. If, however, the injury is a substantial one, more than nominal damages should be awarded.¹ So where owing to the negligence of another a person was injured so as to render him unconscious, confine him in a hospital for several weeks, and his neck was injured so as to cause his head to turn to one side, and at the time of the trial he walked similar to a paralytic, it was held that he was entitled to substantial and not merely nominal damages.² And in this case the plaintiff's injuries being such as to entitle him to substantial damages, it was held that a new trial would be granted where only nominal damages were awarded. But in the absence of evidence upon which substantial damages may be based only nominal damages should be allowed. So where there was no evidence as to the amount of plaintiff's salary as a music teacher, it was held that only nominal damages should be awarded for such item.³ And where the evidence is conflicting as to the injuries sustained by a person, that of the plaintiff tending to show them to have been serious, while that of the defendant shows them to have been slight, it has been held that a verdict for nominal damages will not be disturbed, since in such case the credibility of the witnesses is a matter for the jury to determine.⁴ And a verdict for nominal damages only is held not to be a ground for a new trial where it is apparent that the jury meant to find against his right to recover.⁵ And a charge which stated that

¹ *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 12 Misc. (N. Y.) 5; 66 N. Y. St. R. 727; 33 N. Y. Supp. 70.

² *Carter v. Wells Fargo Co. (C. S. D. Cal.)*, 64 Fed. 1005.

³ *Baker v. Manhattan R. R. Co.*, 118 N. Y. 533, aff'g 22 J. & S. 394.

⁴ *Weinberg v. Met. St. Ry. Co.*, 139 Mo. 286; 40 S. W. 882; 2 Am. Neg. Rep. 397.

⁵ *Reeve v. Wilkesbarre & W. V.*

the plaintiff was entitled to nominal damages at any rate was held not to be ground for reversal where actual damages were found by the jury and the cause of action was dependent on the fact of the injury.⁶

§ 179. Damages flowing from negligent act though not contemplated.—It is not necessary that every result of a person's negligent act which causes an injury to another could have been foreseen or contemplated by such person in order that a recovery therefor may be had. If the damages claimed flowed directly and legitimately from such negligent act, there may be a recovery of the same.⁷ So where, owing to the negligence of a carrier, a passenger sustained personal injuries which resulted in a cancer, it was held that damages might be recovered for such result.⁸ And in another case where, owing to a defect in a highway, the axle of plaintiff's wagon was broken and he was dragged over the dashboard, and he procured another carriage and drove to his home several miles distant in a cold rain, and he claimed that he subsequently suffered injury from the strain and shock, while defendant claimed that such injuries were due to the subsequent exposure to the rain and cold, it was held that the direct result of the accident was the exposure, and whether the subsequent injuries were due to this or to the strain and shock, or to both, recovery of damages therefor might be had.⁹

§ 180. Disfigurement of person.—Disfigurement is an element in an action for personal injuries which the jury may consider in estimating the amount of damages.¹⁰ And where a person has been permanently disfigured or deformed as a result of personal injuries, damages for mental suffering arising from such disfigurement or deformity may, it is generally decided, be re-

Traction Co. (C. P.), 9 Kulp (Pa.), 182.

⁶ Howe v. Cochran, 47 Minn. 403; 50 N. W. 368.

⁷ Crouse v. Chicago & N. W. Ry. Co., 104 Wis. 473, 80 N. W. 752.

⁸ Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134.

⁹ Ehr Gott v. Mayer, 96 N. Y. 264; 48 Am. Rep. 622.

¹⁰ Smith v. Pittsburg & W. R. Co. (C. C. N. D. Ohio), 90 Fed. 783; 13 Am. & Eng. R. Cas. N. S. 716; 41 Ohio L. J. 113; Alabama G. S. R. Co. v. Hill, 93 Ala. 514; 9 So. 722; 47 Am. & Eng. R. Cas. 500; Birmingham v. Lewis, 92 Ala. 352; St. Louis S. W. R. Co. v. Dobbins, 60 Ark. 481; 30 S. W. 887, reh'g denied 60 Ark. 486; 31 S. W. 147; Southern Bell Teleph.

covered.¹¹ And in addition thereto, where the disfigurement is connected with an injury which will impair the injured person's future ability to labor, damages are also to be awarded as in other cases of permanent injury, that is, on the basis of the loss due to the person's impaired ability to labor and earn money.¹² Again in an action for wantonly maiming or disfiguring a person, the injured person may recover exemplary damages.¹³

§ 181. "Inconvenience."—In an action to recover for personal injuries, compensatory damages cannot, it is held, include an allowance for "inconvenience" as well as for the injuries.¹⁴ In a case in Pennsylvania, however, it has been held that the damages in such an action consist, among other items, of the inconvenience and suffering naturally resulting from the injuries.¹⁵ And again, in another case in the same state, it is decided that there may be a recovery for the privation and inconvenience to which a person is subjected as a result of an injury.¹⁶

§ 182. Prospects of marriage impaired.—If as a result of an injury to an unmarried woman her prospects of marriage are impaired, such resulting injury is an element of damage for which recovery may be had.¹⁷ But in order to authorize a recovery therefor such special damage must, it is held, be alleged and proved.¹⁸

§ 183. Miscarriage — Loss of prospective offspring—Whether damages recoverable for.—As will appear hereinafter, the weight of authority supports the rule that there can be no recovery for injuries resulting from fright, though

Co. v. Jordan, 87 Ga. 69; *Western & A. R. Co. v. Young*, 81 Ga. 397; 7 S. E. 912; *Stewart v. Maddox*, 63 Ind. 51; *Newbury v. Getchel & M. Lumber & Mfg. Co.*, 100 Iowa, 441; 69 N. W. 743; *Nichols v. Brabazon*, 94 Wis. 549.

¹¹ See chap. VIII, herein.

¹² See chap. IX, herein.

¹³ *Pike v. Dilling*, 48 Me. 539.

¹⁴ *Root v. Des Moines City Ry. Co.* (Iowa, 1900), 83 N. W. 904; *Jenson v. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 589; 57 N. W. 359; 22 L. R.

A. 680. But see *Railroad Co. v. Carr*, 71 Ind. 135; 17 Ala. 1052; *Miller v. Steamship Co.*, 6 N. Y. St. R. 664.

¹⁵ *Goodhart v. Penna. R. R. Co.*, 177 Pa. St. 1; 35 Atl. 191; 5 Am. & Eng. R. Cas. N. S. 364; 38 W. N. C. 545.

¹⁶ *Smith v. East Mauch Chunk*, 3 Super. Ct. (Pa.) 495.

¹⁷ *Smith v. Pittsburg, etc., Ry. Co.*, 90 Fed. 783.

¹⁸ *Hunter v. Stewart*, 47 Me. 419.

the fright may be caused by the negligent act of another, where there is no immediate, personal injury.¹⁹ So where there was no physical injury sustained by a woman as a result of the negligent act of another but fright alone ensued which resulted in a subsequent miscarriage, it was held that such miscarriage could not be considered as the proximate result of defendant's negligence, and there could be no recovery therefor.²⁰ And where as a result of a personal injury inflicted upon a woman, a miscarriage ensues which results in the loss of prospective offspring, there can be no recovery for such loss by the husband.²¹ In this case it was said by the court that the jury were "allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would become a living child. The sex could not be known and if born alive the infant might have been destitute of some faculty, or so physically infirm as to have made it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of the unborn child, and this injury should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery."²² And in an action by a woman, it was held that the mere loss of prospective offspring by miscarriage, there being no proof that her health had thereby been impaired or that she had suffered to a greater extent than she would have done if the child had been born at the proper time did not entitle her to substantial damages.²³ In another case where a telegraph company failed to deliver a message summoning a doctor to attend a woman

¹⁹ See secs. 219-222, herein.

²⁰ *Mitchell v. Rochester R. Co.*, 151 N. Y. 107; 45 N. E. 354; 34 L. R. A. 781. See also *Phillips v. Dickerson*, 85 Ill. 11; 27 Am. Rep. 607; *Fitzpatrick v. Great Western R. R. Co.*, 12 Up. Can. Q. B. 645; *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222. But see *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134; *Oliver v. Town of LaValle*, 36 Wis. 592.

²¹ *Butler v. Manhattan R. Co.*, 143

N. Y. 417; 26 L. R. A. 46; 62 N. Y. St. R. 432; 42 Am. St. Rep. 738; 38 N. E. 454, rev'g 53 N. Y. St. R. 664; 24 N. Y. Supp. 142, where the court had permitted the jury to consider "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring."

²² Per Andrews, Ch. J.

²³ *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592; 28 Pac. 1021. See *Bovee v. Danville*, 53 Vt. 190.

about to give birth to a child and no doctor was present and the child died before birth, it was held that there could be no recovery for the loss of the child.²⁶ In this case the court said: "We do not think the death of the child before birth, and the grief or sorrow occasioned thereby, can be an element of damages in this character of suit. If it be made to appear from the testimony that Mrs. Cooper suffered more physical pain, mental anxiety and alarm, on account of her own condition than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering; but the death of the child, the bereavement of the parents and their grief for its loss cannot be considered as an element of damages. Such damages are too remote. They are the result of a secondary cause and ought not to be allowed to enter into the verdict. . . . It would be correct to allow proof that the child was stillborn if such fact tended to show that the labor was thereby prolonged and her suffering so increased."²⁷

§ 184. Miscarriage—Loss of prospective offspring—Whether damages recoverable for—Continued.—In other cases, however, it has been decided that where a woman suffers a personal injury which produces a miscarriage, this latter result may be considered in estimating the damages recoverable.²⁸ Thus it was so held where the misconduct of a servant of the carrier was the proximate cause of the miscarriage, though the woman's condition was unknown to the carrier or its employees.²⁹ And where a glass globe was negligently permitted to fall and it struck a woman upon the temple, and as a result of the shock caused by the blow a miscarriage resulted, it was held

²⁶ *Western Union Teleg. Co. v. Cooper*, 71 Tex. 507; 2 Am. Elec. Cas. 795.

²⁷ *Per Collard, J.*

²⁸ *Mann Boudoir Car Co. v. Dupre* (C. C. App. 5th C.), 54 Fed. 646; 47 Alb. L. J. 446; *Tunncliffe v. Bay Cities Consol. R. Co.*, 107 Mich. 261;

65 N. W. 226; 2 Det. L. N. 711; *Jones v. Brooklyn H. R. Co.*, 23 App. Div. (N. Y.) 141; 48 N. Y. Supp. 914; *Brown v. Chicago M. & St. P. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41.

²⁹ *Mann Boudoir Car Co. v. Dupre* (C. C. App. 5th C.), 54 Fed. 646; 47 Alb. L. J. 446.

that damages might be recovered therefor.²⁸ And in another case where a pregnant woman was let off a train at a place three miles from her destination, on a cloudy night, and she walked to her destination and as a result of the walk and exposure a miscarriage resulted, it was held that such miscarriage was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, and that the defendants were liable therefor.²⁹ In this case it was said by the court: "All the acts done by the plaintiffs and from which the injury flowed were rightful on their part and compelled by the act of the defendant. . . . We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act or results from the act of the party in endeavoring to escape from the immediate danger. . . . If defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury, such injury can be and is traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of the law upon that subject."³⁰

§ 185. Miscarriage—Loss of prospective offspring—Whether damages recoverable for—Conclusion.—From a consideration of the cases noted in the preceding section it will be seen that the courts are not in harmony as to the recovery of damages in cases of miscarriage. Where the miscarriage results in loss of prospective offspring, it would seem that the better reasoning would support the conclusion that there can be no recovery for such loss. In many cases the sex of the unborn child cannot be determined, or whether it will be free of deformity, and even where it may be possible to determine these

²⁸ *Jones v. Brooklyn H. R. Co.*, 23 Ry. Co., 54 Wis. 342; 41 Am. Rep. App. Div. (N. Y.) 141; 48 N. Y. Supp. 41.
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²⁹ Per Taylor, J.

³⁰ *Brown v. Chicago, M. & S. D. P.*

facts, it may still be an uncertain question as to whether the embryo would have developed into a child of good health and sound mental faculties. The basis of recovery for a child's death by a negligent act is the value of services to the parent during minority,³¹ but if the child's mental faculties are impaired or he is a sickly child, he may not only be unable to render any services, but may, on the other hand, be a source of expense and cause of sorrow and worry to the parents, not only during minority but during the whole of his or his parent's life. To permit, therefore, a recovery for loss of prospective offspring would be an extension of the field of damages, too much into the realms of possibility. In those cases where a negligent act results in a miscarriage, the general rule seems to be that damages therefor are recoverable. But in such cases it would seem that though damages may be recovered for a physical injury or negligent act independent of any miscarriage, yet if miscarriage results from such act or injury in order to authorize a recovery for the latter, it should appear that there was an increased or aggregated mental or physical pain or distress in connection with such miscarriage, in addition to what the mother would have suffered if the child had been born at the proper time or that her health had been impaired thereby. In the absence of any such evidence there would seem to be but little basis for the awarding of damages for a miscarriage.

§ 186. Exemplary damages.—In actions for physical injuries the plaintiff is not in all cases limited in his recovery to compensatory damages. The injury may not be due alone to mere negligence, but there may be wilfulness, wantonness or malice in the infliction thereof, or there may be such gross negligence in the commission of the act causing the injury or omission to avert the injury, as amounts to a criminal indifference to the consequences. It is in such cases as these that the law permits a recovery, not merely of damages which are compensatory, but also authorizes the jury to assess a sum in addition thereto, not on the basis of a compensation, but rather as an example which may deter others from the commission of similar acts. So it may be stated as a recognized rule of the

³¹ See chaps. on death by wrongful, etc., act, herein.

common law and as a rule generally followed to-day, that wherever a physical injury has been inflicted maliciously or wantonly, the jury may give, in addition to a mere compensation for the injury suffered, punitive or exemplary damages, such damages are, however, only to be awarded where there has been a maliciousness or wantonness in the infliction of the injury.²² But malice, as used in this connection, does not mean merely the doing of an unlawful or injurious act, but rather implies that the act complained of was conceived in a spirit of mischief or of criminal indifference to civil obligations.²³

§ 187. Exemplary damages continued.—While it has sometimes been declared that exemplary damages may be given in

²² *Lake Shore & Mich. Southern R. Co. v. Prentice*, 147 U. S. 101; *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Floyd v. Hamilton*, 33 Ala. 235; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514; 9 So. 722; 47 Am. & Eng. R. Cas. 500; *St. Louis & C. R. R. Co. v. Hall*, 53 Ark. 7; *Moody v. McDonald*, 4 Cal. 297; *Gibney v. Lewis*, 68 Conn. 392; *St. Peters Church v. Beach*, 26 Conn. 355; *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88; *Florida C. & P. R. Co. v. Mooney*, 40 Fla. 17; 24 So. 148; 12 Am. & Eng. R. Cas. N. S. 721; *Florida S. R. Co. v. Hirst*, 30 Fla. 1; 16 L. R. A. 631; 11 So. 506; 52 Am. & Eng. R. Cas. 409; 12 Ry. & Corp. L. J. 218; *Chattanooga R. & C. R. R. Co. v. Liddell*, 85 Ga. 482; 11 S. E. 853; 8 Ry. & Corp. L. J. 296; *Pierce v. Millay*, 44 Ill. 189; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Williams v. Real*, 20 Ill. 147; *Lake Erie & W. R. Co. v. Christian*, 39 Ill. App. 495; *Linton Coal & M. Co. v. Persons*, 15 Ind. App. 69; 43 N. E. 651; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; *Kentucky, etc., R. R. Co. v. Dilla*, 4 Bush (Ky.), 593; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Pike v. Dilling*, 48 Me. 539; *Baltimore, etc., R. R. Co. v. Blocker*, 27 Md. 277; *Baltimore, etc., R. R. Co. v. Breinig*, 25 Md. 378; *Hyatt v. Adams*, 16 Mich. 180; *Allison v. Chandler*, 11 Mich. 542; *Doss v. Missouri, etc., R. R. Co.* 59 Mo. 27; *Lewis v. Jannoupoulo*, 70 Mo. App. 325; *Clark v. Fairley*, 30 Mo. App. 335; *Walker v. Wilson*, 8 Bosw. (N. Y.) 586; *Wallace v. Mayor, etc., N. Y.*, 2 Hilt. (N. Y.) 440; 9 Abb. Pr. 40; 18 How. Pr. 169; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Louder v. Hinson*, 4 Jones (N. C.), L. 369; *Heil v. Glau-ding*, 42 Pa. St. 493; *Bennett v. Reed*, 51 Pa. St. 190; *Mack v. South Bound R. Co.*, 52 S. C. 323; 29 S. E. 905; 40 L. R. A. 679; 3 Chic. L. J. Wkly. 272. See chaps. on Negligence, herein.

²³ *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Baltimore, etc., R. R. Co. v. Blocker*, 27 Md. 277; *Hopkins v. Atlantic Ave., etc., R. R. Co.*, 36 N. H. 9; *Wallace v. Mayor, etc., N. Y.*, 2 Hilt. (N. Y.) 440; 9 Abb. Pr. 40; 18 How. Pr. 169.

cases of gross negligence,⁵⁴ yet this we think is to be construed as being in line with the above rule, and that the gross negligence must be of such a character as to authorize the inference or presumption that the person guilty of such negligence was conscious of the probable consequences of his act and indifferent thereto.⁵⁵ In an action, however, for injuries due to negligence where it is sought to recover punitive damages, the failure of the court to submit the question of the wilfulness of the defendant to the jury is held to be harmless, where the jury found the defendant free from negligence and, therefore, not entitled to damages.⁵⁶ But where the jury are charged that if they find gross negligence they may allow punitive damages, not merely for the purpose of increasing the damages but only as a punishment, and that such damages should not be allowed even for that purpose except the negligence be gross, it is held that such a charge is erroneous in not explaining to the jury under what circumstances such damages may be allowed.⁵⁷

§ 188. Exemplary damages—Physical injuries occasioned by animals.—The rules as to the allowance of exemplary damages in other actions control also in the case of actions to recover for physical injuries occasioned by animals. So where a person possessing a dog which he knew was ferocious and accustomed to bite people, left him unsecured in his sleigh in a village street and the dog threw down and bit a child seven years of age, who came up to the sleigh and commenced handling the whip, it was held that the jury might award vindictive damages if they found that the owner of the dog was guilty of gross and criminal negligence.⁵⁸ And where a person owning a

⁵⁴ *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514; 9 So. 722; 47 Am. & Eng. R. Cas. 500; *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327; 8 S. W. 706; *Kountz v. Brown*, 16 B. Mon. (Ky.) 577; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304. See also chaps. on Negligence, herein; *contra Yeriam v. Linkletter*, 80 Cal. 135; 22 Pac. 70.

⁵⁶ *McHenry Coal Co. v. Sneddon*,

98 Ky. 684; 34 S. W. 228; 17 Ky. L. Rep. 1261. See chaps. on Negligence, herein.

⁵⁵ *Moore v. Drayton*, 40 N. Y. St. R. 933; 16 N. Y. Supp. 723.

⁵⁷ *East Tenn. V. & G. R. Co. v. Lee*, 90 Tenn. 570; 18 S. W. 268.

⁵⁸ *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6. See also *Cameron v. Bryan*, 89 Iowa, 214; 56 N. W. 434.

ram permitted it to run at large and it was alleged that the owner knew that the ram was inclined to be vicious and to injure mankind, it was held that there could be no recovery of exemplary damages except upon proof of gross and criminal negligence amounting to a wanton disregard of the safety of others and in law equivalent to malice.³⁹ But where a dog belonging to a passenger was tied by a porter so that it could reach other passengers, it was held that the company was not liable for punitive damages for injuries caused by a bite from such dog.⁴⁰

§ 189. Exemplary damages—Malpractice.—It would seem that the same rules as apply to the allowance of exemplary damages in other cases would also apply in actions to recover for an injury which is the result of malpractice. If the malpractice is wilful, wanton or malicious, or consists of such gross negligence as raises the presumption of a probable knowledge of the consequences and an entire disregard thereof, then such damages would appear to be properly allowable. So it has been held that if a patient proves gross negligence in the treatment of his diseases, he may recover exemplary damages.⁴¹ In another case, however, it has been held that the damages which a patient or her representative (not her husband) may recover in an action for malpractice are to be measured by the common-law rule and that vindictive damages cannot be recovered.⁴²

§ 190. Exemplary damages—Placing cantharides in wine.—The giving to a person of any substance which will probably have an injurious effect and of which effect the giver is aware, though done in a spirit of mischief, should render such person liable to exemplary damages where injury results therefrom. Thus it was so held where a physician put a portion of cantharides into the plaintiff's glass of wine, from the effects of which the plaintiff did not recover for several months.⁴³

§ 191. Direct results of injury—Defect in highway—Statute—What included—Massachusetts.—Under the Massa-

³⁹ *Pickett v. Crook*, 20 Wis. 358.

⁴⁰ *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; 46 S. W. 389.

⁴¹ *Cochran v. Miller*, 13 Iowa, 128.

⁴² *Long v. Morrison*, 14 Ind. 595.

⁴³ *Genay v. Norris*, 1 Bay. (S. C.)

chusetts statute "providing that where a person is injured by any defect negligently allowed to exist in the highway, the city which is responsible for such defect shall be liable for the direct and immediate results of the injury, if an injury is caused by such a defect, damages will be limited to the direct and immediate results thereof and will not include a subsequent injury due to a weakness resulting from the original injury. So where a person's ankle was injured by such a cause, and owing to a weakness of the ankle resulting therefrom, the person sustained a subsequent fracture of the leg, it was held there could be no recovery of damages for the latter injury."⁶

§ 192. Interest not recoverable.—The general rule in an action for personal injuries is that the damages therefor should not include an allowance for interest,⁶ though it has been said that in estimating the damages the jury may consider the length of time that has elapsed since the injury.⁷ But it is held in one case that interest may be allowed, in the discretion of the jury, upon such money as has been actually expended by the plaintiff as a result of the injury and in connection therewith.⁸

§ 193. Mitigation of damages.—Contributory negligence may in some cases be considered in mitigation of damages in actions for personal injuries.⁹ And a person's condition caused

⁶ Mass. Pub. Stat. chap. 52, sec. 18.

⁶ *Raymond v. Haverhill*, 168 Mass. 382; 47 N. E. 101.

⁶ *Western & A. R. Co. v. Young*, 81 Ga. 397; *Ratteree v. Chapman*, 79 Ga. 574; *Sargent v. Hampden*, 38 Me. 581; *Zipperlein v. Pittsburg, C. C. & St. L. Ry. Co.*, 8 Ohio S. & C. P. Dec. 587; *Pittsburg S. Ry. Co. v. Taylor*, 104 Pa. St. 306; *Louisville & N. R. Co. v. Wallace* (Tenn.), 14 L. R. A. 548; 49 Am. & Eng. R. Cas. 490; 17 S. W. 882; *Texas & N. O. R. Co. v. Carr*, 91 Tex. 332; 43 S. W. 18, rev'g 42 S. W. 126. But see *Chic. St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213; 28 N. E. 328.

⁷ *Zipperlein v. Pittsburg C. C. & St. L. Ry. Co.*, 8 Ohio S. & C. P. Dec. 587.

⁸ *Washington, etc., R. R. Co. v. Hickey*, 12 App. (D. C.) 269.

⁹ *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144; 19 S. W. 116. See chaps. herein on effect of contributory negligence. But in a case in Georgia, it was held that an unqualified instruction that if plaintiff's negligence contributed to the damages, the jury might reduce the amount according to the extent of the contribution, was erroneous though the jury were also instructed by the court that want of ordinary care on the plaintiff's part would defeat recovery. *Miller v. Smythe*, 95 Ga. 288; 22 S. E. 532.

by injuries sustained prior to those for which he seeks to recover may be considered by the jury.⁵⁰ And where a boy misrepresented his age at the time of obtaining employment in a factory, it was held that such fact might be considered in mitigation of damages for injuries sustained while working at a dangerous machine.⁵¹ But the jury in making up their verdict are not to consider sick benefits received from any source other than the defendant.⁵² And gratuitous nursing, or aid, or help from friends are not to be considered in mitigation of damages.⁵³ Nor is the defendant entitled to have the proceeds of an accident insurance policy deducted from the amount of damages.⁵⁴ And the fact that the results of an injury to a married woman may have been prolonged or her recovery delayed by her becoming pregnant after receiving the injury is held not necessarily and as a matter of law sufficient ground to justify a reduction of damages, where she had not been cautioned in respect thereto by her medical adviser.⁵⁵

§ 194. Duty of injured person to minimize the damages—Medical assistance.—Where a person has been injured by the negligence of another, it is his duty to exercise reasonable care to prevent any aggravation of the injury and consequent increase of damages. In these cases it is his duty to employ such medical assistance as ordinary prudence in his situation requires, and to use ordinary care and judgment in so doing.⁵⁶ And

⁵⁰ *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82; 35 S. W. 264; 5 Am. & Eng. R. Cas. N. S. 401. See sec. 216, herein as to effect of prior injury or disease.

⁵¹ *Legare v. Esplin*, Rap. Jud. Quebec, 12 C. S. 113.

⁵² *Baltimore City Pass. Ry. Co. v. Baer*, 90 Md. 97; 44 Atl. 992.

⁵³ *Ohio, etc., R. R. Co. v. Dickerson*, 59 Ind. 317; *Indianapolis v. Gaston*, 58 Ind. 224.

⁵⁴ *Harding v. Town of Townshend*, 43 Vt. 536; 5 Am. Rep. 304, where a person was injured owing to a defect in the highway. See also *Pittsburg, etc., R. R. Co. v. Thomson*, 56 Ill.

138; *Clark v. Wilson*, 103 Mass. 219; 4 Am. Rep. 532; *Althorf v. Wolf*, 22 N. Y. 355; *Coulter v. Pine Township*, 164 Pa. St. 543; *Bradburn v. Great Western R. R. Co.*, L. R. Exch. 1.

⁵⁵ *Salladay v. Dodgeville*, 85 Wis. 318; 20 L. R. A. 541; 55 N. W. 696.

⁵⁶ *Osborne v. Detroit*, 32 Fed. 36; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305; 45 N. E. 290; *Pullman Pal. Car Co. v. Bluhm*, 109 Ill. 20; *Toledo & W. V. R. Co. v. Eddy*, 72 Ill. 138; *Elgin v. Riordan*, 21 Ill. App. 600; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409; *Columbia City v. Langohr*, 20 Ind. App. 395; 50 N. E. 831; *Citizens R. R. Co.*

where any of the consequences which a plaintiff has suffered could have been avoided by the exercise of the required care and prudence, there can be no recovery for such results,⁵⁷ although it has been declared that in case of a wilful injury, the mere failure of the injured person to use reasonable care to avoid the consequences of the injury will not prevent a recovery by him for so much of the damage as results from that failure.⁵⁸ In this case it was said: "Where in cases of an intentional tort, the plaintiff has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a wilful omission on his part, he ought not to recover for the damages which might have been prevented by proper care; but on the other hand we think that he should recover his full damages where he has been guilty of ordinary negligence only."⁵⁹ And in cases of injury by the negligence of another, the failure to procure medical assistance at once will not prevent a recovery where the person injured considered the injury at first but a slight one,⁶⁰ since a person in such case is only obliged to act in the treatment of an injury in the manner which common prudence would dictate under like circumstances.⁶¹ And where one who had been injured imprudently used intoxicating liquors as a result of which his trouble was aggravated, and the diffi-

v. Hobbs, 15 Ind. App. 610; Allender v. Chic. R. I. & P. R. Co., 37 Iowa, 264; Fitzpatrick v. Boston & M. R. Co., 84 Me. 33; 24 Atl. 432; Strudgeon v. Sand Beach, 107 Mich. 496; 65 N. W. 616; 2 Det. L. N. 749; Chandler v. Allison, 10 Mich. 460; Fullerton v. Fordyce, 144 Mo. 519; 10 Am. & Eng. R. Cas. N. S. 729; 44 S. W. 1053; Miles v. Chic. R. I. & P. R. Co., 76 Mo. App. 484; 1 Mo. App. Rep. 534; Hogle v. New York Cent. R. R. Co., 28 Hun (N. Y.), 363; Howson v. Mestayer, 3 N. Y. St. R. 571; Radman v. Haberstro, 1 N. Y. St. R. 561; Toledo Elec. St. R. Co. v. Tucker, 13 Ohio C. C. 411; 7 Ohio Dec. 169; Vallo v. United States Exp. Co., 147 Pa. St. 404; 14 L. R. A.

743; Bradford v. Downs, 126 Pa. St. 622; Gulf C. & S. F. R. Co. v. Manerwitz, 70 Tex. 73.

⁵⁷ Fullerton v. Fordyce, 144 Mo. 519; 44 S. W. 1053; 10 Am. & Eng. R. Cas. N. S. 729; Throckmorton v. Missouri, K. & T. R. Co., 14 Tex. Civ. App. 222; 39 S. W. 174.

⁵⁸ Galveston, H. & S. A. R. Co. v. Zantzing, 92 Tex. 365; 44 L. R. A. 553; 48 S. W. 563; 71 Am. St. Rep. 859; 13 Am. & Eng. R. Cas. N. S. 840; 5 Am. Neg. Rep. 477.

⁵⁹ Per Gaines, Ch. J.

⁶⁰ Kennedy v. Busse, 60 Ill. App. 440; Texas & P. R. Co. v. Neal (Tex. Civ. App.), 33 S. W. 693.

⁶¹ Mt. Sterling v. Crammy, 73 Ill. App. 572.

culty of being cured increased, it was held that evidence of this fact was admissible.³³ But the fact that the injury has been aggravated by plaintiff's negligence will not prevent the admission of evidence as to the nature, extent and duration of the injuries.³⁴ Again, in case of an injury to a minor child of tender years, it has been held that the negligence of the parent in procuring medical assistance and treatment after the injury cannot be imputed to the child so as to affect the amount of recovery by the latter for such injury.³⁵

§ 195. Same subject continued.—As we have stated in the preceding section, it is the duty of a person injured by the negligence of another to employ such medical assistance as ordinary prudence in his situation requires. This does not, however, mean that he must employ the most skillful practitioner obtainable, but only that he shall exercise reasonable care in the selection of the physician or surgeon, and where such care has been exercised, the fact that more skillful medical assistance might have been obtained will not be considered in mitigation of the damages.³⁶ So if an injured person has exercised ordinary care in the selection of a physician or surgeon, the fact that the latter makes any errors or mistakes in the treatment of the injuries will not prevent a recovery of all the damages sustained.³⁷

³³ *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328; 23 S. W. 159; 24 S. W. 210.

³⁴ *Plummer v. Milan*, 79 Mo. App. 439; 1 Mo. App. Rep. 600.

³⁵ *Texas & P. R. Co. v. Beckworth* (Tex. Civ. App.), 32 S. W. 809.

³⁶ *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; *Columbia City v. Langohr*, 20 Ind. App. 395; 50 N. E. 831; *Rice v. Des Moines*, 40 Iowa, 638; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200; *Stover v. Inhabitants of Bluehill*, 51 Me. 439; *McGanahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211; 50 N. E. 610; 4 Am. Neg. Rep. 284; *Moore v. Kalamazoo*, 109 Mich. 176; *Reed v. Detroit*, 108 Mich. 224; 62 N. W. 967; 2 Det. L. N. 822; *New York &*

N. J. Teleph. Co. v. Bennett, 62 N. J. L. 742; 5 Am. Neg. Rep. 657; 42 Atl. 759; *Tuttle v. Farmington*, 58 N. H. 13; *Sullivan v. Tioga R. R. Co.*, 112 N. Y. 643; *Loeser v. Humphrey*, 41 Ohio St. 378; *Heintz v. Caldwell*, 16 Ohio C. C. 630; *Selleck v. Janesville*, 100 Wis. 157; 75 N. W. 975; 41 L. R. A. 563; 4 Am. Neg. Rep. 352.

³⁷ *Columbia City v. Langohr*, 20 Ind. App. 395; 50 N. E. 831; *McGanahan v. N. Y. N. H. & H. R. R. Co.*, 171 Mass. 211; 50 N. E. 610; *Reed v. Detroit*, 108 Mich. 224; 65 N. W. 967; 2 Det. L. N. 822; *New York & N. J. Teleph. Co. v. Bennett*, 62 N. J. L. 742; 42 Atl. 759; 5 Am. Neg. Rep. 657; *Heintz v. Caldwell*, 16 Ohio C. C. App. 630.

So the following charge to the jury was declared to be certainly supported by authority as well as reason: "The plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercises ordinary care in procuring the services of such physician. Again, where one is injured by the negligence of another, or by the negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care, she will be entitled to recover in consequence of the wrong done, and the full extent of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it otherwise should have been."⁶⁷ So in another case it was held that where a reputable and reasonably competent physician was employed by an injured person, the amount of damages recoverable by such person should not be lessened because the injury was aggravated by the use of the injured arm and shoulder, where used in accordance with the directions of the physician.⁶⁸ In those cases where an injured person has consulted a physician, but negligently fails to comply with his directions, he is not necessarily precluded from recovering damages accruing subsequent to such failure, but only those damages which accrue as a result of such failure are not recoverable.⁶⁹

§ 196. Duty of injured person to submit to surgical operation.—It may in some cases of injury be necessary to perform a surgical operation in order to effect a cure. Where such an operation is required in order to give relief or to bring about a cure and it is attended with slight inconvenience and no danger, it is held that if a person under such circumstances refuses to submit to an operation, there can be no recovery of damages attributable to such failure.⁷⁰ So in a late case in New

⁶⁷ *Selleck v. Janesville*, 100 Wis. 157; 75 N. W. 975; 41 L. R. A. 563; 4 Am. Neg. Rep. 352.

⁶⁸ *Columbia City v. Langohr*, 20 Ind. App. 395; 50 N. E. 831.

⁶⁹ *Keyes v. Cedar Falls*, 107 Iowa, 509; 78 N. W. 227.

⁷⁰ *Bailey v. Centerville*, 108 Iowa, 20; 78 N. W. 831. See *Mattis v. Philadelphia Traction Co.*, 6 Pa. Dist. R. 94; 18 Pa. Co. Ct. 106, where it was held that where a surgical operation was comparatively new and the profession were not abso-

York,⁷¹ where this question arose, it was held proper to charge the jury that where a person was injured by the negligence of another, he was bound to use the usual and reasonable remedies appropriate to effect a cure; that he could not increase the damages by negligently allowing his condition to become worse than it would if properly treated; that if an operation was attended with danger in the remotest degree, he was not obliged to submit thereto; that he must determine this matter for himself, and if he decided not to submit to an operation, either by reason of apprehension or other cause, the person responsible for the injury could not complain thereof; but that the evidence of the experts as to the possibility of curing such an injury by operation and the slight inconvenience said to result from such operation in most cases was to be considered by the jury in determining the amount and permanency of the injury. So where a person who had been injured by a fall upon a defective sidewalk refused to submit to a surgical operation for hernia and his conduct was that of a reasonably prudent man in the exercise of reasonable judgment, it was held that he was not chargeable with such negligence as would affect his recovery.⁷²

§ 197. Effect of plaintiff's death.—The plaintiff's death during the pendency of an action to recover for injuries sustained by him and the substitution of his personal representative in his stead does not affect the right to recover damages but only limits the recovery to such damages as are shown to have been sustained by the plaintiff prior to his death.⁷³

§ 198. Release of claims for personal injuries—Generally.—If a person who has received a personal injury executes a release to the person liable therefor, for a specified consideration, the release being given understandingly with full knowledge

lutely at rest as to the best method of performing it though it was generally considered as accompanied by slight risk of death, an injured person was not obliged to submit to the same, though it might have occasioned substantial relief and approximate cure,

⁷¹ Blate v. Third Ave. R. Co., 60 N. Y. St. R. 732.

⁷² Williams v. Brooklyn, 33 App. Div. (N. Y.) 539; 53 N. Y. Supp. 1007.

⁷³ Illinois Steel Co. v. Ostrowski, 93 Ill. App. 57.

of its force and meaning, and there are no fraudulent or deceitful representations, which materially induce the person injured to execute the same, such release will be a bar to a subsequent action for the injuries.⁷⁴ And it has been held that an employee may, by contract, assume all liability for injuries received owing to the negligence of the employer, and that such contract is not against public policy.⁷⁵ So where an employee has been injured while in the company's employ, and as a part compensation for such injury the company agrees to employ him at certain specified wages during his life or ability and disposition to work, he may in an action for the breach of such contract recover prospective damages therefor.⁷⁶ The measure of damages in such an action is the amount of wages due at the time of the trial, together with compensation for such future benefit as he would probably have received under the contract, less the amount which he earned, or with reasonable diligence might have earned elsewhere, allowance being made to him for the expenses of obtaining such employment.⁷⁷ A release executed by an employee who has been injured is, it is held, admissible in an action in trespass on the case against his employer.⁷⁸ But where a person who was injured by being thrown from a street car executed a release or receipt in full for all damages received from the fall, such receipt being in the name of a certain street car company, and given to the manager of such company, who was also the manager of another street car company operated in connection with such company, it was held that the receipt was not sufficient to establish the fact that the fall was from the car of the former company, where the manager testified that it was from the car of the latter company.⁷⁹

⁷⁴ *Lumley v. Wabash R. Co.* (C. C. E. D. Mich.), 71 Fed. 21; *McFarland v. Missouri P. R. Co.*, 125 Mo. 253; 28 S. W. 590; *Seeley v. Citizens Tract. Co.*, 179 Pa. St. 334; 36 Atl. 229.

⁷⁵ *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196; 40 L. R. A. 101; 46 N. E. 917; 8 Am. & Eng. R. Cas. N. S. 441. See *Brasell v. La Campagnie du Grand Tronc, Rap.* Jud. Quebec, 11 C. S. 150.

⁷⁶ *Brighton v. Lake Shore & M. S. R. Co.* (Mich. 1895), 61 N. W. 550.

⁷⁷ *Penn. R. R. Co. v. Dolan*, 6 Ind. App. 109; 32 N. E. 802.

⁷⁸ *Johnson v. Phila. & R. R. Co.*, 163 Pa. St. 127; 29 Atl. 854; 35 W. N. C. 355.

⁷⁹ *Anderson v. Des Moines St. R. Co.*, 97 Iowa, 739; 66 N. W. 64.

§ 199. Release when induced by fraud no bar.—If a person who has been injured by the negligent act of another is fraudulently induced to sign a release for the damages sustained, such release will not operate as a bar to a subsequent action to recover for such injuries. So where a written release was executed by one who was not in a condition to understand what he was doing, it was held that it was no bar to an action by the injured person to recover damages when attacked for fraud.⁸⁰ And where an illiterate employee gave a receipt for wages on which was written the words, "in full for services and damages," it was held that the employer was not thereby released from damages, where it appeared that the employee did not understand that such receipt was to be a release of damages.⁸¹ So, also, where money was received by a person under the impression that it was a gratuity, it was held that an instrument which referred to such money as a "donation" to be in "full payment of all the matters" which the maker thereof might have against a certain street car company in consequence of an accident which was declared in the instrument to be due to such person's own carelessness, was not a bar to an action to recover for the injuries resulting from such accident.⁸² And again, where, four days after an accident while the injured person was utterly helpless and was mainly concerned with his immediate needs, a release was executed by him for a very small consideration, and at the instigation of the claim agent of the railroad company, it was held that under such circumstances the release would be set aside as a fraud and an imposition.⁸³

§ 200. Same subject continued.—A settlement of a pending suit to recover for personal injuries will not be set aside merely because the plaintiff had not fully recovered, could not read or

⁸⁰ *Malmstrom v. Northern P. R. Co.*, 20 Wash. 195; 55 Pac. 38; 12 Am. & Eng. R. Cas. N. S. 329.

⁸¹ *Whitney & S. Co. v. O'Rourke*, 172 Ill. 177; 50 N. E. 242, aff'g 68 Ill. App. 487.

⁸² *Boikens v. New Orleans & C. R. Co.*, 48 La. Ann. 831; 19 So. 737.

⁸³ *Atchison, T. & S. F. R. Co. v. Cunningham*, 59 Kan. 722; 54 Pac.

1055; 12 Am. & Eng. R. Cas. N. S. 132. In this case it appeared that the person, while a passenger, had been injured in a collision, and that, among other severe injuries, his skull had been fractured and his leg broken. The consideration for the release was \$75 and care to be given him at the hospital to which he was taken after the accident.

write, and his attorneys were not present at the time he made such settlement and had no knowledge of the same.⁵⁴ And a release to a railroad company by an employee for injuries received while on one of such company's trains, due to a defect in the track of another company over which such train was passing, will not, in the absence of undue influence, be set aside on the ground of fraud because the company to which he gave such release represented that the company owning the track was alone responsible where, as a matter of fact, both companies were responsible and the effect of the release was to discharge both companies.⁵⁵ Again, though the want of sufficient mental capacity may be a good ground for setting aside a release, yet there must be some evidence tending to show the want of such capacity in order to authorize the consideration of such question by the jury.⁵⁶ And where a person who has executed a release of damages for personal injuries claims that he had no knowledge of the contents of such release and was induced to sign the same by misrepresentations, though it is held that he cannot state his understanding as to the purport or purpose of the paper, yet he may be asked whether he knew at the time he signed the same that he was settling with the company for damages due to the injury.⁵⁷ And where a release is pleaded by the defendant in an action to recover for personal injuries, the admissibility of evidence for the purpose of showing that the release was obtained by fraud cannot be questioned for the first time on appeal.⁵⁸

§ 201. Setting aside of release—Return of consideration not necessary.—The general rule that one who seeks to rescind a contract must restore the other party thereto to the position which he was in at the time he entered into the contract does not apply where one seeks to set aside a release which has been procured by fraud. In such cases a return of the money or

⁵⁴ *Mosby v. Cleveland Street R. Co.*, 15 Ohio C. C. 501.

⁵⁵ *Denver & R. G. R. Co. v. Sullivan*, 21 Colo. 302; 41 Pac. 501.

⁵⁶ *Och v. Missouri, K. & T. R. Co.*, 130 Mo. 27; 39 L. R. A. 442; 31 S. W. 962; 2 Am. & Eng. R. Cas. N. S. 343.

⁵⁷ *National Syrup Co. v. Carlson*, 155 Ill. 210; 40 N. E. 492.

⁵⁸ *Chesapeake & O. R. Co. v. Howard*, 27 Wash. L. Rep. 146; 14 App. D. C. 262.

consideration received at the time of and for the execution of the release need not be made.⁸⁹ So where one who had been injured, owing to the negligence of another, signed a paper releasing such person of all claims for damages, and he was induced to make such release by fraud and false representations that the money was a gift from the wife of the defendant who had on previous occasions made gifts to her, it was held that before commencing an action for such injuries the plaintiff was not bound to restore the money received.⁹⁰ And where a passenger who had been injured was fraudulently induced to sign a release to the company of all claims for damages for personal injuries under the belief that he was merely signing a release of any claim for damages to his clothing, it was held that it was not necessary for him to return the money received under such release before bringing an action for the physical injuries sustained by him.⁹¹

§ 202. Release limited to injuries specifically mentioned.

—Where a release specifically enumerates the injuries which are known and considered as the basis of the settlement and other injuries subsequently develop, the existence of which were unknown to the parties at the time, but which are of such a character and nature as to clearly indicate that if they had been known the release would not have been executed on such a basis, such release will be no bar to an action for such subsequently developed injuries.⁹² And where a release was executed

⁸⁹ *O'Brien v. Chic. M. & St. P. R. Co.*, 89 Iowa, 644; 57 N. W. 425, where it was declared that the release was a mere receipt for a gratuity which the plaintiff might retain though defeated in the action. *Bliss v. N. Y. C. & H. R. R. Co.*, 160 Mass. 447; 36 N. E. 65; *Dwyer v. Wabash R. Co.*, 66 Mo. App. 335; *Shaw v. Webber*, 79 Hun (N. Y.), 307; 61 N. Y. St. R. 430; 29 N. Y. Supp. 437; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; 41 S. W. 117. But see *Lyons v. Allen*, 11 App. D. C. 548; 26 Wash. L. Rep. 50; *Louisville & N. R. Co. v. McElroy*, 100 Ky. 153; 18 Ry. L. Rep.

730; 37 S. W. 844; *Och v. Missouri, K. & T. R. Co.*, 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; 2 Am. & Eng. R. Cas. N. S. 343.

⁹⁰ *Shaw v. Webber*, 79 Hun (N. Y.), 307; 61 N. Y. St. R. 430; 29 N. Y. Supp. 437, aff'd 151 N. Y. 655, no opinion.

⁹¹ *Bliss v. N. Y. C. & H. R. R. Co.*, 160 Mass. 447; 36 N. E. 65.

⁹² *Lumley v. Wabash R. Co.* (C. C. App. 6th C.), 76 Fed. 66; 43 U. S. App. 476; *Union P. R. Co. v. Artist*, 19 U. S. App. 612; 23 L. R. A. 581; *Nelson v. Minneapolis St. R. Co.*, 61 Minn. 167; *Och v. Missouri*,

under such circumstances, which was broad enough in its terms but the unsuspected injury which developed appeared to have been the principal injury and to have resulted in serious and permanent disability, it was held that the release would not be construed as including such injury.⁸³ In this class of cases also a tender back of the money received in connection with such release is not necessary in order to enable the party injured to recover for the injury subsequently developed.⁸⁴

§ 203. Release by railroad employee—Acceptance of benefits of relief association.—Relief associations have been formed in many instances for the benefit of the employees of a railroad who have been injured or disabled. Of these associations the railroad company in many cases contribute to a certain extent to the running expenses and maintenance and often also to the general relief fund. Where associations of this kind are in existence and an employee joining the same stipulates or contracts with the railroad company which employs him, that if he is injured and accepts money from the relief fund on account of such injury, the acceptance by him of such money shall operate as a relinquishment or release of any right to damages against the company, such stipulation is a valid contract or stipulation being supported by a sufficient consideration and not contrary to public policy.⁸⁵ Such a contract is not an agreement

K. & T. R. Co., 130 Mo. 27; 36 L. R. A. 442; 31 S. W. 962; 2 Am. & Eng. R. Cas. N. S. 343.

⁸³Lumley v. Wabash R. Co. (C. C. App. 6th C.), 76 Fed. 66; 43 U. S. App. 476. In this case the surgeon of the company had told the injured person that the pain complained of was sympathetic and due to another cause, but it was held that whether the opinion was honestly or dishonestly given it was immaterial as affecting the question whether the release included such injury.

⁸⁴Lumley v. Wabash R. Co. (C. C. App. 6th C.), 76 Fed. 66; 43 U. S. App. 476.

⁸⁵Chic. B. & Q. R. Co. v. Miller

(C. C. App. 8th C.), 76 Fed. 439; 22 C. C. A. 264; 40 U. S. App. 448; Owens v. Balt. & O. R. Co., 35 Fed. 715; Eckman v. Chic. B. & Q. R. Co., 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496; 9 Am. & Eng. R. Cas. N. S. 308, aff'g 64 Ill. App. 444; Lease v. Penn. Co., 10 Ind. App. 47; 37 N. E. 423; Maine v. Chic. B. & Q. R. Co. (Iowa), 70 N. W. 630; 9 Am. & Eng. R. Cas. N. S. 299; 2 Am. Neg. Rep. 15; Chic. B. & Q. R. Co. v. Curtis, 51 Neb. 442; 71 N. W. 42; Pittsburgh, C. C. & St. L. R. Co., 55 Ohio St. 497; 35 L. R. A. 507; 45 N. E. 641; 7 Am. & Eng. R. Cas. N. S. 152; 37 Ohio L. J. 30; Johnson v. Philadelphia & R. R. Co., 163 Pa.

not to sue the employer for injuries due to the latter's negligence, but merely gives to the employee an election either to accept the benefits, in which case he is precluded by the agreement from suing the company, or to sue the company, in which event he cannot accept the benefits of the association. The acceptance of the benefits operates as a release of all claim to damages against the railroad company.⁹⁶ Again, where an employee releases the company from liability by accepting the benefits of a relief fund, such release is not in violation of a constitutional provision giving to employees the same rights and remedies allowed to persons who are not employees in certain cases and providing that a waiver of the benefit of such provision shall be null and void.⁹⁷ So, also, under a statute of Ohio,⁹⁸ prohibiting any contract by which the right to damages against a railroad in case of personal injury or death should be surrendered or waived, or in case that right is asserted, the surrender, or waiver of any other right, it was held that a contract by an employee that the acceptance of any benefits from the relief fund should release the employer from liability for damages was not within such prohibition.⁹⁹ And where a release of the railroad company has been made by the acceptance of benefits, such release cannot be avoided merely on the ground that the employee did not know that he could prove certain facts, or by what witnesses he could prove them.¹⁰⁰

127; 29 Atl. 854; *Johnson v. Charleston & S. R. Co.*, 55 S. C. 152; 44 L. R. A. 645; 32 S. E. 2; 12 Am. & Eng. R. Cas. N. S. 761; 4 Chic. L. J. Wkly. 81.

⁹⁶ *Eckman v. Chic. B. & Q. R. Co.*, 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496; 9 Am. & Eng. R. Cas. N. S. 308, aff'g 64 Ill. App. 444; *Lease v. Penn. Co.*, 10 Ind. App. 47; 37 N. E. 423; *Spitze v. Baltimore & O. R. Co.*, 75 Md. 162; *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 55 Ohio St. 497; 35 L. R. A. 507; 45 N. E. 641; 7 Am. & Eng. R. Cas. N. S. 152; 37 Ohio L. J. 30; *Baltimore & O. R. Co. v. Bryant*, 9 Ohio C. C. 332; *Ringle v.*

Penn. R. Co., 164 Pa. St. 529; 30 Atl. 492; *Brown v. Balt. & O. R. Co.*, 23 Wash. L. Rep. 337. See *Elliott on R. R.*, sec. 1384.

⁹⁷ *Johnson v. Charleston & S. R. Co.*, 55 S. C. 152; 44 L. R. A. 645; 32 S. E. 2; 12 Am. & Eng. R. Cas. N. S. 761; 4 Chic. L. J. Wkly. 81, construing such a release in connection with S. C. Const. 1895, art. 9, sec. 15.

⁹⁸ Ohio Act, April 2, 1890.

⁹⁹ *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 55 Ohio St. 597; 35 L. R. A. 507; 45 N. E. 641; 7 Am. & Eng. R. Cas. N. S. 152; 37 Ohio L. J. 30.

¹⁰⁰ *Vickers v. Chic. B. & Q. R. Co.* (C. C. N. D. Ill.), 71 Fed. 139.

§ 204. **Recovery of special damages—Pleadings.**—The damages which are recoverable in an action for personal injuries are such as necessarily result from the act complained of in the absence of allegation and proof of special damages. If a plaintiff in such an action seeks to recover special damages, he should allege them in his complaint and give proof thereof.¹ So where plaintiff claims particular damages by reason of loss of any special contract or engagement as a result of personal injuries, the grounds for same should be stated in the declaration.² And where the only allegation as to special damage was that the plaintiff had been hindered in her business and incurred expenses in being cured, it was held that evidence was not admissible of any special business engagement into which she had entered, and that she could not express her opinion of what she could or would have earned thereunder.³ And in an action to recover for injuries received while in defendant's car, it was held that the plaintiff could not recover damages for the cutting of his clothing, since they were special and should be alleged in the complaint.⁴ So again, under an allegation of a physical injury resulting in soreness and lameness, it was held that there could be no recovery for rheumatism augmented by such injury.⁵ But the recovery of special damages from an injury to plaintiff's business may be had under an allegation that the plaintiff has become so disabled as to interfere seriously with his business in the absence of a motion to make the allegation more definite and certain.⁶

§ 205. **Amendment of complaint—Increased damages.**—The general rule seems to be that a complaint may, in the discretion of the court, be amended so as to increase the amount of damages claimed. Thus it is so held in Massachusetts.⁷

¹ Hunter v. Stewart, 47 Me. 419.

² North Chic. St. R. Co. v. Barber, 77 Ill. App. 257; Citizens St. R. Co. v. Burke, 98 Tenn. 650; 40 S. W. 1085.

³ Beardstown v. Smith, 150 Ill. 169; 37 N. E. 211, aff'g 52 Ill. App. 46.

⁴ Schmitt v. Dry Dock R. R. Co., 3 N. Y. St. R. 257; 2 City Ct. 359. In this case it was held that damages for loss by such cutting were not

recoverable under an allegation that the clothing of the plaintiff was saturated with blood.

⁵ Hall v. Cadillac, 114 Mich. 99; 72 N. W. 33; 4 Det. L. N. 499.

⁶ Frobisher v. Fifth Ave. Transp. Co., 81 Hun (N. Y.), 544; 63 N. Y. St. R. 287; 30 N. Y. Supp. 1099.

⁷ Graves v. New York & N. E. P. Co., 160 Mass. 402; 35 N. E. 851.

And in the United States courts it is held that the trial judge may, in his discretion, permit a complaint to be amended so as to introduce an additional element of damages for money expended where such element is foreshadowed in the bill of particulars.⁸ So in Georgia it is held that the plaintiff is, after the commencement of the trial, entitled as a matter of right to amend his complaint for the purpose of showing an additional injury, and that the defendant, if surprised thereby, may have a continuance of the case for the purpose of meeting such amendment upon making a proper showing.⁹ And in a case in New York in an action for personal injuries, which occurred prior to the removal of the statutory limitation of the amount recoverable in such actions, it was held that where a complaint, declaring upon such action, was amended to increase the demand in excess of the statutory limit, it was not prejudicial where the verdict was not in excess of such limit.¹⁰ In New Hampshire also it is held that the statement filed in accordance with the laws of that state¹¹ within ten days of the date of the injury may be amended to cover damages which appear subsequent to the date of filing.¹²

§ 206. Instructions—Generally.—Where the law provides a definite measure of damages in an action for personal injuries, the statement in an instruction of a general principle as to the measure of damages which is broader than is applicable to the particular case and which is not qualified by other instructions is erroneous.¹³ Although it has been held that though an instruction does not limit the jury to any particular elements of damages, it is not prejudicially erroneous if the verdict is clearly not excessive.¹⁴ Where the plaintiff's recovery was limited by the instruction to the issue "if the jury shall find the plaintiff has been injured as charged in the declaration," such instruc-

⁸ *Forty-Second St. M. & St. N. R. Co. v. Hannon* (C. C. App. 2d C.), 57 U. S. App. 255; 85 Fed. 852; 29 C. C. A. 437.

⁹ *Atlanta Consol. St. R. Co. v. Bagwell*, 107 Ga. 157; 33 S. E. 191.

¹⁰ *Barns v. Houston W. S. & P. F. R. Co.*, 15 Misc. (N. Y.) 19; 36 N. Y. Supp. 774; 71 N. Y. St. R. 864.

¹¹ N. H. Gen. Laws, chap. 75, sec. 7.

¹² *Noble v. Portsmouth* (N. H.), 30 Atl. 419.

¹³ *Omaha Coal C. & L. Co. v. Fay*, 36 Neb. —; 55 N. W. 211.

¹⁴ *Sherwood v. Grand Ave. R. Co.*, 132 Mo. 389; 33 S. W. 774.

tion was held to limit the recovery by the plaintiff not only to the described injuries but to their causation as described in the declaration.¹⁵ While an instruction should be clear as to the measure of damages in each particular case, it need not state all the elements of recovery.¹⁶ And if an instruction attempts to state the causes, other than those for which defendant is responsible, which may have produced the injury, but omits those which the evidence tends to establish as producing causes, such omission does not constitute error.¹⁷ Again, an instruction should not assume the existence of elements which should be shown by the evidence and are not. So where a person fell into an excavation it was held in an action to recover for the injury caused thereby that an instruction which assumed that the plaintiff sustained physical injuries causing bodily pain and mental suffering, was erroneous.¹⁸ But an instruction that the plaintiff may recover as a result of "said injury" for any pain and anguish which he has suffered or will suffer in consequence thereof, all damages to his person, permanent or otherwise, occasioned thereby, and generally all damages alleged in the declaration which they may believe from the evidence he has sustained by reason thereof, was held not erroneous as assuming that the hernia which it had been shown that the plaintiff was suffering from was a result of the injuries in question.¹⁹ And it was held not erroneous as assuming that damages were sustained to instruct the jury that in assessing damages they should take into consideration all the facts and circumstances before them, where a technical liability was admitted by the defendant upon the trial.²⁰ But in another case it was held to be error to permit the jury to consider the dislocation of a shoulder as an element of damages where there was no evidence showing a dislocation, the only evidence bearing thereon being the testimony of the plain-

¹⁵ *American Exp. Co. v. Risley*, 77 Ill. App. 476, *aff'd* in 179 Ill. 295; 53 N. E. 558; 6 Am. Neg. Rep. 40.

¹⁶ *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48; 32 N. E. 398.

¹⁷ *Missouri, K. & T. R. Co. v. Simmons*, 12 Tex. Civ. App. 501; 33 S. W. 1096.

¹⁸ *Evans v. Joplin*, 76 Mo. App. 20; 1 Mo. App. Rep. 485.

¹⁹ *Chicago City R. Co. v. Allen*, 169 Ill. 287; 48 N. E. 414, *aff'g* 68 Ill. App. 472.

²⁰ *North Chic. St. R. Co. v. Housinger*, 175 Ill. 318; 51 N. E. 613, *aff'g* 70 Ill. App. 101.

tiff that he could not use his arm, and that of his physician that he was unable to tell whether there was a dislocation.²¹ Again, if the evidence as to the cause of an injury consists of mere speculations, it is held that a verdict should be directed for the defendant.²² But if the evidence with all its inferences fairly tends to sustain a verdict for plaintiff, it is declared that it is proper to refuse a peremptory instruction for the defendant.²³

§ 207. Amount of recovery—Instructions as to.—While the amount named in the complaint in an action for personal injuries may be said to be the amount in excess of which damages should not be awarded, or in other words a limitation as to the damages which the jury may assess, yet the amount claimed may be so largely in excess of what the facts of the case would justify or warrant, that it would be improper to instruct the jury that they may award plaintiff fair, reasonable and just compensation to any amount not exceeding the amount demanded, since such instruction would tend to impress the jury that a verdict of such amount would be justified.²⁴ But though such an instruction, may be erroneous, yet a judgment will not be reversed on that account alone, if it appear from the amount of the verdict and the evidence that the error was harmless.²⁵ But where in an action for injuries caused by a defective bridge, the plaintiff had offered to accept a certain amount in his claim filed with the supervisors, it was held not prejudicial to defendant to instruct the jury that he could not recover in excess of that amount.²⁶ Where the jury is instructed as to the amount recoverable in such actions, it is a better practice to instruct them that they should not find for any item an amount in excess

²¹ *Haszlachern v. Third Ave. R. Co.*, 60 N. Y. Supp. 1001.

²² *Gerue v. Consol. Fireworks Co.*, 12 Ohio C. C. 420; 1 Ohio C. S. 616.

²³ *West Chicago St. R. Co. v. Lyons*, 157 Ill. 593; 42 N. E. 55.

²⁴ *Gilbertson v. Forty-Second St. M. St. N. Co.*, 14 App. Div. (N. Y.) 294; 43 N. Y. Supp. 782; *Rost v. Brooklyn H. R. Co.*, 10 App. Div. (N. Y.) 477; 41 N. Y. Supp. 1069. See also *Illinois C. R. Co. v. Louders*.

178 Ill. 585, rev'g 79 Ill. App. 41; *De La Vergne Refrigerating Mach. Co. v. McLeroth*, 60 Ill. App. 529; *Benson v. Chicago & N. W. R. Co.*, 41 Ill. App. 227; *Illinois C. R. Co. v. Minor (Miss.)*, 11 So. 101; 16 L. R. A. 627.

²⁵ *Texas & P. R. R. Co. v. Hoffman*, 83 Tex. 286; 18 S. W. 741.

²⁶ *Homan v. Franklin County*, 98 Iowa, 692; 68 N. W. 559.

of what the petition or complaint claims, instead of merely limiting the aggregate amount, and instructing them that in assessing the damages they are to consider the various items claimed in the complaint, but imposing no limitation as to the amount they may assess for each item.²⁷ Again, where the court was charging the jury as to the amount recoverable for expenses in connection with plaintiff's business, it was held error to instruct them that they were not bound to restrict the amount awarded to what was actually proven in dollars and cents, and that the plaintiff's efforts in going to business, contrary to the advice of his doctor, probably saved the defendants a considerable amount of expense for other superintendence for which they would have been liable.²⁸ If, however, in a certain case of injuries the amount of recovery is fixed by statute, an instruction limiting plaintiff's recovery to actual damages, not exceeding such amount, cannot be complained of by defendant.²⁹ And it is proper to charge the jury that in assessing the damages in the particular case before them, they are not to consider decisions of the supreme court upon the point whether verdicts awarded by juries in other cases were or were not excessive.³⁰ But in instructing the jury as to the amount of damages which they may award to the plaintiff, it is not proper to draw their attention to the price for which they would be willing to suffer the same injury.³¹

§ 208. "Such sum as will compensate"—"Fair and just compensation"—"Fair and reasonable compensation"—Instructions.—In an action for personal injuries the jury is frequently charged that they may assess damages at such sum as will compensate the plaintiff, and the use of such term has been held proper. So it is proper to charge the jury that they may "assess the damages in such sum as in your judgment will compensate the plaintiff for such injury and pain and suffering."³² And, again, the instruction that the plaintiff is entitled to re-

²⁷ *Blackwell v. Kansas City*, 76 Mo. App. 46; 1 Mo. A. Rep. 486.

²⁸ *Smith v. Nova Scotia Teleph. Co.*, 26 N. S. 275.

²⁹ *Schlerth v. Missouri, P. R. R. Co. (Mo.)*, 19 S. W. 1134.

³⁰ *East Tennessee, V. & G. R. Co. v. King (Ga.)*, 14 S. E. 708.

³¹ *Kehler v. Schwenk*, 144 Pa. St. 348; 13 L. R. A. 374; 22 Atl. 910; 48 Phila. Leg. Intel. 910.

³² *Springfield Consol. R. Co. v.*

cover such sum as will compensate him for the injuries, "and put him in such a position as he would have been in if he had not been injured," is proper.³¹ So, also, where the jury was instructed to find compensatory damages, "considering all the facts and circumstances of the case," it was held that such instruction was not objectionable as failing to confine the jury to what they believed the evidence showed.³² And an instruction to the jury that they might assess damages in such an amount as would "fully compensate" for the injury proved is proper, the word "fully" not being construed as extending the measure of damages beyond the amount proved.³³ So an instruction to the jury that they might assess the damages at such sum as would reasonably compensate the plaintiff for her injuries, but which failed to state the elements of damages which the jury should consider, was held not objectionable by reason of such omission, it being declared that if the defendant desired a specification in that respect, he should have made a request therefor.³⁴ But where plaintiff admitted that she had been recompensed up to a certain date for all damages resulting from an injury, it was held error to charge the jury that if she recovered she was entitled to such an amount as would compensate her for all pain and suffering which she had sustained as a result of the injury.³⁵ In other cases it has been held proper to instruct the jury that they may award reasonable and fair compensation,³⁶ or fair and just compensation.³⁷ And where such words were used, the use of the additional words, as in the sound judgment of the jury, is a

Hoeffner, 175 Ill. 634; 51 N. E. 884, aff'd 71 Ill. App. 162. See *Jacquín v. Grand Ave. Cable Co.*, 57 Mo. App. 320.

³¹ *Lee v. Manhattan Ry. Co.*, 21 J. & S. (N. Y.) 260.

³² *Missouri, K. & T. R. Co. v. McElree*, 16 Tex. Civ. App. 182; 41 S. W. 843.

³³ *Harrington v. Eureka Hill Min. Co.*, 17 Utah, 300; 63 Pac. 737.

³⁴ *Rose v. McCook*, 70 Mo. App. 183.

³⁵ *Och v. Missouri, K. & T. R. R. Co.*, 130 Mo. 27; 21 S. W. 962; 36 L.

R. A. 442; 2 Am. & Eng. R. Cas. N. S. 843.

³⁶ *Seward v. Wilmington*, 2 Marv. (Del.) 189; 42 Atl. 451; *Missouri, K. & T. R. Co. v. Warren* (Tex. Civ. App.), 39 S. W. 652; 2 Am. Neg. Rep. 246, aff'd 90 Tex. 566; 40 S. W. 6. But see *Texas Brew. Co. v. Dickey*, 20 Tex. Civ. App. 606; 49 S. W. 935.

³⁷ *Griffin Wheel Co. v. Markus*, 79 Ill. App. 82; 3 Chic. L. J. Wkly. 546, aff'd 180 Ill. 391; 54 N. E. 206. See *Thomas v. Gates* (Cal. 1899), 58 Pac. 315.

proper and adequate compensation to the injured party,⁴⁰ or in the sound discretion of the jury⁴¹ have been held no error. Again, where the jury were instructed that they might award such reasonable sum as they thought would be a proper recompense for pain and suffering, not a compensation, since such injury could not be compensated, it was declared that though this statement rendered the instruction subject to criticism, yet there was not sufficient cause for reversal where immediately following such statement the court charged that it was for the jury to fix some value for pain and suffering.⁴²

§ 209. Instructions—Measure of damages—Miscellaneous.

—An instruction to the jury to allow “such sum as you believe from the evidence he is justly entitled to” is sufficient in the absence of a request for more definite instructions.⁴³ So, again, where the jury were instructed that if they found for the plaintiff they should award her such damages, not in excess of a certain specified amount, as from the testimony in the case they might think she was entitled to, such instruction was declared not to be erroneous as indicating to the jury that they might allow the plaintiff a sum in excess of the compensatory damages to which she might be entitled under the evidence.⁴⁴ And in an action for wilful or wanton injury where the damages may be punitive in addition to compensatory, it is proper to charge the jury that they may award such damages as they see proper, not exceeding the amount claimed in the complaint.⁴⁵ But where an instruction was given to the jury that if they found for the plaintiff the verdict should be, “We, the jury, find the defendant guilty and assess the damages at”—whatever you think proper not in excess of the amount claimed in the declaration, it was held that such instruction was erroneous since it gave the jury uncontrolled discretion, where the basis for the assessment of damages was

⁴⁰ *Seward v. Wilmington*, 2 Marv. (Del.) 189; 42 Atl. 451.

⁴¹ *Griffin Wheel Co. v. Markus*, 79 Ill. App. 82; 3 Chic. L. J. Wkly. 456, aff'd 180 Ill. 391; 54 N. E. 206.

⁴² *Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430; 42 Atl. 1; 5 Am. Neg. Rep. 245.

⁴³ *Lamb v. Cedar Rapids*, 108 Iowa, 629; 79 N. W. 366. See *St. A. & T. H. R. Co. v. Oden*, 52 Ill. App. 519.

⁴⁴ *Wade v. Columbia Elec. St. R. L. & P. Co.*, 51 S. C. 296; 29 S. E. 233; 64 Am. St. Rep. 676.

⁴⁵ *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555; 25 So. 251.

not explained.⁴⁸ And an instruction has been held erroneous which directed the jury that if they found for plaintiff they might bring in such damages as would make him "whole in dollars as far as possible."⁴⁹ Again, where the jury were charged that injuries could not be fully compensated by money, and in connection with such statement it was also declared that this did not allow the jury to give whatever was claimed by the plaintiff, but that the question must be considered by them fairly and reasonably and that they must decide under all the circumstances what in good conscience, justice and right ought to be given, the instruction was held not erroneous.⁵⁰ And in another case where the court stated to the jury that "money is an inadequate recompense for pain," it was held that this was not a reversible error where the jury was expressly instructed that the plaintiff's measure of recovery was "compensatory damages—that is such sum as will compensate the plaintiff for the injury she has sustained," and the whole charge was based on the theory that exemplary damages could not be given.⁵¹ And where an instruction permitted the jury to determine the extent of a pecuniary loss resulting from total permanent disability, merely from evidence that the plaintiff was sixteen years of age, it was held that such instruction was not, by reason of its inadequacy, prejudicially erroneous, especially if the verdict was not excessive.⁵²

§ 210. New trial based on change of experts' opinions.—

The fact that expert witnesses have changed their minds since the trial of a case as to the extent of the injury, is not sufficient ground for the setting aside of a verdict on appeal and the granting of a new trial where the affidavits of such witnesses are met by counter affidavits of other experts of great experience.⁵³

⁴⁸ Quincy Horse R., etc., Co. v. Schulte (C. C. App. 7th C.), 71 Fed. 487; 18 C. C. A. 221; 34 U. S. App. 444. See Wilson v. Granby, 47 Conn. 47; Hawes v. Kansas City, etc., R. R. Co., 103 Mo. 10; Houston E. & W. T. R. Co. v. Richards, 20 Tex. Civ. App. 203; 49 S. W. 687.

⁴⁹ Guinard v. Knapp S. & Co., 95 Wis. 482; 70 N. W. 671.

⁵⁰ Toledo v. Clopeck, 9 Ohio C. D. 432; 17 Ohio C. C. 585, aff'd in 52 Ohio St. 642.

⁵¹ Morgan v. Southern P. Co., 95 Cal. 501; 30 Pac. 601.

⁵² Baker v. Irish, 172 Pa. St. 528; 33 Atl. 558; 37 W. N. C. 480; 26 Pitts. L. J. N. S. 397.

⁵³ Munday v. Laudry, 51 La. Ann. 308; 25 So. 66.

§ 211. **Inadequate damages—Generally.**—In actions to recover for personal injuries, the damages which may be awarded therefor cannot be graduated with certainty, but must be left to the sound discretion of the jury to be determined by them in the exercise of their intelligence and sense of justice after a consideration of the facts of each case. The rule as to the granting of a new trial in case the damages awarded are inadequate is similar to that which controls in the case of excessive damages. The fact that another jury might have awarded a larger verdict is not of itself sufficient to authorize the granting of a new trial unless it also clearly appear that they must have been influenced by passion, prejudice, partiality, corruption or ignorance or mistake as to law or facts. Where any of these elements appear and the verdict is such as to shock the conscience, a new trial may be properly granted.⁵³ In this connection it is said in a late case: "Where substantial damages are awarded in an action of this sort, courts are very reluctant to grant a new trial on account of the inadequacy thereof."⁵⁴ . . . The extent of the plaintiff's injuries and the money damages which would adequately compensate her therefor, were questions upon which different minds might very naturally and very honestly arrive at different conclusions. The jury were in the best possible position to judge intelligently and fairly in relation thereto; and while the amount awarded may not be so large as another jury or even the court perhaps might award, yet there being nothing to show that it does not represent the honest judgment of competent and fair-minded men, we have no right to disturb it."⁵⁴ But where the jury rendered a verdict

⁵³ *Morris v. Grand Ave. R. R. Co.*, 144 Mo. 500; *Weinberg v. Metropolitan St. R. Co.*, 139 Mo. 286; 40 S. W. 882; *Spirk v. Chic. B. & Q. R. Co.*, 57 Neb. 565; 78 N. W. 272; *Ellsworth v. Fairbury*, 41 Neb. 881; 60 N. W. 336; *Holyoke v. Railway Co.*, 48 N. H. 541; *Miller v. Del., etc., R. Co.*, 29 Vr. (N. J.) 428; 33 Atl. 950; *Morrissey v. Westchester Elec. Ry. Co.*, 30 App. Div. (N. Y.) 424; 51 N. Y. Supp. 945; *Saferstone v. Rochester R. Co.*, 25 App. Div.

(N. Y.) 285; 49 N. Y. Supp. 486; 27 Civ. Proc. 133; *Evans v. Del. & H. Canal Co.* (Pa. C. P.), 6 Kulp, 465; *McNeil v. Lyons*, 20 R. I. 672; 40 Atl. 831; 4 Am. Neg. Rep. 728; *McDermott v. Chic. & N. W. R. Co.* (Wis.), 55 N. W. 179; *Phillips v. Southwestern Ry. Co.*, 4 Q. B. D. 406.
⁵⁴ Citing *Manufacturing Co. v. Smith*, 9 Pick. (Mass.) 12.

⁵⁴ *McGowan v. Interstate Consol. St. R. Co.*, 20 R. I. 264; 38 Atl. 497; 3 Am. Neg. Rep. 737, per Tilling-

for \$55 in an action for personal injuries, and the evidence clearly established the fact that the value of the physician's services was \$88, it was held that though there was no evidence as to the value of time lost by the plaintiff, a new trial should be granted.⁵⁵ And in another case where it appeared that the plaintiff had expended \$485 for medical services; that the value of her lost time was over \$400; that her sufferings had been protracted and severe, and that her injuries were serious and perhaps permanent, it was held that a verdict for \$1,000 was inadequate.⁵⁶ And again in another case it was held that a verdict for nominal damages should be set aside and a new trial granted where it appeared that plaintiff's injuries were severe and that she had suffered much therefrom.⁵⁷ But it is held that though a verdict may be less than the physician's bill, yet in the absence of evidence showing that such bill is reasonable or has been paid, it will not be set aside as inadequate in the absence of other grounds.⁵⁸

§ 212. **Excessive damages.**—As we have elsewhere stated excessive damages are those which are so largely in excess of what the facts of the case and the law justify as to appear to have been the result of passion, prejudice, partiality, ignorance or corruption, and as a general rule unless it is apparent that some of the above elements have influenced the jury in their verdict, it will not be disturbed on appeal on the ground of being excessive.⁵⁹ And it has been held that where a verdict is grossly

hast, J. In this case the injury was a severe and permanent one and the jury awarded \$5,000. See *Evans v. Delaware & H. Canal Co.* (Pa. C. P.), 6 Kulp, 465; *Allison v. Gulf C. & S. F. R. Co.* (Tex. Civ. App.), 29 S. W. 425.

⁵⁵ *Saferstone v. Rochester R. Co.*, 25 App. Div. (N. Y.) 285; 49 N. Y. Supp. 486; 27 Civ. Proc. 133.

⁵⁶ *McNeil v. Lyons*, 20 R. I. 672; 40 Atl. 831; 4 Am. Neg. Rep. 728.

⁵⁷ *Chouquette v. Southern Elec. R. Co.*, 152 Mo. 257; 53 S. W. 897.

⁵⁸ *Brook v. Luden*, 6 N. Y. Supp. 510, aff'g 1 N. Y. Supp. 338.

⁵⁹ *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513; 42 Pac. 983; *Denver v. Stein*, 25 Colo. 125; 53 Pac. 283; 4 Am. Neg. Rep. 125; *Central R. & Bkg. Co. v. Strickland*, 90 Ga. 562; 52 Am. & Eng. R. Cas. 216; 16 S. E. 352; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463; *Cleveland, C. C. & St. L. R. Co. v. Halbert*, 75 Ill. App. 592; *Illinois C. R. Co. v. Cheek*, 152 Ind. 663; 53 N. E. 641; 1 Rep. 975; *Decatur v. Stoops*, 21 Ind. App. 397; 52 N. E. 623; 1 Rep. 516; *Lauter v. Duckworth*, 19 Ind. App. 535; *Fulmore v. St. Paul City R. Co.*, 72 Minn. 448; 75 N. W. 589; 11

excessive and due to any of the above causes, it will be set aside without regard to the number of times the case has been tried and similar verdicts rendered.⁶⁰ So, also, where the verdict is manifestly the result of any of the above causes or where the evidence is conflicting, an order granting a new trial on the ground that the damages are excessive will not be disturbed on appeal.⁶¹ But where the testimony, as to plaintiff's physical condition being a result of the injury or of other causes, is conflicting, a verdict of damages will not be set aside as excessive on the ground that such condition was caused otherwise than by the injury.⁶² And again where, although there was some evidence that the plaintiff's condition was due partially to alcoholism, it was held that a verdict which was not excessive if his condition resulted solely from the injury would not be deemed excessive on appeal where the trial court had in its charge entirely limited the recovery of the plaintiff to damages for illness or incapacity as a result of the injury.⁶³

§ 213. Excessive damages—Remittitur of part of judgment.—If the plaintiff in an action for personal injuries has been

Am. & Eng. R. Cas. N. S. 636; *Kennerly v. Somerville*, 68 Mo. App. 222; *Egan v. Dry Dock E. B. & B. R. Co.*, 12 App. Div. (N. Y.) 556; 42 N. Y. Supp. 188; *Swan v. Long Island R. Co.*, 86 Hun (N. Y.), 265; 33 N. Y. Supp. 190; 66 N. Y. St. R. 864; *Hempstead v. N. Y. C. & H. R. R. Co.*, 82 Hun (N. Y.), 285; 64 N. Y. St. R. 76; *Rowe v. N. Y. C. & H. R. R. Co.*, 82 Hun (N. Y.), 153; 63 N. Y. St. R. 753; *Uertz v. Singer Mfg. Co.*, 35 Hun (N. Y.), 116; *Butez v. Fonda J. & G. R. Co.*, 45 N. Y. Supp. 808; 20 Misc. 123; *Nolan v. N. Y. C. & H. R. R. Co.*, 40 N. Y. St. R. 848; 16 N. Y. Supp. 826; *Polak v. Met. St. R. Co.*, 58 N. Y. Supp. 1133; 28 Misc. 791; *Tisdale v. D. & H. Canal Co.*, 4 N. Y. St. R. 812; *Buffalo L. Oil Co. v. Everest*, 3 How. (N. S.) 179; *Southern R. Co. v. Smith*, 95 Va. 187; 28 S. E. 173; *Joyce on Electric Law*, sec. 949. As to excessive ver-

dicts in particular cases, see note at end of this chapter.

⁶⁰ *Consol. Traction Co. v. Graham*, 62 N. J. L. 80; 40 Atl. 773; 4 Am. Neg. Rep. 660; 17 Nat. Corp. R. 616; 58 Alb. L. J. 93; 31 Chic. L. News, 35.

⁶¹ *Minick v. Troy*, 19 Hun (N. Y.), 253, aff'd 83 N. Y. 514; *Peck v. N. Y. C. & H. R. R. Co.*, 4 Hun (N. Y.), 236; *Herbst v. Vacuum Oil Co.*, 40 N. Y. St. R. 558; 15 N. Y. Supp. 938; *Hickinbottom v. D. L. & W. R. Co.*, 15 N. Y. St. R. 11; *McDonald v. Long Island R. R. Co.*, 6 N. Y. St. 691, aff'd 116 N. Y. 546; 27 N. Y. St. R. 481; 22 N. E. 1168.

⁶² *Haviland v. Manhattan R. Co.*, 40 N. Y. St. R. 773; 15 N. Y. Supp. 898.

⁶³ *Wilhelm v. Brooklyn Q. C. & S. R. Co.*, 32 App. Div. (N. Y.) 637; 52 N. Y. Supp. 1090.

awarded a larger verdict than the court considers is properly allowable under and justified by the evidence, the court may, under such circumstances, require the plaintiff to elect to take judgment for a less sum or accept a new trial, and such action is not prejudicial to the defendant.⁶⁴ And in Illinois it is held that an order of the appellate court requiring a remittitur of a part of the judgment in such an action and taxing the costs in that court to the plaintiff, removes all just ground of complaint in the supreme court as to the misconduct of the counsel for plaintiff, which is alleged to have increased the verdict.⁶⁵ In Missouri it is held that the supreme court has no power to require a remittitur of a part of the amount awarded in an action to recover for personal injuries as a condition of the affirmance of the judgment.⁶⁶

§ 214. Excessive damages—Review of question as to amount.—Whether the verdict in an action for personal injuries is excessive will not be determined in the supreme court of the United States on a writ of error.⁶⁷ And in Wisconsin the question will not be considered on appeal, where there has been no motion for a new trial on such ground, and where there is no certificate that the bill of exceptions contains all the evidence.⁶⁸ And in Illinois it has been decided that on appeal from the appellate court to the supreme court of that state, the latter court

⁶⁴ *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181; *Cleveland, C. C. & St. L. R. Co. v. Beckett* (Ind. App.), 39 N. E. 429; *Newberry v. Getchell & M. Lumber & Mfg. Co.*, 100 Iowa, 441; 69 N. W. 743; *Rea-Patterson Mill Co. v. Myrick* (Kan. App. 1901), 63 Pac. 462; *Union P. Ry. Co. v. Mitchell*, 56 Kan. 324; *Flournoy v. Shreveport Belt Ry. Co.*, 50 La. Ann. 491; 23 So. 465; *Friend v. Ingersoll* (Neb.), 58 N. W. 281; *Kalfur v. Broadway Ferry & M. A. R. Co.*, 161 N. Y. 860; 57 N. E. 1113, aff'g 34 App. Div. 267; 54 N. Y. Supp. 503; *McGowan v. Givven Mfg. Co.*, 54 App. Div. (N. Y.) 233; 66 N. Y. Supp. 706; *Silberstein v. H. W. S., etc., R.*

Co., 22 N. Y. St. R. 452; 4 N. Y. Supp. 843; *Clapp v. Hudson River R. R. Co.*, 19 Barb. (N. Y.) 461; *Geisberg v. Mut. Bldg. & L. Assn.* (Tex. Civ. App. 1900), 60 S. W. 478.

⁶⁵ *West Chicago St. R. Co. v. Musa*, 180 Ill. 130; 54 N. E. 168, aff'g 80 Ill. App. 223; 4 Chic. L. J. Wkly. 74.

⁶⁶ *Rodney v. St. Louis S. W. R. Co.* (Mo.), 30 S. W. 150.

⁶⁷ *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 50; 36 L. Ed. 71; 11 Ry. & Corp. L. J. 146; 12 Sup. Ct. Rep. 356.

⁶⁸ *Collins v. Janesville*, 99 Wis. 464; 75 N. W. 88.

will not review the amount of damages awarded in an action for personal injuries though the appellate court may have expressed in its opinion wrong views as to the basis of damages.⁶⁹ And again, in North Carolina it is held that where the trial court refuses to set aside a verdict on the ground that the damages are excessive, such refusal cannot be reviewed by the supreme court of that state.⁷⁰ So, also, it is held in New York that a judgment in an action for negligence cannot be reversed by the court of appeals of that state on the ground of excessive damages.⁷¹ And in Utah, under the statute of that state, where there is any evidence to support a verdict in an action to recover damages for injuries due to negligence, the supreme court has no power to say that such verdict is excessive.⁷²

⁶⁹ Illinois C. R. Co. v. Harris, 162 Ill. 200; 44 N. E. 498. See also Chicago, etc., R. R. Co. v. O'Connor, 119 Ill. 586.

⁷⁰ Norton v. North Carolina R. Co., 122 N. C. 910; 29 S. E. 886.

⁷¹ Gale v. New York C. & H. R., etc., R. R. Co., 76 N. Y. 594, aff'g 13 Hun, 1.

⁷² Harrington v. Eureka Hill Min. Co., 17 Utah, 300; 53 Pac. 737. It has been declared that in determining whether damages are excessive or not, the best criterion is the average amount awarded for injuries of a like nature. Lockwood v. Twenty-Third St. R. R. Co., 23 N. Y. St. R. 16; 7 N. Y. Supp. 663; 15 Daly, 374.

In the following note we give a list of cases classified as nearly as it is possible so to do, in which the question of whether the damages were excessive or not has been considered in connection with the various injuries and elements for which awarded. The injuries and elements so far as they appear in each case, are stated as briefly and concisely as it is possible so to do, for it is of little value to know whether a verdict has been held excessive or not

as given for some general injury, without knowing the various elements considered.

Ankle—injury to. Verdicts held not excessive. Compound, comminuted fracture—bones protruded through flesh and shoe—over one hundred pieces removed—twenty months' suffering—ankle permanently stiff—also foot slightly deformed—\$15,000. Western Un. Teleg. Co. v. Engler (C. C. App. 9th C.), 21 C. C. A. 246; 44 U. S. App. 517; 75 Fed. 102. Dislocated and bone fractured—disabled from work for nearly a year—in opinion of physicians is permanently disabled—age 47—earning \$50 a month—\$5,000. Richmond & D. R. Co. v. Farmer, 97 Ala. 141; 12 So. 86. Sprained—never as strong as before—future working capacity seriously affected—confined to house some weeks—used crutches 2 or 3 months—using cane a year later—\$1,650. Chesapeake & O. R. Co. v. Friel, 39 S. W. 704; 19 Ky. L. Rep. 152. Wrenched—laborer—unable to work for four months—obliged to use crutches 2 or 3 weeks—considerable pain—\$1,500. McCovey v.

Forty-Second St. & G. S. R. Co., 79 Hun (N. Y.), 255; 61 N. Y. St. R. 34; 20 N. Y. Supp. 368.

Verdicts held excessive. Not permanent, only less free in its movements—confined in house but few weeks—\$10,000. Louisville & N. R. Co. v. Mattingly, 38 S. W. 686; 18 Ky. L. R. 823. Ordinary sprain—not permanent—\$2,000—reduced to \$1,250. Bennett v. Backus Lumber Co., 69 Minn. 530; 79 N. W. 682. Fracture of one of bones in—tearing of ligaments—injury to joint—great pain—bed 3 months—age 75—\$4,000. Johnson v. St. Paul City Ry. Co., 67 Minn. 260; 36 L. R. A. 586; 69 N. W. 900; 1 Am. Neg. Rep. 93. Injury to ankle confining to house 3 or 4 weeks—loss of 7 or 8 months' time—at time of trial able to earn as much as before the accident—\$8,660. Nichols v. Crystal Plate Glass Co. (Mo. 1895), 28 S. W. 991. Ankle and heel lacerated and bruised—in bed 11 weeks—loses a year's time—ankle probably more or less weak always—in time may be used without pain and only stiffness—farmer—\$6,300. Fremont E. & M. V. R. Co. v. French, 48 Neb. 638; 67 N. W. 472; 4 Am. & Eng. R. Cas. N. S. 365. Sprained and bruised—shoulder dislocated—no considerable time lost—no severe suffering—earning capacity not materially diminished—\$2,650, reduced to \$1,200. Fremont E. & M. V. R. Co. v. Leslie (Neb.), 59 N. W. 559. Sprained—prevented from occupation as dressmaker—nervous from—in bed 5 or 6 weeks—paid between \$5 and \$10 for medical services—\$1,000, should be reduced to \$500. Corcoran v. Ulster & D. R. Co., 40 N. Y. Supp. 1117; 9 App. Div. (N. Y.) 621. Injury to ankle—fibula broken above it—in house 2 months

and then went about on crutches—earning capacity not affected, but ankle will be weak for a long time—\$11,006—excessive and should be reduced to \$5,000. Bronson v. Forty-Second St. M. & St. N. A. R. R. Co., 67 Hun (N. Y.), 647; 50 N. Y. St. R. 740.

Arm—loss of. Verdicts held not excessive. One arm—common laborer—\$10,000. Chicago Anderson Pressed-Brick Co. v. Rembarz, 51 Ill. App. 543, aff'd Barnes v. Rembarz, 150 Ill. 192; 37 N. E. 239. Injured so as to require amputation—laboring man—age 46 or 47—receiving from \$1.25 to \$1.50 per day—\$7,500. Gibson Co. v. Glizozinski, 76 Ill. App. 400. Right arm—leg more or less bruised—evidence from which injury might have been found to be permanent—\$8,537. Barrett v. N. Y. Cent. & H. R. R. Co., 61 N. Y. St. R. 9. Right arm—other serious and permanent injuries—brakeman—\$10,000. Galveston, H. & S. A. R. Co. v. Slinkard, 17 Tex. Civ. App. 585; 44 S. W. 35. Forearm—brakeman—age 35—receiving \$55 per month—great physical pain and mental anguish—\$9,119. Missouri, K. & T. R. Co. v. Kirkland, 11 Tex. Civ. App. 528; 32 S. W. 588. One arm—suffering—young, industrious and able-bodied man—wholly dependent on manual labor for living—\$3,500. Norfolk & W. R. Co. v. Ampey, 93 Pa. 108; 25 S. E. 226; 2 Va. L. Reg. 284. Injury necessitating amputation—left arm—age 19—healthy, strong and capable of labor—\$10,000. Baltzer v. Chicago, M. & N. R. Co., 89 Wis. 257; 60 N. W. 716. Following verdicts held excessive: right arm—great pain—age 20—earning \$1 per day—idle for 2½ years—then receives employment at \$35 per month—\$20,000 grossly exces-

sive. *Chicago & N. W. R. Co. v. Kane*, 70 Ill. App. 676; 2 Chic. L. J. Wkly. 489. Right arm—age 19—earning \$18 per week, 5 months, in year—also earns additional money—\$18,000. *Musser v. Lancaster City St. R. Co.*, 15 Pa. Co. Ct. 430; 12 Lanc. L. Rev. 12.

Arm—Fractures of. Passenger on street car—arm broken—contact with iron post near track—\$2,000. *New Orleans & C. R. Co. v. Schneider* (C. C. App. 5th C.), 60 Fed. 210; 8 C. C. A. 571. Woman—age 63—compound fracture of lower part of left arm—dislocation left wrist—great pain—unable to shut left hand or use arm—expenses for surgical treatment \$35—\$950. *Kennedy v. Whittaker*, 81 Ill. App. 605. Married woman—double fracture of arm—fracture two ribs resulting in traumatic pleurisy—contusion of knee resulting in synovitis—about thirty abrasions on body—in bed 2 months—home 4 months—much pain—\$2,500. *Terhune v. Koellisch* (N. J.), 43 Atl. 655. Right arm broken—also five ribs—injured in back—muscles torn from attachments to spine—in bed 3 months—year before he could use arm—ultimate recovery placed at from 2 to 5 years—\$25,000. *Dieffenbach v. N. Y. L. E. & W. R. R. Co.*, 5 App. Div. (N. Y.) 91; 74 N. Y. St. R. 80. Arm fractured—bruised hip—\$1,750. *Murphy v. Weidman Cooperage Co.*, 1 App. Div. (N. Y.) 283; 72 N. Y. St. R. 486. One arm broken—permanently weakened for labor and also rendered smaller—severe suffering caused by sloughing of pus and taking out of the affected bone—\$1,200. *Toledo v. Higgins*, 12 Ohio C. C. 646; 3 Ohio Dec. 532.

Verdicts held excessive. Left arm fractured—permanently impaired—

joint became stiffened requiring adhesions to be broken when plaster cast was removed at end of six weeks—necessary to break adhesions—disabled several weeks longer as result thereof—unable for some time to attend to business as a member of a firm of custom house brokers—expended for physicians about \$250—\$3,000 held excessive by \$500. *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36; 42 Atl. 1061; 6 Am. Neg. Rep. 122. Arm fractured and disfigured—\$6,600, reduced to \$3,000. *Ryder v. Mayor*, 50 N. Y. Supr. 220.

Back, see Spine and Back.

Bite of dog. Following verdicts held not excessive. Bite penetrating to bone of wrist—also on side $\frac{1}{4}$ inch deep and $\frac{1}{4}$ long—great fright and terror—nervous prostration—woman—\$300. *Robinson v. Marino*, 3 Wash. 434; 28 Pac. 752. Girl—age 9—bite of dog on hip—one half inch deep and two inches long—in bed several weeks—still lame at time of trial—\$1,450. *Fitzgerald v. Dolson*, 78 Me. 659. (In accordance with the statute the amount in this last case was to be doubled.) Bite of vicious dog—\$150. *Sylvester v. Maag*, 155 Pa. St. 225; 26 Atl. 392. In following cases verdicts held excessive. Child—resulting epilepsy claimed but evidence not clear as to—doubts resolved by jury in favor of plaintiff—not clear but that an award by way of punishment was included in verdict—\$20,000. Judgment not allowed to stand unless \$10,000 was remitted. *Fye v. Chapin* (Mich. 1899), 80 N. W. 797. Bright, active and well woman—rendered delicate and nervous—frequent fainting spells and becomes partially unconscious—injury permanent—mind impaired

and nearly gone—\$7,500, reduced to \$5,000. *Hayes v. Smith*, 15 Ohio C. C. 300; 8 Ohio C. D. 92.

Crippled by injury. Following verdicts held not excessive: Wound 5 to 7 inches long on thigh—necessary to graft skin—permanently crippled—\$7,500. *Lowry v. Mt. Adams & E. P. I. P. R. Co.* (C. C. S. D. Ohio), 68 Fed. 827; 34 Ohio L. J. 147. Man—age 36—formerly good health and active—in business—in bed nearly a year—unable to walk for nearly 3 years—joint of one foot destroyed and control of foot lost—after ten years one leg atrophied—other leg only one fourth of original vigor—other severe injuries—use of legs would never be recovered—\$30,000. *Smith v. Whittier* (Cal.), 30 Pac. 529. Young man—strong—earning \$45 per month—\$800 for medical treatment and no relief—\$8,000. *Lanark v. Dougherty*, 45 Ill. App. 266. Woman—earning \$6 or \$7 per week washing—also \$2 per day on knitting machine—kept boarders—hip rendered useless—cannot walk with crutches—or stand without something to lean upon—permanent—also both arms were broken—\$6,565. *Miller v. Boone County* (Iowa), 63 N. W. 352. Permanently lame and partially disabled—broken leg—in bed two months—man 67—\$2,000. *Topeka v. Bradshaw*, 5 Kan. App. 879; 48 Pac. 751. Cripple for life—employee in paper mill—thrown into hot pulp and acid. \$2,037.50. *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268; 39 Atl. 996. Injury to girl—intense pain—running sore—cripple for life—\$4,000. *Goina v. Moberly* (Mo.), 29 S. W. 985. Face crushed—lower part immovable—cripple for life—\$8,000. *Oties v. Cowles E. S. & A. Co.*, 7 N. Y. Supp. 251; 26 N. Y. St. R. 869,

aff'd 130 N. Y. 639; 40 N. Y. St. R. 983; 29 N. E. 151. Woman—age 33—apparently healthy—able to earn wages—use of knees lost—employment lost—repeatedly blistered and cauterized—but unable to regain use of limbs—obliged to use crutches—\$2,500. *Cross v. Elmira*, 86 Hun (N. Y.), 467; 33 N. Y. Supp. 947; 67 N. Y. St. R. 617. Injuries to railroad switchman—permanently lamed and crippled—\$7,000. *Lake Shore & M. S. R. Co. v. Winslow*, 10 Ohio C. C. 193; 1 Ohio Dec. 147. Injuries to woman—much pain and suffering—cripple for life—\$10,000. *Skottowe v. Oregon S. L. & U. N. R. Co.* (Oregon), 30 Pac. 222; 12 Ry. & Corp. L. J. 112. In favor of parent for injuries to child—age 7—foot injured—\$200 for medical treatment—to some extent a cripple for life—\$500. *Dublin Cotton Oil Co. v. Jarrard* (Tex. Civ. App.), 40 S. W. 531, aff'd 42 S. W. 959; 91 Tex. 289. Injury to girl—age 7—foot injured—to some extent a cripple for life—\$2,500. *Dublin Cotton Oil Co. v. Jarrard* (Tex. Civ. App.), 40 S. W. 531, aff'd 42 S. W. 959; 91 Tex. 289. Able-bodied man—age 29—earning \$2.10 per day—crippled for life—\$4,000. *St. Louis & S. F. R. Co. v. Woolum* (Tex.), 19 S. W. 782. Woman—age 24—period of 15 months from date of injury to time of trial—helpless invalid and cripple during that time—suffered continual pain during such time and at times excruciating agony—neuritis or periostitis as result of injury—take possibly 18 months or more to restore to health—unable to assist in household matters—nervous system and general health affected—unable to move around without aid—could not participate in social enjoyment—\$5,000. *Norfolk v. Jonakin*, 94 Va. 285; 26 S. E. 830. Laborer—age over 35—

full health and vigor at time of injury—severe pain and suffering—earning capacity—decreased—permanently crippled—\$6,500. *Ogle v. Jones*, 16 Wash. 319; 47 Pac. 747. In following case verdicts held excessive: Injury to ankle—previously feeble—woman—age 75—in bed 3 months—still suffering pain at time of trial—can never walk without crutch—\$4,000. *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; 69 N. W. 900; 36 L. R. 586.

Earning capacity. Impairment of—cases generally. Following cases, verdicts not excessive: Shipwright—earning about \$96 per month—age 48—only able to work lightly for few hours—muscular sense impaired—unable to do work requiring dexterity and fine manipulation—loss of hearing in one ear—\$5,000. *The Pioneer* (D. C. N. D. Cal.), 78 Fed. 600. Longshoreman—age 42—wholly disabled from severe work because injuries aggravated previous disease of heart—\$2,000. *The Persian Monarch* (D. C. E. D. N. Y.), 49 Fed. 669. Cigar packer—business necessitated his standing up—earning \$20 per week—could not stand up at time of trial 2 years after injury—earnings reduced to \$6 per week—suffering from hernia at time of trial—\$4,200. *Denver v. Steia* (Colo. S. C. 1898), 4 Am. Neg. Rep. 125. Permanently disabled and incapacitated from securing permanent employment—\$1,000. *Brush Elec. L. & P. Co. v. Simonsohn*, 107 Ga. 70; 32 S. E. 902. Boarding house keeper—age 42—painful injuries—in bed 2 months—incapable of doing housework previously done by her—constantly growing worse—\$800. *Lockport v. Richards*, 81 Ill. App. 533. Conductor of street car—earning from \$80 to \$90 per month—

age 45—prospects of future career good—impairment of capacity for every kind of employment—\$16,500. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354. Widow—age 41—supporting herself and children by washing and scrubbing—unable to continue scrubbing—unable to stand for only a short time without much pain—\$1,500. *Joliet v. Johnson*, 71 Ill. App. 423. Man—earning average of \$90 per month—age 32—incapacitated from work and any manual labor—\$6,000. *Lake Shore & M. S. R. Co. v. Ryan*, 70 Ill. App. 45. Tailor—loss of use of thumb—prevented from earning full wages at trade—also other injuries—in house 4 months—subsequent suffering and failure to sleep well—\$3,500. *North Chicago St. R. Co. v. Broms*, 62 Ill. App. 127. Laborer—earning \$1.50 per day—age 51—much past and future suffering—laboring ability diminished one half—\$3,500. *Frazer v. Schroeder*, 60 Ill. App. 519. Boy—age 16—physical strength and activity permanently diminished—\$1,500. *Homan v. Fleming*, 51 Ill. App. 572. Man—earning \$15 or \$16 per week at time of injury—age over 60—rendered an invalid—unable to perform manual or mental labor—\$12,500. *West Chicago St. R. Co. v. Bode*, 51 Ill. App. 440, aff'd 150 Ill. 396; 37 N. E. 879. Stenographer—earning \$75 to \$80 per month—permanent internal injuries—pain—external bruises—unable to work at her occupation—\$10,000. *North Chicago St. R. Co. v. Eldridge*, 51 Ill. App. 430. Farmer—incapacitated from work at—also unable to work at any business requiring physical exertion—\$3,500. *La Salle v. Porterfield*, 38 Ill. App. 553. Woman—formerly in good health—suffered pain continually—injury probably incurable—unable to do her housework—\$1,000. *Frankfort v. Cole*

man, 19 Ind. App. 368; 49 N. E. 474. Stenographer—receiving salary of \$50 per month and earning from \$20 to \$25 per month in addition thereto at time of injury—injury probably permanent—lameness—constant pain—incapacitated from regular work—\$4,000. *Bryant v. Omaha & C. B. R. & B. Co.*, 98 Iowa, 483; 67 N. W. 392. Woman—severe fall—passing of blood—sinking spells causing pain—unable to obtain rest and sleep—unable to perform labor—\$2,000. *Atchison, T. & S. F. R. Co. v. Stewart*, 55 Kan. 667; 41 Pac. 961. Engineer—at time of injury earning \$103.54 per month—age 31—unable to continue in such occupation at time of trial—hardly able to perform any work—disability probably permanent—\$6,500. *Woods v. Chicago & G. T. Co.*, 108 Mich. 396; 66 N. W. 328; 2 Det. L. N. 888. Man—earning \$70 per month—age 58—great pain—under continual medical treatment—as result of injury progressive and incurable disease which will ultimately end in death—prevented from further work—\$8,800. *Cooper v. St. Paul City R. Co.*, 54 Minn. 379; 56 N. W. 42. Man—earning from \$1,200 to \$1,500 per year—age 56—great pain—injuries permanent—practically deprived of power to earn a living—\$9,000. *Furman v. Brooklyn H. R. Co.*, 25 App. Div. (N. Y.) 133; 49 N. Y. Supp. 194. Man—earning \$18 per week—strong and healthy—age 38—suffers continual pain—seriously disabled—tremor and dizziness—unable to perform ordinary work—\$5,000. *Mayer v. Liebmann*, 16 App. Div. (N. Y.) 54; 44 N. Y. Supp. 1067; 2 Am. Neg. Rep. 760. Man—earning \$3,000 per year and expense—age 28—strong and healthy prior to injury—great suffering—loss from inability to work and medical expenses at time of trial \$9,100—may never again be able to engage in his former occupation—\$25,000. *Dieffenbach v. N. Y. L. E. & W. R. Co.*, 5 App. Div. (N. Y.) 91; 38 N. Y. Supp. 788. Man—in bed 10 days—prevented from work for five weeks—earning power reduced from \$25 per week to \$8 per week—\$2,232.60. *Miller v. Manhattan R. Co.*, 73 Hun (N. Y.), 512; 56 N. Y. St. R. 189; 26 N. Y. Supp. 162. Laborer—earning \$2 per day—age 56—permanently disabled—\$1,000. *Soderman v. Troy Steel & L. Co.*, 70 Hun (N. Y.), 449; 53 N. Y. St. R. 678; 24 N. Y. Supp. 401. Injuries likely to be permanent—age 35—disabled from all labor—\$15,000. *Solarz v. Manhattan R. Co.*, 8 Misc. (N. Y.) 656; 11 Misc. 715, aff'd 155 N. Y. 645. Woman—husband a cripple—incapacitated from work by her injury—\$1,000. *Fitzsimons v. Rome*, 21 W. D. (N. Y.) 343. Man—earning \$1.50 per day—healthy, strong, sober and industrious—age 40—leg crushed and broken—3½ years after injury dead bone still working from wound—leg devoid of strength, shortened and partially stiffened—earning capacity practically destroyed—\$11,000. *Texas & N. O. R. Co. v. Echols*, 17 Tex. Civ. App. 677; 41 S. W. 488. Man—earning from \$60 to \$125 per month—age 42—permanent injuries—totally unable to pursue his trade—\$9,000. *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; 43 S. W. 1028. Brakeman—earning from \$60 to \$75 per month—age 27—great physical and mental pain—permanent impairment of health—ability to earn a living for the remainder of his life probably permanently destroyed—\$1,500. *Missouri, K. & T. R. Co. v. Chambers*, 17 Tex. Civ. App. 487; 43 S. W. 1090; 3 Chic. L. J. Wkly.

99. Man—earning about \$75 per month—age 30—confined to house about 4 months—paid about \$300 to physicians—obliged to use crutches—earns but little—\$10,000. *Missouri, K. & T. R. Co. v. Cook*, 12 Tex. Civ. App. 208; 33 S. W. 669, reh'g denied in 34 S. W. 178. Traveling salesman—salary \$190 per month above expenses—age 43—wounds in stomach and body—eyesight gradually failing—prevented from attending to business—\$5,000. *Missouri, K. & T. R. Co. v. Huff* (Tex. Civ. App.), 32 S. W. 551. Man—healthy and robust—age 32—constant pain—mind impaired and wrecked body—deprived of ability to support himself and family—\$6,500. *Atchison, T. & S. F. R. Co. v. Click* (Tex. Civ. App.), 32 S. W. 226. Man—in vigorous health—age 30—earning capacity reduced from \$60 to \$25 per month—\$4,750. *Mexican C. R. Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. 301. Conductor on railroad—age 36—several hundred dollars expended for treatment—still suffering—earning capacity diminished two thirds—\$11,200. *Mexican Nat. Bank v. Musette* (Tex. Civ. App. 1894), 24 S. W. 520, aff'd 86 Tex. 708; 24 L. R. A. 642; 26 S. W. 1075. Servant—skull broken—necessary to remove part leaving brain unprotected—capacity to labor materially impaired—\$2,500. *Richlands Iron Co. v. Elius* (Va. 1894), 17 S. E. 890; 17 Va. L. J. 431. Entirely deprived of health and ability to labor for life—\$10,000. *Columbia & P. S. R. Co. v. Hawthorn* (Wash. T.), 19 Pac. 25.

Verdicts held excessive. Woman—about half of time worked as nurse at from \$12 to \$15 per week—remainder of time took care of her home—age 59—only partially incapacitated—\$7,000 is excessive, should be reduced

to \$3,500. *Chicago City Ry. Co. v. Anderson*, 80 Ill. App. 71, aff'd 182 Ill. 298; 55 N. E. 366. Man—previously healthy and able to perform any kind of work—age 30—would continue to be subject to annoyance from pain unless he submitted to an operation to which some risk is attached—obliged to work for less wages—\$8,000 excessive and new trial unless plaintiff stipulate to reduce to \$5,000. *Bosworth v. Standard Oil Co.*, 92 Hun (N. Y.), 485; 72 N. Y. St. R. 195. Man—leg shortened—still suffering pain—ability to work impaired—\$7,500 reduced to \$3,500. *Geiler v. Manhattan R. Co.*, 11 Misc. (N. Y.) 413; 65 N. Y. St. R. 437. Man—earning \$12 per week—in hospital for a year—use of leg impaired by varicose veins—unable to do hard or heavy work—\$15,000 excessive, should be reduced to \$3,000. *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. (N. Y.) 384; 36 N. Y. Supp. 1045. Man—age 74—much pain—health and working capacity seriously impaired—not wholly disabled—\$7,800. *Campbell v. Cornelius* (Tex. Civ. App. 1894), 23 S. W. 117.

Eye—loss of and injury to. Verdicts not excessive. Locomotive engineer—unable to work for eight months—considerable expense—lost sight of one eye—disqualified from his occupation—\$3,000. *East St. Louis v. Dougherty*, 74 Ill. App. 490. To father of boy aged 6—sight of one eye lost entirely and of other partially if not entirely—\$2,900. *Seltzer v. Saxton*, 71 Ill. App. 229. Man—age 22—loss of sight of one eye—\$2,000. *Lemser v. St. Joseph Furniture Co.*, 70 Mo. App. 209. Man—age 35—sight of one eye destroyed and of other affected—only able to do one half the work since

the accident that he could before—\$5,000. *Johnston v. Missouri Pac. Ry. Co.* (Mo.), 9 S. W. 790. Loss of eyesight—in bed about six weeks—in opinion of physician would never recover—\$3,000. *New Jersey R. R. Co. v. West*, 3 N. J. L. 91. Loss of an eye—\$5,000. *Texas & P. R. Co. v. Bowlin* (Tex. Civ. App.), 32 S. W. 918. Verdicts held excessive. Loss of eyesight—\$37,500. *Deep Min. & D. Co. v. Fitzgerald*, 21 Colo. 533; 43 Pac. 210. Loss of an eye—\$5,000. Excessive remittitur of \$2,000. *Benagam v. Plassan*, 15 La. Ann. 703.

Fingers—loss of. Verdicts not excessive. *Brakeman*—one finger lost—another broken—another mashed—hand crushed—unable to do heavy work—earning power reduced from \$1.25 to 75 cents per day—\$2,350. *Richmond & D. R. Co. v. Williams* (Ga.), 14 S. E. 120. Car inspector—three fingers of right hand lost—idle about seven months—earning \$65 per month—in another position he had filled could earn \$75—obtained position afterwards at \$2.00 per day—subsequently increased to \$16 per week—\$2,416.50. *Savannah, F. & W. R. Co. v. Howard*, 91 Ga. 99; 163 S. E. 306. *Brakeman*—loss of finger—hand crushed—probable permanent impairment—earnings reduced from \$60 to \$45 per month—\$1,500. *Strong v. Iowa C. R. Co.* (Iowa), 62 N. W. 799. Man—earning \$40 per month—age 23—unable to work for eight months—finger injured—thumb amputated—arm weakened—injury permanent—unable to do former work—earnings reduced to \$1.10 per day—\$2,300. *Whalen v. Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 563; 39 N. W. 894. Boy—loss of three fingers on one hand—\$4,000. *Barg v. Bonsfield*, 65 Minn. 355; 68 N. W. 45. Man—married—one child—three fingers lost—wrist

and arm injured—earning \$1.50 per day—\$6,000. *Montaugh v. N. Y. C. & H. R. R. R. Co.*, 23 N. Y. St. R. 636. *Brakeman*—age 29—loss of two middle fingers and also top half of index finger of right hand—loss of use of hand and hand movement of wrist—intense pain and suffering—earnings reduced from \$65 to \$25 per month—\$8,000. *San Antonio & A. P. R. Co. v. Parr* (Tex. Civ. App.), 26 S. W. 861. Loss of little finger on right hand—finger next to it drawn up and cannot be straightened—loss of use of hand for four months—ability to perform manual labor greatly impaired—\$2,500. *Campbell v. McCoy*, 3 Tex. Civ. App. 298; 23 S. W. 34. *Switchman*—loss of all the fingers of right hand—\$7,500. *Missouri, K. & T. R. Co. v. Hauer* (Tex. Civ. App.), 33 S. W. 1010. Railroad section hand—loss of two fingers of left hand—others mangled, lacerated and devoid of strength—permanently injured—\$3,300. *Chapman v. Southern P. R. Co.*, 12 Utah, 30; 41 Pac. 551.

Verdicts held excessive. Employee in paper mill—loss of three fingers, portion of fourth finger and part of outside of hand—\$4,250 excessive.—\$2,500 sufficient. *Sawyer v. Rumford Falls Paper Co.*, 90 Me. 354; 38 Atl. 318. Boy—age between 8 and 9—injury necessitating amputation of ring and middle fingers of left hand near first joint—\$1,800. *Gahagan v. Aermotor Co.*, 87 Minn. 252; 69 N. W. 914. Man—age 43—loss of middle finger of left hand—first and third fingers of left hand permanently stiffened—severe pain for several weeks—medical attendance costing \$25—\$8,000 excessive. Reduced to \$5,000. *Borgeson v. United States Projectile Co.*, 2 App. Div. (N. Y.) 57; 37 N. Y. Supp. 458;

72 N. Y. St. R. 548. Freight conductor—*injury*—*necessary* to amputate three fingers—*subsequently necessary* to amputate hand at wrist—*prior* to the accident one of the bones of the hand had been broken—and one or two fingers had become stiffened and withered—\$8,000. *Pittsburg & L. E. R. Co. v. Blair*, 11 Ohio C. C. 579. Man—age 25—loss of little finger—next finger to it broken and stiffened—\$4,000. *Mahood v. Pleasant Valley Coal Co. (Utah)*, 30 Pac. 149.

Fingers—fracture of. Employee—two fingers broken—\$4,000 excessive. Remittitur of \$1,000. *Mahood v. Pleasant Valley Coal Co.*, 8 Utah, 85.

Foot—loss of. Verdicts not excessive. Farmer—making about \$500 per year—age 40—loss of one foot—\$9,000. *Georgia R. & Bkg. Co. v. Keating*, 99 Ga. 308; 25 S. E. 669; 5 Am. & Eng. R. Cas. N. S. 331. *Brakeman*—loss of one foot—\$1,000. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327; 8 S. W. 706. Man—earning \$53.50 per month—age 32—foot amputated above ankle and further amputation necessary later—intense pain—will probably suffer more or less during life—\$9,000. *Manley v. N. Y. C. & H. R. R. Co.*, 18 Misc. (N. Y.) 502; 42 N. Y. Supp. 1076, rev'd however in 18 App. Div. 420; 45 N. Y. Supp. 1108; Man—age 23—lost part of foot—could not leave bed without assistance for ten weeks—unable to work for eight months—permanently disabled—could subsequently work only about three-quarters of the time—physician's bill \$200—\$8,500. *Commerford v. Atlantic Ave. R. R. Co.*, 8 Misc. (N. Y.) 599; 29 N. Y. Supp. 391; 61 N. Y. St. R. 51. Man—age 80—part of foot lost—incapacitated

from attending to business—\$11,500. *Jordan v. N. Y. & H. R. R. Co.*, 30 N. Y. St. R. 670; 9 N. Y. Supp. 506. Young man—good health—age 18—*injury* necessitating the amputation of one foot—in his room four weeks—in house four months—pain in leg results from changes in weather—\$8,000. *San Antonio & A. P. R. Co. v. Green*, 20 Tex. Civ. App. 5; 49 S. W. 670. Favor of father for loss of services of minor son—age 19—employed in dangerous business without father's consent—loss of foot—use of arm permanently impaired—earning \$65 per month at time of injury—\$1,200. *Texas & P. R. Co. v. Brick (Tex.)*, 18 S. W. 947. Child—age 3 years—loss of foot—due to gross negligence of employees of railroad company—\$10,500. *Chipman v. Union P. R. Co.*, 12 Utah, 68; 41 Pac. 562.

Verdicts held excessive. Switchman—loss of one foot and four toes of other foot—\$8,000. *Wood v. Louisville & N. R. Co.*, 88 Fed. 44; 11 Am. & Eng. R. Cas. N. S. 525. Loss of one foot—\$1,200—remittitur \$4,000. *Kroener v. Chicago, M. & St. P. R. Co.*, 88 Iowa, 16. Laborer—earning \$1.50 per day—age 24—loss of one foot—\$10,000 excessive and should be reduced to \$5,000. *Peri v. N. Y. C. & H. R. R. Co.*, 87 Hun (N. Y.), 499; 68 N. Y. St. R. 844. *Injury* necessitating amputation of both feet—man—age 36—earning \$8 per week—\$11,620 excessive and judgment ordered reversed unless plaintiff accepted \$5,000. *Pfeffer v. Buffalo Ry. Co.*, 54 N. Y. St. R. 342; 24 N. Y. Supp. 490; 4 Misc. 465, aff'd 144 N. Y. 636; 64 N. Y. St. R. 868; 39 N. E. 494.

Hand—loss of. Verdicts held not excessive. Man—age 29—been earn-

ing \$2.30 per day—loss of one hand—after injury obtained employment without difficulty—but received only \$1 a day—\$6,500. *Wooster v. Western N. Y. & P. R. Co.*, 40 N. Y. St. R. 844; 16 N. Y. Supp. 764. Loss of right hand—\$3,500. *Greenville Oil & C. Co. v. Harkey*, 20 Tex. Civ. App. 225; 48 S. W. 1005. Injury to hand—run over by car—\$1,250. *Ft. Worth & D. C. R. Co. v. Bell*, 5 Tex. Civ. App. 28; 23 S. W. 922.

Verdicts held excessive. Child—age two and a half years—loss of both hands and one foot—excruciating pain—\$4,000, excessive in absence of claim for exemplary damages and in view of fact that expectancy of life after majority is only eighteen and a half years. *St. Louis, I. M. & S. R. Co. v. Waren*, 65 Ark. 619; 48 S. W. 222; 13 Am. & Eng. R. Cas. N. S. 729. Loss of one hand—\$15,000 excessive, where annual earnings are less than annual interest on such sum. *Peoria, D. & E. R. Co. v. Hardwick*, 53 Ill. App. 161. Loss of right hand—workman—\$25,000 excessive, reduced at the trial to \$15,000; held still excessive; reduced to \$10,000. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. (N. Y.) 307; 58 N. Y. Supp. 640; 6 Am. Neg. Rep. 322.

Hip—fracture of. Dressmaker—earning \$2 per day—\$15,000 excessive, should be reduced to \$10,000. *Coxhead v. Johnson*, 20 App. Div. (N. Y.) 605; 21 App. Div. 626; 47 N. Y. Supp. 389; motion to dismiss appeal denied in 156 N. Y. 680.

Jaw—fracture of. Verdicts held not excessive. Jaw fractured—also collar bone—severe pain for several weeks—health not restored at time of trial—\$3,000. *Chicago, P. & St. L.*

R. Co. v. Lewis, 48 Ill. App. 274. Badly fractured—exceedingly painful—permanent effects and disfigurement—\$8,000. *Miller v. Erie R. Co.*, 34 App. Div. (N. Y.) 217; 54 N. Y. Supp. 606.

Leg—loss of. Verdicts held not excessive. Seaman—loss of leg below knee—much pain—\$4,000 not excessive, as recovery was considered not more than half the actual damages. *The Edenmore*, 58 U. S. App. 104; 86 Fed. 886; 30 C. C. A. 675. Healthy man—able to earn about \$100 per month—age 39—loss of both legs—must drag himself about on his knees as artificial limbs cannot be adjusted—\$13,000. *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219; 27 Pac. 701; 10 Ry. & Corp. L. J. 351; 48 Am. & Eng. R. Cas. 235. Left leg severed from body—collision with locomotive—permanent injuries to head, spine and back—much suffering—great expense—vocation interfered with—\$6,500. *East St. Louis Connecting R. Co. v. Reames*, 75 Ill. App. 28, aff'd 173 Ill. 582; 51 N. E. 68. Brakeman—earning \$60 per month—injury requiring amputation four and one half inches below hip—\$8,000. *Chicago & N. W. R. Co. v. Gillison*, 72 Ill. App. 207. Girl—age 6—loss of right leg—\$12,000. *Sloniker v. Great Northern R. Co.*, 76 Minn. 306; 79 N. W. 168; 13 Am. & Eng. R. Cas. N. S. 819; 6 Am. Neg. Rep. 298. Brakeman—earning \$65 per month—age 32—leg crushed below knee—amputation necessary and performed three times, the last time above the knee—long and severe suffering—\$10,000. *Hollenbeck v. Missouri P. R. Co.*, 141 Mo. 97; 38 S. W. 723; 8 Am. & Eng. R. Cas. N. S. 277. Boy—age 18 months—injury requiring amputation above the knee—nearly \$16,000. *Kalfur v. Broad-*

way Ferry & M. Ave. R. Co., 34 App. Div. (N. Y.) 267; 54 N. Y. Supp. 503; 12 Am. & Eng. R. Cas. N. S. 850, aff'g 23 Misc. 417; 51 N. Y. Supp. 179. Boy—age 5—loss of one leg—\$12,000. *Akersloot v. Second Ave. R. Co.*, 40 N. Y. St. R. 231; 15 N. Y. Supp. 864, aff'd on other grounds in 131 N. Y. 599; 15 L. R. A. 489; 43 N. Y. St. R. 290; 30 N. E. 195. Healthy woman in prime of life—leg amputated below knee—one arm enlarged—hearing impaired—great suffering and pain—\$23,000. *Erickson v. Brooklyn H. R. R. Co.*, 11 Misc. (N. Y.) 662, aff'd 155 N. Y. 643. Man in prime of life—loss of leg—also arm—\$18,000. *Murray v. Brooklyn City R. R. Co.*, 7 N. Y. Supp. 900. Boy—age 16—loss of one leg just below knee—\$9,000, not excessive, though plaintiff's earning power is less than the legal interest on such amount. *Richmond v. Second Ave. R. Co.*, 76 Hun (N. Y.), 233; 59 N. Y. St. R. 113; 27 N. Y. Supp. 780. Brakeman—age 19—injury requiring amputation of leg below the knee—strength and efficiency of right hand impaired—\$9,000. *Texas & P. R. Co. v. Brick*, 83 Tex. 598; 20 S. W. 511. Strong healthy man—earning from \$125 to \$150 per month—age 32—loss of right leg below knee—scalded on head, face, hands and arms—loses all his flesh on lower part of arms and on his hands—loses nearly all his hair—right arm partially and sometimes totally paralyzed—\$12,500. *Texas & P. R. Co. v. Johnson* (Tex. Civ. App.), 34 S. W. 186, reh'g denied in 14 Tex. Civ. App. 566; 37 S. W. 973; which has writ of error denied in 90 Tex. 304; 38 S. W. 520. Boy—age 11—loss of one leg—permanently weakening of other leg—\$10,000. *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.), 14 L. R. A. 781; 16 S. W. 1093. Boy—

leg crushed so amputation necessary—\$15,000. *Roth v. Union Depot Co.*, 13 Wash. 525; 31 L. R. A. 855; 43 Pac. 641; 44 Pac. 253.

Verdicts held excessive. Loss of leg below knee—\$10,000 excessive. *Remittitur—\$3,000.* *Mo. Pac. R. Co. v. Dwyer*, 36 Kan. 59. Loss of leg—\$8,500, should be reduced to \$6,000. *Conway v. New Orleans City & L. R. Co.*, 51 La. Ann. 146; 24 So. 780; 5 Am. Neg. Rep. 354.

Verdicts held excessive. Man—age 23—earning about \$480 a year—injury requiring amputation below knee—not entirely incapacitated from earning a living—\$17,000—reduced to \$6,000. *Brakeman—loss of leg—\$25,000 excessive but third trial refused where plaintiff offered to remit \$5,000.* *Waldhiser v. Hannibal & St. J. R. Co.*, 87 Mo. 37. Man in good health—capable of earning \$12 per week—age 28—suffered great pain—\$25,000. *Tully v. N. Y. & T. S. S. Co.*, 10 App. Div. (N. Y.) 463; 42 N. Y. Supp. 29. Loss of leg below knee—hip, right arm and leg cut and knee joint stiffened—three weeks before he could get around—leg healed in four months—\$16,000 excessive, \$9,000 sufficient. *Bailly v. Rome, W. & O. R. R. Co.*, 84 Hun (N. Y.), 4; 61 N. Y. St. R. 490. Mason's tender—wages \$2.00 per day—loss of leg—\$9,000 excessive and new trial unless \$5,000 accepted. *Morris v. Eighth Ave. R. Co.*, 68 Hun (N. Y.), 39; 52 N. Y. St. R. 61. Laborer—capable of earning but \$8 per week—age 36—loss of both legs—\$11,620.11 excessive and reduced to \$5,000. *Pfeffer v. Buffalo R. Co.*, 4 Misc. (N. Y.) 465; 24 N. Y. Supp. 490. Clergyman—salary \$1400 per year—age 30—injury requiring amputation of leg just below hip

joint—collar bone broken—cuts and bruises—\$15,000 excessive where exemplary damages are not warranted. *Holden v. Penn. R. R. Co.* (Pa. C. P.), 7 Kulp, 52.

Leg, fractures of. Verdicts held not excessive. Of leg—dislocated ankle—medical expense \$75—in house over two months—obliged to use crutches for a time and subsequently a walking stick—doubtful as to recovery from lameness—\$1,400. *Smith v. Des Moines* (Iowa), 51 N. W. 77. Of leg—man—age 67—\$2,000. *Topeka v. Bradshaw* (Kan. C. A. 1897), 2 Am. Neg. Rep. 535. Small bone of leg broken—boy—heel also smashed—leg bruised and injured—nervous system and general health materially impaired—\$500. *Kentucky Hotel Co. v. Camb* (Ky. 1895), 80 S. W. 1010. Leg broken between knee and ankle—in bed for many weeks—awarded for pain and suffering only—\$1,500. *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 296; 23 So. 837. Leg broken in three places—permanently shorter—\$1,200. *Rhoades v. Varney*, 91 Me. 222; 39 Atl. 552. Leg broken—in bed six weeks—at time of trial unable to walk without support and great pain—permanent impediment in walk because of foot turning out—\$5,166. *Meiners v. St. Louis*, 130 Mo. 274; 32 S. W. 637. Leg broken, shortened and use of impaired—less able to work—earning \$30 per month—\$7,500. *Thomas v. Union Ry. Co.*, 18 App. Div. (N. Y.) 185; 45 N. Y. Supp. 920. Leg broken—fracture a simple one—in plaster cast for five weeks—still painful after more than year—\$1,100. *Stapleton v. Newburg*, 9 App. Div. (N. Y.) 39; 41 N. Y. Supp. 96. Both bones of leg broken—\$5,000. *Beltz v. Yonkers*, 74 Hun (N. Y.), 73; 56 N. Y. St. R. 205; 26 N. Y. Supp. 106.

Leg broken—permanent internal injuries—\$5,000. *Brady v. Manhattan Ry. Co.*, 6 N. Y. Supp. 533; 25 N. Y. St. R. 585; 15 Daly, 272, rev'd 127 N. Y. 46; 37 N. Y. St. R. 840; 27 N. E. 368. Cab-driver—earning \$12 per week—age 32—comminuted fracture of both legs—compound fracture of jaw—\$12,500. *McDonnell v. Henry Elias Brew. Co.*, 16 App. Div. (N. Y.) 223; 44 N. Y. Supp. 652; 2 Am. Neg. Rep. 423. Girl—both bones of leg fractured between knee and ankle—leg shortened—toes bent downward and sore caused by being compelled to walk thereon—permanent injury and deformity in leg and foot—\$5,000. *Missouri, K. & T. R. Co. v. Johnson* (Tex. Civ. App.), 37 S. W. 771. Both legs broken—ankle dislocated—using crutches at time of trial four months after accident—railroad employee—\$7,500. *Evans v. Delk* (Tex.), 9 S. W. 550. Both bones of leg broken and shortened—cannot walk without a cane over two years after the accident—\$1,800. *Propson v. Leathen*, 80 Wis. 608; 50 N. W. 586.

Verdicts held excessive. Leg broken—man—age 67—weight 240 pounds—\$5,000 excessive; \$2,500 is sufficient. *North Chicago St. R. Co. v. Wiswell*, 68 Ill. App. 443, aff'd 168 Ill. 613; 48 N. E. 407. Employee—leg broken—\$4,000 excessive. Remittitur of \$1,500. *Lombard v. Chicago R. I. & P. R. Co.*, 47 Iowa, 494. Both legs broken—\$10,000 excessive. Reduced to \$5,000. *Black v. Carrolton R. Co.*, 10 La. Ann. 33. Railway employee—leg broken—shortened $\frac{1}{2}$ to $\frac{3}{4}$ of an inch—capacity to labor not seriously impaired—\$4,100. *Slette v. Great Northern R. Co.* (Minn.), 55 N. W. 137. Leg broken—simple fracture—cured in five months—\$3,500. *Dwyer v.*

Hickler, 43 N. Y. St. R. 221; 16 N. Y. Supp. 814. Leg broken—person already deprived of use of lower part of leg for ten years—\$7,500 excessive. Half of amount sufficient. *Texas C. P. R. Co. v. Burton* (Tex. Civ. App.), 30 S. W. 491.

Malpractice, negligence of surgeon in failing to discover a dislocation of the shoulder resulting in almost complete paralysis of the right arm—\$1,741.66 held not excessive. *Hastings v. Stetson*, 91 Me. 229; 39 Atl. 580.

Miscarriage—Injuries causing. Verdicts held not excessive. Injury causing miscarriage—also other suffering—\$2,000. *Joliet v. Conway*, 17 Ill. App. 577. Injuries causing bearing down pain and ultimate miscarriage—\$5,000. *Butler v. Manhattan R. Co.*, 3 Misc. (N. Y.) 453; 52 N. Y. St. R. 498; 23 N. Y. Supp. 163; 30 Abb. N. Cas. 78, aff'd 143 N. Y. 630. Passenger—forced to make change of sleepers with no time to dress—miscarriage as result thereof—\$2,500. *McKeon v. Chicago, M. & St. P. R. Co.*, 94 Wis. 477; 35 L. R. A. 252; 69 N. W. 175; 2 Chic. L. J. Wkly. 175.

Nervous system—Injury to. Verdicts held not excessive. Nervous shock from which he may never recover—hearing in one ear permanently destroyed—sight of one eye impaired—\$2,000. *Clare v. Sacramento Electric P. & L. Co.*, 122 Cal. 504; 55 Pac. 326; 5 Am. Neg. Rep. 115. Active woman—age 35—nervous system permanently shattered—great pain—unable to indulge in active exercise or endure fatigue—\$7,000. *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181. Strong laboring man—earning \$40 to \$45 per

month—age 46—nervous system permanently diseased—recovery so as to perform labor doubtful—\$6,500. *Olson v. Great Northern R. Co.*, 68 Minn. 155; 71 N. W. 5; 7 Am. & Eng. R. Cas. N. S. 241. Nervous shock caused by injury to knee and resulting in development of heart disease—helpless invalid—\$10,000. *Galloway v. Chicago M. & St. P. R. Co.* (Minn. 1894), 23 L. R. A. 442; 57 N. W. 1058. Nervous disorder—knee impaired—urine affected—bruises and pains—\$7,500. *Quirk v. Siegel, Cooper Co.*, 26 Misc. (N. Y.) 244; 56 N. Y. Supp. 49. Nervous system injured causing paresis—\$5,000. *McMahon v. Eau Claire Waterworks Co.* (Wis. 1897), 95 Wis. 640; 70 N. W. 829; 2 Am. Neg. Rep. 478.

Paralysis. Verdicts held not excessive. Longshoreman—unmarried—earning \$3 per day—age 29—paralysis resulting from fractured skull—grave, permanent injuries therefrom also—possibility of imbecility or insanity—earning power permanently destroyed—\$6,000. *The Joseph B. Thomas* (D. C. N. D. Cal.), 81 Fed. 578. Man—age 50—injury resulting in incurable paralysis, \$15,000. *Bishop v. St. Paul City R. Co.* (Minn.), 50 N. W. 927. Injury of extreme severity causing progressive paralysis—will be helpless after a time and necessary to have medical attendance and one or more nurses—\$18,500. *Tuthill v. Long Island R. Co.*, 81 Hun (N. Y.), 616; 63 N. Y. St. R. 135; 30 N. Y. Supp. 959.

Permanent injuries—Miscellaneous. Verdicts held not excessive. Girl—age five—permanently disfigured—\$10,000. *Smith v. Pittsburg & W. R. Co.* (C. C. N. D. Ohio), 90 Fed. 783; 13 Am. & Eng. R. Cas. N. S.

716; 41 Ohio L. J. 113. Man—age 73—employed as street sweeper—leg permanently shortened—less able to work than formerly—still suffering pain at time of trial one year after the accident—\$4,000. Roche v. Redington, 125 Cal. 174; 57 Pac. 890. Leg permanently stiffened—unable to walk securely or perform her duties as a housewife—\$3,500. North Chicago St. R. Co. v. Schwartz 82 Ill. App. 493. Leg permanently weakened—accident cutting through the muscle to the bone—unable to walk for four or five months without crutch or cane—\$3,000. West Chicago St. R. Co. v. Johnson, 77 Ill. App. 142, aff'd 180 Ill. 285; 54 N. E. 334. Permanent injury to hip joint—woman strong and healthy—age 35—great pain—in hospital nearly six months—obliged to use crutches for eight months after leaving there—\$5,000. North Chicago St. R. Co. v. Brown, 76 Ill. App. 634. Permanent injury to one foot which incapacitates from constant use of same—unable to work for a year and a half—medical expenses \$900—easily tired—nervous and irritable—\$5,000. Grossman v. Cosgrove, 75 Ill. App. 385, aff'd 174 Ill. 383; 51 N. E. 694. Permanent enlargement of the cartilages of the bone and knee—constant pain—was compelled to use crutches and cane—\$4,500. Chicago v. Fitzgerald, 75 Ill. App. 174. Man—earning \$58 per month—good health—age 34—unable to walk—constant pain—probably hasten his death—\$14,000. Chicago & A. R. Co. v. Swan, 70 Ill. App. 331; 2 Chic. L. J. Wkly. 419. Driver of horse car—permanently disabled from all bodily exertions—still suffering much pain at end of four years—temporarily earning higher pay in clerkship than he was as car driver—\$15,000. Chicago City

R. Co. v. Taylor, 68 Ill. App. 613, aff'd 170 Ill. 49; 48 N. E. 831. Brakeman—chronic hip disease resulting from crushed hips—\$5,000. Elgin J. & E. R. Co. v. Eselin, 68 Ill. App. 96. Mind permanently impaired—boy—age 16—\$10,000. N. Y. C. & St. L. R. R. Co. v. Luebeck, 54 Ill. App. 551. Permanent injury—boy—age 4—Atchison, T. & S. F. R. Co. v. Elder, 50 Ill. App. 276, aff'd 149 Ill. 173; 36 N. E. 565. Young girl—permanent scar caused by lacerated wound of face and neck—medical services \$75—\$1,500. Cameron v. Bryan (Iowa), 56 N. W. 434. Railway freight conductor—earning \$60 per month—age 30—unable to perform duties of conductor—only do light work—injuries permanent—\$7,660. Harker v. Burlington C. R. & N. R. Co. (Iowa), 55 N. W. 316. Serious and permanent injuries—\$7,175. Wichita v. Stallings, 59 Kan. 779; 54 Pac. 689. Stiff arm—\$3,500. Detzer v. Stroh Brew. Co., 119 Mich. 282; 77 N. W. 948; 44 L. R. A. 500; 5 Am. Neg. Rep. 371; 5 Det. L. N. 803. Shoulder one and a half inches lower than other—as result thereof unable to obtain position as a teacher—\$2,000. Illinois C. R. Co. v. Mizell, 100 Ky. 235; 38 S. W. 5; 6 Am. & Eng. R. Cas. N. S. 337; 18 Ky. L. Rep. 738. Hearing in one ear destroyed—sight impaired—memory unreliable—health seriously affected—unable to work as effective as before injury—\$4,000. Kennedy v. Chicago, M. & St. P. R. Co. (Minn. 1894), 58 N. W. 878. Permanent limp and incapacity to straighten leg—boy—\$3,000. Buck v. Peoples St. R. & E. L. & P. Co. (Mo.), 18 S. W. 1090, aff'd 46 Mo. App. 555. Use of left hand permanently lost—woman—\$1,200. Harvard v. Stiles, 54 Neb. 26; 74 N. W. 399. School teacher—woman—earning \$450 per year—age

48—much suffering physical and mental—in bed three months—considerable medical expense—also expense for nursing—permanently disabled and obliged to use crutches—\$7,208. *Burr v. Penn. R. R. Co.* (N. J. 1899), 44 Atl. 845. Young man with wife and child—permanently lame as result of injuries to kidneys and hips—\$10,000. *Boyce v. Shawangunk*, 40 App. Div. (N. Y.) 593; 58 N. Y. Supp. 26. Woman—healthy before accident—bruises and sprains—in house two or three months—suffering also from prolapsus uteri and congestion—wearing a pessary—in opinion of physicians condition permanent—\$3,750. *Rippe v. Met. St. R. Co.*, 35 App. Div. (N. Y.) 321; 54 N. Y. Supp. 958. Roofer—permanent injuries to—\$6,000. *Bryer v. Foerster*, 9 App. Div. (N. Y.) 542; 41 N. Y. Supp. 617. Child—age 8—permanently disfigured—also will be always unable to masticate food on one side of her mouth—collar bone and four ribs broken—injury to pelvis—\$6,000. *Bennett v. Brooklyn H. R. Co.*, 1 App. Div. (N. Y.) 205; 37 N. Y. Supp. 447; 72 N. Y. St. R. 719. Woman—age 27—run over by street car—permanent injuries—\$15,000. *Mitchell v. Broadway & S. Ave. R. R. Co.*, 70 Hun (N. Y.), 387; 54 N. Y. St. R. 116. Permanent injury to well educated and healthy married man—\$25,000. *Alberti v. N. Y. L. E. & W. R. R. Co.*, 43 Hun (N. Y.), 421. Woman—healthy—married—age 28—permanent injury—great sufferer. *Groves v. Rochester*, 39 Hun (N. Y.), 5. Permanent injuries to genital organs—great pain and suffering—unable to perform ordinary duties and work—\$12,500. *Cannon v. Brooklyn City R. R. Co.*, 9 Misc. (N. Y.) 282, aff'd 149 N. Y. 615. Van driver—injuries which will always render him a sickly man—\$15,000. *Arnesen v.*

Brooklyn City R. R. Co., 9 Misc. (N. Y.) 270; 61 N. Y. St. R. 324; 29 N. Y. Supp. 748. Laborer—age 35—injuries likely to be of a permanent character wholly disabling him from all labor—\$15,000. *Solarz v. Manhattan R. Co.*, 8 Misc. (N. Y.) 656; 59 N. Y. St. R. 537; 31 Abb. N. Cas. 426; 29 N. Y. Supp. 1123. Man—strong and powerful—age 22—permanent injury to muscular power of hand—intense pain—still suffers pain after several years—\$175 for medical attendance—\$3,250. *Wilson v. Broadway & S. A. R. Co.*, 8 Misc. (N. Y.) 450; 28 N. Y. Supp. 781; 60 N. Y. St. R. 60. Leg permanently shortened—under surgical treatment for 3 months—great pain—\$7,500. *Vail v. Broadway R. Co.*, 6 Misc. (N. Y.) 20; 26 N. Y. Supp. 59; 58 N. Y. St. R. 124; 31 Abb. N. Cas. 56. Permanent enlargement of knee joint—depression of skull—\$3,000. *Montgomery v. Long Island R. R. Co.*, 6 N. Y. Supp. 178. Strong man—earning \$3.50 per day—permanent injury—life shortened eight years—\$4,680. *Hughes v. Orange Co., Milk Assoc.*, 10 N. Y. Supp. 252. Leg permanently shortened—man—age 32—nervous system affected—in bed eight weeks—\$4,750. *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. St. R. 154; 18 N. Y. Supp. 841, aff'd 138 N. Y. 641; 53 N. Y. St. R. 929; 34 N. E. 512. Shoulder permanently disabled—woman pushed from train—\$3,000. *Allen v. Manhattan R. Co.*, 42 N. Y. St. R. 227; 17 N. Y. Supp. 187, aff'd 137 N. Y. 561; 50 N. Y. St. R. 933; 33 N. E. 338. Married woman—age 52—severe and permanent injuries—\$10,000. *Althouse v. Sharpe*, 13 Wkly. Dig. (N. Y.) 478. Woman—permanently and seriously injured—torn ligament in region of the womb—\$1,000. *Toledo v. Clopeck*,

9 Ohio C. D. 432; 17 Ohio C. C. 583, aff'd 52 Ohio St. 642. Man—age 56—earning \$1.75 per day—arm rendered useless—\$2,950. Toledo Consol. St. R. Co. v. Rohner, 9 Ohio C. C. 702. Railroad engineer—earning \$1,320 per year—age 43—good health—permanent injuries disabling him—intense suffering for a long time—\$19,000. Lake Shore & M. S. R. Co. v. Topliff, 2 Ohio Dec. 522. Laborer—injury to right leg permanently affecting his capacity for lifting—\$3,500. West Memphis Packet Co. v. White, 99 Tenn. 256; 41 S. W. 583; 38 L. R. A. 427. Railroad employee—injuries permanent and serious—health and earning capacity greatly impaired—unable to work at all for about ten months—continual suffering—\$6,500. Galveston, H. & S. A. R. Co. v. Waldo (Tex. Civ. App.), 32 S. W. 783. Railroad employee—earning \$2.25 per day—age 30—injuries permanent and one leg shortened—\$4,600. Galveston H. & S. A. R. Co. v. Templeton (Tex. Civ. App. 1894), 25 S. W. 135, aff'd 26 S. W. 1066. Man—earning from \$1,800 to \$2,400 per year—age 37—injury causing severe suffering and total disability—probably permanent—\$15,000. Galveston, H. & S. A. R. Co. v. Scott, 21 Tex. Civ. App. 24; 50 S. W. 477. Permanent and painful internal injuries—age 38—earning \$75 per month before injury—also other injuries which may make amputation of leg necessary—\$10,500. Smith v. Spokane, 16 Wash. 403; 47 Pac. 888. Permanent and almost total loss of use of left arm—age 17—\$4,000. McCoy v. Milwaukee St. R. Co. (Wis. 1894), 59 N. W. 453.

Verdicts held excessive. Right leg seriously shortened and stiffened—performance of manual labor seri-

ously interfered with if not prevented—\$5,000. Chicago & A. R. Co. v. Goltz, 71 Ill. App. 414. Railroad conductor—age 30—disfigured for life by burns about the face—loss of use of left arm—right hand and both feet somewhat injured—\$2,500. Standard Oil Co. v. Tierney (Ky.), 14 L. R. A. 677; 13 Ky. L. Rep. 626; 49 Am. & Eng. R. Cas. 117; 17 S. W. 1025; 11 Ry. & Corp. L. J. 92. Employee—permanent injuries to—in house three or four weeks—on crutches five or six months—no expense on account of injuries—again able to work and capacity to labor not materially affected—\$8,666. Nicholds v. Crystal Plate Glass Co. (Mo.), 27 S. W. 516. Usefulness of left arm permanently impaired—difficult surgical operation necessary at cost of about \$3,500—ability to walk and read greatly reduced—no loss of earnings shown—duration of mental and nervous conditions not shown—\$25,000, reduced to \$15,000, and expenses. De Wardener v. Met. St. R. Co., 1 App. Div. (N. Y.) 240; 37 N. Y. Supp. 133; 72 N. Y. St. R. 741. Bartender—leg shortened—other injuries—\$13,500 excessive—\$7,000 sufficient. Coffins v. N. Y. C. & H. R. R. Co., 48 Hun (N. Y.), 292. Man earning \$12 per week—only permanent injury is varicose veins which prevent him from doing hard or heavy work—in hospital about a year—suffered pain part of such time—\$12,000. Chapman v. Atlantic Ave. R. R. Co., 14 Misc. (N. Y.) 404; 35 N. Y. Supp. 1045; 70 N. Y. St. R. 753. Man—age 66—earning capacity diminished but not destroyed—earning capacity before injury only \$20 per week—\$7,500. Geiler v. Manh. R. Co., 11 Misc. (N. Y.) 413; 65 N. Y. St. R. 437; 32 N. Y. Supp. 254.

Physical wreck—totally disabled. Verdicts held not excessive. Able-bodied man—iron worker—capable of earning \$12 to \$18 per week—totally disabled—\$7,500. *Alton Paving B. & F. Brick Co. v. Hudson*, 74 Ill. App. 612, *aff'd* 176 Ill. 270; 52 N. E. 256. Woman strong and healthy—injury making her a physical wreck. *DeKalb v. Ashley*, 61 Ill. App. 647. Engineer—under 40 years of age—helpless for a very short residue of life—\$16,000. *Chicago v. Edson*, 43 Ill. App. 417. Young man—bodily maimed and deformed for life—practically a physical wreck—\$14,500. *Howe v. Minneapolis, St. P. & S. S. M. R. Co.*, 62 Minn. 71; 30 L. R. A. 684; 64 N. W. 102; 2 Det. L. N. 537; 28 Chic. Leg. News, 25. Man—strong and healthy—age 27—mental and physical wreck—\$11,400. *Cobb v. St. Louis & H. R. Co.*, 149 Mo. 609; 50 S. W. 894; 13 Am. & Eng. R. Cas. N. S. 682. Injuries making person a physical wreck—\$10,000. *Dalzell v. Long Island R. R. Co.*, 6 N. Y. Supp. 167. Woman—able and obliged to earn her living—good health—almost complete wreck as result of injury—\$10,000. *Mattis v. Phila. Traction Co.*, 6 Pa. Dist. R. 94; 19 Pa. Co. Ct. 106. Man—strong and healthy—vision impaired—partially paralyzed and general physical wreck—\$8,000. *San Antonio & A. P. R. Co. v. Long* (Tex. Civ. App. 1895), 28 S. W. 214.

Ribs—fracture of. Verdicts held not excessive. Man—age 65—several ribs broken—fracturing a lung—much suffering—in the house several weeks—injuries apparently permanent—\$8,250. *Reed v. Chicago, St. P. N. & O. Ry. Co. (Iowa)*, 37 N. W. 149. Physician—three ribs broken—paralyzed on one side—spine and left hip injured—dis-

figured and an invalid for life—practice of \$2,500 per year rendered much less by accident—\$10,175. *Gratiot v. Missouri P. R. Co. (Mo.)*, 21 S. W. 1094. Rib fractured—would probably always have more or less trouble with it—\$700. *Aslen v. Charlotte*, 35 App. Div. (N. Y.) 625; 54 N. Y. Supp. 754. Rib fractured—development of tumor and pleurisy therefrom—also adhesion to wall of chest—\$3,200. *Wynne v. Atlantic Ave. R. R. Co.*, 14 Misc. (N. Y.) 394; 35 N. Y. Supp. 1034, *aff'd* 156 N. Y. 702. Man—age 64—fifth rib fractured—rendered unconscious for a time—in house two months—much pain—permanent pleuritic thickening—diminished respiration—insomnia—incapacitated from work over half the time—druggist's and doctor's bills over \$100—\$3,600. *Eifinger v. Brooklyn H. R. Co.*, 13 Misc. (N. Y.) 389; 34 N. Y. Supp. 239; 68 N. Y. St. R. 118. Fireman—age 30—ribs broken—badly scalded and burned on face, hand and arm—been unable to work since—\$9,000. *Galveston, H. & S. A. R. Co. v. Croskell*, 6 Tex. Civ. App. 160; 25 S. W. 486.

Rupture. Verdict held not excessive. Permanent rupture—injury to leg—constant pain—ability to labor greatly lessened—\$4,000. *Dillingham v. Richards* (Tex. Civ. App.), 27 S. W. 1061; writ of error denied in 87 Tex. 247; 28 S. W. 272.

Verdicts held excessive. Switchman—strong and healthy—age 30—permanent rupture—much pain—obliged to work in position where he receives from \$20 to \$25 per month less—\$8,000. Excessive, reduced to \$5,000. *Bosworth v. Standard Oil Co.*, 92 Hun (N. Y.), 485; 72 N. Y. St. R. 195; 37 N. Y. Supp. 43. Child—age 4—rupture—had

previous rupture but that had disappeared—second rupture curable by use of truss or operation—\$5,000. *Evers v. Will*, 46 Hun (N. Y.), 622; 17 N. Y. Supp. 29; 43 N. Y. St. R. 336, aff'd 135 N. Y. 649.

Service—loss of—parent for child's. Verdicts held not excessive. Loss of services of seven year old daughter—medical expenses \$100—injury, loss of thumb—\$2,000. *Kitchell v. Brooklyn H. R. Co.*, 10 Misc. (N. Y.) 277; 63 N. Y. St. R. 267; 30 N. Y. Supp. 827. Mother for loss of service of child and extra care and expenses—\$1,000 already secured—\$5,000. *Cumming v. Brooklyn City R. R. Co.*, 24 N. Y. St. R. 718. Loss of services son 14 years of age—several hundred dollars for medical treatment—earning capacity largely diminished—out of work about eleven months—\$1,940. *Texas & N. O. R. Co. v. Wood* (Tex. Civ. App. 1894), 24 S. W. 569. Son 18 years of age—earning capacity diminished about \$40 per month—expended for medicine and medical attendance about \$300—\$1,500. *San Antonio & A. P. R. Co. v. Green* (Tex. Civ. App.), 49 S. W. 672.

Verdicts held excessive. Son—age 17—injury preventing him from work until after majority—\$2,050 excessive, ordered remitted to \$1,500. *McGee v. Penn. R. Co.* (Pac. P.), 33 W. N. C. 15.

Services—loss of—husband for wife's. Verdicts held not excessive. Strong healthy woman—age 39—before injury—since then confirmed invalid—can never be a wife to plaintiff again—\$10,000. *Cannon v. Brooklyn City R. R. Co.*, 14 Misc. (N. Y.) 400; 35 N. Y. Supp. 1089; 70 N. Y. St. R. 756. Loss of services, society and companionship of wife—

her left arm and shoulder disabled—compelled as a result of the injury to wear an iron frame to support her shoulder—\$3,000. *Allen v. Manhattan R. Co.*, 42 N. Y. St. R. 227; 17 N. Y. Supp. 187.

Spine and back—injuries to. Verdicts held not excessive. *Brakeman*—permanent injury to spine, head, legs and hip—much mental and physical suffering—unable to work for a long time—medical attendance \$300—\$2,000. *Kansas City, M. & B. R. Co. v. Lackey*, 114 Ala. 152; 21 So. 444. Strong and healthy man—age 33—injury to spine, back and side—in bed 5 weeks—unable to work or attend to business for over a year and up to time of trial—still suffering pain—evidence that injuries were permanent—\$1,500. *Spring Valley v. Gavin* (Ill. 1899), 54 N. E. 1035, aff'g 81 Ill. App. 456. Permanent injury to spine—\$2,500. *Union Show Case Co. v. Blindauer*, 75, Ill. App. 358, aff'd 175 Ill. 325; 51 N. E. 707. Injury to spinal cord—danger of permanent paralysis—\$5,000. *Chicago & A. R. Co. v. Blaul*, 70 Ill. App. 518. Strong and vigorous man—spine and hips injured—continuous bodily pain—permanently disabled—\$6,500. *Huntington County v. Bonebrake*, 146 Ind. 311; 45 N. E. 470. Woman—injury affecting spinal column—much pain and suffering—life overshadowed if not blighted—\$12,000. *Louisville & N. R. Co. v. McEwan* (Ky.), 21 Ky. L. Rep. 487; 51 S. W. 619. Permanent and progressive injury to spine—impairment of memory—insomnia, hernia, loss of virility and incontinence of urine—\$13,500. *Fullerton v. Fordyce*, 144 Mo. 519; 10 Am. & Eng. R. Cas. N. S. 729; 44 S. W. 1053. Financial manager of firm doing business of \$750,000 per

year—severe injury to spine and possibly permanent—confined in bed for a month—at time of trial still under care of physician—medical expenses \$750—\$7,500. *Clark v. Chicago & A. R. Co.* (Mo.), 29 S. W. 1013. Woman—good health—age 33—injury resulting in hemorrhage of the spinal cord and traumatic neurasthenia—injury to spinal cord probably permanent—\$8,000. *Baker v. New York, N. H. & H. R. Co.*, 28 App. Div. (N. Y.) 316; 50 N. Y. Supp. 999. Spine and liver probably permanently affected—several months' medical treatment—headaches, stomach and liver trouble—\$1,500. *Ferguson v. Ehret*, 14 Misc. (N. Y.) 454; 35 N. Y. Supp. 1020; 70 N. Y. St. R. 725. Permanent curvature of spine—permanent paralysis of one of shoulder muscles—lifting power of arm affected—\$4,000. *Degnan v. Brooklyn City R. Co.*, 14 Misc. (N. Y.) 408; 35 N. Y. Supp. 1047; 70 N. Y. St. R. 755. Injury to spine and brain—man—age 57—also numerous bruises and paralysis of bladder and sphincter muscle—in bed 4 weeks—from work about five months—still suffering pain four years after the accident—\$3,600. *Paetzig v. Brooklyn City R. R. Co.*, 12 Misc. (N. Y.) 573; 67 N. Y. St. R. 607. Brakeman—earning \$1.90 per day—back permanently injured—severe and continuous pain—unconscious for several days after receiving injuries—also one leg made smaller and weaker than the other—ability to labor materially affected—\$10,000. *Tierney v. Syracuse, B. & N. Y. R. Co.*, 85 Hun (N. Y.), 146; 66 N. Y. St. R. 85; 32 N. Y. Supp. 627. Healthy woman—age 33—permanent injury to spine—unable to work since accident—growing worse—\$3,500. *Morris v. N. Y. O. & W. R. Co.*, 73 Hun (N. Y.), 560; 56 N. Y. St. R.

231; 26 N. Y. Supp. 342. Severe spinal trouble—incapacitated from work for months—physician testified that he could never do anything but light work—\$5,500. *Stephens v. Hudson Valley Knitting Co.*, 66 Hun (N. Y.), 628; 48 N. Y. St. R. 814. Spine seriously injured—\$8,525.87. *Stouter v. Manh. R. Co.*, 25 N. Y. St. R. 683; 6 N. Y. Supp. 163. Spine injured—permanent prolapsus uteri—\$4,000. *Valentine v. Broadway, etc., R. Co.*, 14 Daly (N. Y.), 540. Full vigor, health—concussion of spine—faculties largely impaired—paralysis probably ensue—\$30,000. *Harrold v. N. Y. Elev. R. R. Co.*, 24 Hun (N. Y.), 184. Newsboy—curvature of spine and continual pain—leg broken in two places and shortened—also some ribs broken—\$5,000. *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653; 36 S. W. 282. Railroad fireman—injuries producing spinal trouble and hernia—much mental and physical pain—\$5,000. *Missouri, K. & T. R. Co. v. Gordou*, 11 Tex. Civ. App. 672; 33 S. W. 484. Injury to back causing traumatic fever—resulting in incurable disease of spine—\$4,000. *International & G. N. R. Co. v. Muliken*, 10 Tex. Civ. App. 663; 32 S. W. 152. Child—injury to spine—partial and probably permanent paralysis—double fracture of limb—\$5,000. *Roanoke v. Shull* (Va. 1899), 34 S. E. 34. Man—strong and vigorous—earning \$2 per day—injury to back, shoulder, arm and abdomen—probably permanently injured—\$5,150. *Sproul v. Seattle*, 17 Wash. 256; 49 Pac. 489.

Verdicts held excessive. Engineer—concussion of spinal cord—\$9,250 excessive. Remittitur of \$3,000 ordered. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578. Unmarried man—age 50—earning \$2.75

per day—back injured—also knees—varicose veins—not entirely prevented from work in the future—\$8,000. *Campbell v. North Amer. Brew. Co.*, 22 App. Div. (N. Y.) 414; 47 N. Y. Supp. 992. Railway passenger—bruise on nerves of spine and injury may possibly be permanent—severe shock—numbness of leg as result of spinal injury—\$10,000. *For-dyce v. Moore* (Tex. Civ. App.), 22 S. W. 235.

Temporary injuries—miscellaneous cases. Verdicts held not excessive. Passenger—struck on shoulder by falling lantern—severe pain and disabled for some time—no dangerous or permanent injury—\$150. *The Wasco* (D. C. D. Wash.), 53 Fed. 546. Injury to arm—unable to use it owing to severe pain—no external marks—\$1,500. *Joliet v. Looney*, 150 Ill. 471; 42 N. E. 854. Man—strong and healthy—age 33—in bed 5 weeks—unable to attend to business or work for a year—still suffering pain—\$1,500. *Spring Valley v. Gavin*, 81 Ill. App. 456. Sewing woman—in bed 3 weeks—in room 5 weeks—unable to run sewing machine more than an hour a day—\$1,500. *Chicago v. Sanders*, 50 Ill. App. 136. Well and hearty woman—great pain—disabled from work—development of a necrosis in the shinbone—formation of abscesses. *Joliet v. McCraney*, 49 Ill. App. 381. Woman in good health—age 59—in bed several weeks—severe pain—several months after injury still suffering and unable to perform her customary work about house or weave for support of family as formerly—\$2,300. *Hill v. Sedalia*, 64 Mo. App. 494; 2 Mo. App. Rep. 1019. In hospital two months—much pain—medical expenses large—unable for considerable time to earn his wages of \$25 per week

—\$3,500. *Williams v. Brooklyn*, 33 App. Div. (N. Y.) 539; 53 N. Y. Supp. 1007. Injuries requiring medical attendance for 5 weeks—\$1,250, liberal but not excessive—\$1,250. *Clegg v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 207; 72 N. Y. St. R. 737. Brakeman—in room three and a half weeks—unable to work at end of six months—take a long time to recover—\$2,500. *Hayden v. Platt*, 84 Hun (N. Y.), 487; 65 N. Y. St. R. 875; 32 N. Y. Supp. 1144. Injury to knee—necessary to inject morphine because of pain—on couch 2 weeks—use crutch in about 3 weeks—\$1,000. *Kirk v. Hower*, 77 Hun (N. Y.), 459; 60 N. Y. St. R. 594. Sprained wrist—right leg injured—constant pain—unable to attend to outside business—whether injuries permanent testimony conflicting—\$5,000. *Kellon v. Long Island R. R. Co.*, 62 Hun (N. Y.), 620; 42 N. Y. St. R. 813. Serious personal injuries—\$375. *Dise v. Met. St. Ry. Co.*, 22 Misc. (N. Y.) 97; 48 N. Y. Supp. 551, aff'd 21 Misc. 790; 47 N. Y. Supp. 1134. Healthy girl—age 14—in bed 2 weeks—rendered subject to dizziness and headache, sleepless at nights—eyesight and ability to study affected—probably not permanent—\$3,500 large, but not excessive. *Birmingham v. Rochester City & B. R. Co.*, 45 N. Y. St. R. 724; 18 N. Y. Supp. 649. Black eye—\$100. *Dunlap v. Ross*, 43 N. Y. St. R. 509; 18 N. Y. Supp. 48. Injury to eye causing pain for a period of three years—\$300. *Schuler v. Third Ave. R. Co.*, 44 N. Y. St. R. 774; 17 N. Y. Supp. 834. Able-bodied man—unable to perform much labor since injury—\$1,350. *Oklahoma City v. Welsh*, 3 Okla. 288; 41 Pac. 598. Boy—age 11—scalp torn from side of head—\$1,200. *McGaw v. Lancaster* (C. P. Pa.), 14 Lanc. L. Rev. 276. Healthy man—age 28—earning \$80 to

\$95 per month—skull crushed—portion of removed—left eye destroyed—\$10,000. *Missouri, K. & T. R. Co. v. Parker*, 20 Tex. Civ. App. 470; 49 S. W. 717, reh'g denied in 50 S. W. 606. Teeth broken—knee injured—lame for a long time—unable to work efficiently at his trade for about eight months—\$1,000. *Richmond R. & E. Co. v. Garthright*, 92 Va. 627; 24 S. E. 267; 32 L. R. A. 220.

Verdicts held excessive. Injuries consisting of bruises—discoloration and jar of fall—not permanent—no medical attendance necessary—\$1,500. *Dixon v. Scott*, 74 Ill. App. 277. Sprained wrist—limb bruised and discolored—also sides and back—pain—\$2,500. *Lake Street Elev. R. Co. v. Johnson*, 70 Ill. App. 413; 2 Chic. L. J. Wkly. 433. Conductor—no loss of time from usual labor—no physician—and no complaint made for a year after the accident—injuries only slight—\$1,725. *Louisville & N. R. Co. v. Banks*, 17 Ky. L. Rep. 1065; 33 S. W. 627. Slight temporary injuries—\$6,000. *Louisville & N. R. Co. v. Sawant*, 16 Ky. L. Rep. 545; 27 S. W. 999. Married woman—age 32—injuries resulting in uterine and other painful difficulties—have partially yielded to medical treatment and probably curable—\$20,000, reduced to \$7,500. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334; 42 Pac. 860, reh'g denied in 17 Mont. 351; 43 Pac. 713. Injuries requiring medical attendance five weeks—\$1,250. *Clegg v. Met. St. R. Co.*, 54 N. E. 1089, aff'g 1 App. Div. (N. Y.) 207; 37 N. Y. St. R. 130. Recovery for pain and suffering only—evidence as to continuation of suffering indefinite—\$10,000. *Becker v. Albany R. Co.*, 35 App. Div. (N. Y.) 46; 54 N. Y. Supp. 395; 12 Am. & Eng. R. Cas.

N. S. 853; 5 Am. Neg. Rep. 231. Boy—earning \$10 to \$12 per week—age 17—earning about half usual wages four months after injury—entire recovery probable in three or four years—\$4,300. *Levitt v. Nassau Elec. R. Co.*, 14 App. Div. (N. Y.) 83; 43 N. Y. Supp. 426. Teacher—earning \$1,750 per year—age 54—cut on forehead and bruises on body and limbs—two weeks in bed—brain irritation at time of trial—absent from work four months but lost little in salary or money—\$10,000 excessive, should be reduced to \$5,000. *Smith v. Third Ave. R. Co.*, 10 App. Div. (N. Y.) 409; 41 N. Y. Supp. 977. Grocer—legs badly bruised—in bed only two weeks and in house only five weeks—\$4,500 reduced to \$2,000. *Meade v. Brooklyn H. R. Co.*, 3 App. Div. (N. Y.) 432; 39 N. Y. Supp. 320. Man—able before injury to earn about \$500 per year and possibly able since injury to earn about the same—\$16,000. *Bailey v. Rome, W. & O. R. Co.*, 80 Hun (N. Y.), 4; 61 N. Y. St. R. 490; 29 N. Y. Supp. 816. Bruise on leg requiring use of crutch eight weeks and subsequently use of cane—\$200 for medicine—\$450 for medical attendance—\$12,500. *Swan v. Long Island R. R. Co.*, 79 Hun (N. Y.), 612; 61 N. Y. St. R. 28. Washerwoman—confirmed invalid and earning but \$6 per week—age 69—injury neither painful, serious, nor incurable—\$5,000 excessive; \$2,500 sufficient. *Anderson v. Manhattan R. Co.*, 1 Misc. (N. Y.) 504; 49 N. Y. St. R. 233; 21 N. Y. Supp. 1.

Temporary injuries and probably permanent. Verdicts held not excessive. Child—age three months—injury displacing parietal bone—atrophy of muscles on side of neck—spasms not previously existing—may

develop seriously—\$2,000. *Kowalski v. Chicago G. W. R. Co.* (C. C. N. D. Iowa), 84 Fed. 586. Man—in good health and prime of life—unable to follow his vocation for four months—evidence tending to show that some of his injuries may and probably will be permanent—\$5,000. *Illinois C. R. Co. v. Cole*, 62 Ill. App. 480. Injuries serious and liable to be permanent—\$1,000. *Osborne v. Jenkinson*, 100 Iowa, 432; 69 N. W. 548. Earning ability \$2.50 per day—injury to head, chest and hip—much suffering—numbness in hip and leg—sciatic nerve probably injured and perhaps permanently—\$2,405. *Wilkins v. Omaha & C. B. R. & B. Co.*, 96 Iowa, 668; 65 N. W. 987. Boy injured by falling from platform of street car—complete recovery matter of uncertainty—\$750. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48; 76 N. W. 956; 5 Am. Neg. Rep. 47. Injury which according to the evidence may have been the cause of septicæmia which plaintiff had—\$2,500. *Miller v. St. Paul City R. Co.*, 66 Minn. 192; 68 N. W. 862. Conductor—earning \$75 per month—age 37—medical expenses result of injury \$750—invalid and unable to follow his occupation—condition promises to be permanent. *Geary v. Kansas City, O. & S. R. Co.*, 137 Minn. 251; 39 S. W. 774; 60 Am. St. Rep. 555.

Verdicts held excessive. Injury to leg—continued at work for several months after injury in same occupation without consulting a physician and did not consult one for nearly six years—\$3,500. *Shortsleeves v. N. Y. C. & H. R. R. Co.*, 40 N. Y. Supp. 1105. Woman—age 64—exceeding painful injuries and probably permanent—\$10,000 excessive. New trial granted unless \$3,000 is

remitted. *Taylor v. Chicago & N. W. R. Co.*, 108 Wis. 27; 79 N. W. 17; 15 Am. & Eng. R. Cas. N. S. 788.

Thigh—Injuries affecting. Verdicts held not excessive. Compound fracture of femur, fibula and tibia—man—earning \$80 per month—age 30—in bed ten weeks and entirely disabled ten months—strength and plasticity of leg permanently impaired—only able to earn \$80 per month at time of trial—\$4,400. *The Alijandro* (C. C. App. 9th. C.), 6 C. C. A. 54; 56 Fed. 621. Child—age 5—simple fracture of thigh bone—leg permanently shortened one fourth of an inch—pain and weakness more than two years after injury—\$2,000. *Met. West Side Elev. R. Co. v. Kersey*, 80 Ill. App. 301; 4 Chic. L. J. Wkly. 112. Married woman—impacted fracture of thigh bone—in bed six months—great pain—leg shortened—\$5,000. *Young v. Webb City*, 150 Mo. 333; 51 S. W. 709. Fracture of thigh bone—permanent injury—\$5,000. *O'Connell v. St. Louis Cable & W. R. Co.*, 106 Mo. 482; 17 S. W. 494. Woman—age 63—intense pain—\$7,000. *Fitch v. Broadway & S. A. R. Co.*, 10 N. Y. Supp. 225. Thigh broken and leg shortened—\$7,500. *Danville & W. R. Co. v. Brown* (Va. 1894), 18 S. E. 278. Girl—age 8—injury involving removal of portion of femur—in bed about eighteen months—much pain—more or less pain through life as result of injury—right leg shortened four to six inches—\$8,000. *Lorensee v. Ellensburgh*, 13 Wash. 341; 43 Pac. 20.

Verdict held excessive. Man—age forty-nine and a half years—earning \$20 per week—right thigh broken—arm hurt and face skinned—in bed six weeks and contracted bed sores

—five months lost time after which he resumed work at previous wages—suffered great pain and still suffers when weather changes—leg shortened—bill of \$111.50 for medical attendance and expenses—\$5,561. *Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.), 43 S. W. 551, aff'd 91 Tex. 562; 44 S. W. 1064.

Toe—Injury to. Verdicts held not excessive. Loss of three toes—woman—earning \$1.25 per day—age 64—also head injured—much pain—in hospital seven weeks—earned nothing since—\$3,500. *Lar-*

kin v. N. Y. & N. R. R. Co., 46 N. Y. St. R. 658; 19 N. Y. Supp. 479, aff'd 138 N. Y. 634. Man—age 33—*injury necessitating amputation of three toes—in house five months—unable to work more than three fourths of his time—\$3,500. Commerford v. Atlantic Ave. R. R. Co.*, 8 Misc. (N. Y.) 599; 61 N. Y. St. R. 51. Loss of great toe—side and leg injured—disabled two and a half months—subsequent occasional suffering and at times disabled—\$2,000. *Reynolds v. Van Beuren*, 10 Misc. (N. Y.) 703; 64 N. Y. St. R. 633; 31 N. Y. Supp. 827.

CHAPTER VIII.

PAIN AND SUFFERING—MENTAL SUFFERING.

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| <p>§ 215. Pain and suffering—Physical injury.</p> <p>216. Pain and suffering—Evidence as to.</p> <p>217. Pain and suffering—Effect of prior injury or disease.</p> <p>218. Mental suffering—Physical injury.</p> <p>219. Same subject continued.</p> <p>220. Fright—not result of physical injury.</p> <p>221. Fright—Physical injury resulting from.</p> | <p>222. Same subject continued.</p> <p>223. Mental suffering—Fear of consequences of injury—Bite of dog.</p> <p>224. Mental suffering of injured person—Disfigurement.</p> <p>225. Mental suffering—Action by husband for injury to wife—Parent and child.</p> <p>226. Mental suffering—Pleading—Evidence.</p> |
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§ 215. Pain and suffering—Physical injury.—Pain and suffering are naturally connected with all physical injuries and may be considered as the direct and proximate results thereof. Whether the physical injury results from the negligent or wilful act of another, recovery may be had for the pain and suffering connected with such injury, both at the time of its occurrence and subsequently, the recovery being in the nature of compensatory damages, so far as it is possible to compensate therefor.¹

¹ Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545; 7 S. Ct. 1; Rouse v. Hornsby (C. C. App. 8th C.), 67 Fed. 219; Robertson v. Cornelson, 34 Fed. 716; Beardsley v. Swann, 4 McLean (U. S. C. C.), 333; Wade v. Leroy, 20 How. (U. S.) 34; Alabama G. S. R. Co. v. Bailey, 112 Ala. 167; 20 So. 313; Louisville & N. R. Co. v. Binion, 107 Ala. 645; 18 So. 75; Alabama G. S. R. Co. v. Hill, 93 Ala. 514; 9 So. 722; 47 Am. & Eng. R. Cas. N. S. 500; St. Louis, S. W. R. Co. v. Dobbins, 60 Ark. 481; 30 S. W. 887, reh'g denied, 60 Ark. 486; 81 S. W. 147; Wall v. Livezey, 6 Colo. 465; Maisenbacker v. Society Concordia, 71 Conn. 369; 42 Atl. 67; Masters v. Warren, 27 Conn. 293; Linsley v. Bushnell, 15 Conn. 225; Warner v. Chamberlain, 7 Houst. (Del.) 18; Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269; 46 Atl. 1114; Friedman v. McGowan, 1 Penn. (Del.) 436; 42 Atl. 723; Brown v. Green, 1 Penn. (Del.) 535; 42 Atl. 991; Jones v. Bell, 8 Houst. (Del.) 562; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Atlanta St. R. Co. v. Jacobs, 88 Ga. 647; 15 S. E. 825;

Pain and suffering, however, have no pecuniary value and cannot be measured by an equivalent in money. They are not capable of exact proof by any pecuniary standard. There is no

Cooper v. Mullins, 30 Ga. 146; Chicago City R. Co. v. Anderson, 182 Ill. 298; 55 N. E. 366, aff'g 80 Ill. App. 71; North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466; 54 N. E. 483, aff'g 79 Ill. App. 632; Chicago & E. I. R. Co. v. Cleninger, 178 Ill. 536; 53 N. E. 320, aff'g 77 Ill. App. 186; West Chicago St. R. Co. v. Foster, 175 Ill. 396; 51 N. E. 690, aff'g 74 Ill. App. 414; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634; 51 N. E. 884, aff'g 71 Ill. App. 162; West Chicago St. R. Co. v. Carr, 170 Ill. 478; 48 N. E. 992, aff'g 67 Ill. App. 530; Central R. Co. v. Serfass, 153 Ill. 379; 39 N. E. 119, aff'g 53 Ill. App. 448; Consolidated Coal Co. v. Haenni, 146 Ill. 614; Pierce v. Millay, 44 Ill. 189; Peoria Bridge Assn. v. Loomis, 20 Ill. 235; Pittsburg, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. 582; 9 Am. & Eng. R. Cas. N. S. 792; Linton Coal & M. Co. v. Persons, 15 Ind. App. 69; 43 N. E. 651; Wabash W. R. Co. v. Morgan (Ind.), 31 N. E. 661; Haden v. Sioux City & P. R. Co. (Iowa, 1895), 60 N. W. 537; Morris v. Chicago, etc., R. Co., 45 Iowa, 29; Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 411; 43 Pac. 683; Abilene v. Wright, 4 Kan. App. 708; 46 Pac. 715; Cent. Pass. R. Co. v. Kuhn, 86 Ky. 578; Louisville & N. R. Co. v. Greer (Ky. 1895), 29 S.W. 337; 16 Ky. L. Rep. 667; Stockton v. Frey, 4 Gill (Ind.), 406; Canning v. Williamstown, 1 Cush. (Mass.) 451; Tunncliffe v. Bay City Consol. R. Co., 107 Mich. 261; 65 N. W. 226; 2 Det. L. N. 711; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466; Covell v. Wabash R. Co., 82 Mo. App. 190; Hansberger v. Sedalia Elec. R. L. & P. Co., 82 Mo. App. 566; Gerdes v. Christopher & S. A. Iron & F. Co., 124 Mo. 347; 27 S. W. 615; Ridenhorn v. Kan. City Cable R. Co., 102 Mo. 270; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323; West v. Frost, 22 Mo. 344; Plummer v. Milan, 79 Mo. App. 439; 1 Mo. A. Rep. 600; Fremont, E. & M. V. R. Co. v. French, 48 Neb. 638; 67 N. W. 472; 4 Am. & Eng. R. Cas. N. S. 365; Sioux City & P. R. Co. v. Smith (Neb.), 36 N. W. 285; Klein v. Jewett, 26 N. J. Eq. 474; Ehrigatt v. Mayor, etc., New York, 96 N. Y. 264; Drinkwater v. Dinsmore, 80 N.Y. 390, rev'g 16 Hun, 250; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534; Ransom v. N.Y., etc., R. Co., 15 N. Y. 415; Gilbertson v. Forty-Second St. R. Co., 14 App. Div. (N. Y.) 294; 43 N. Y. Supp. 782; Cannon v. Brooklyn City R. Co., 9 Misc. (N. Y.) 282; 61 N.Y. St. R. 147; 29 N. Y. Supp. 722; Doyle v. Manhattan Ry. Co., 37 N. Y. St. R. 604; Wallace v. Western W. C. R. Co., 104 N.C. 442; Oliver v. North Pac., etc., R. Co., 3 Oreg. 84; Schenkel v. Pittsburg & B. Traction Co. (Pa. 1899), 44 Atl. 1072; Bamford v. Pittsburg & B. Traction Co. (Pa. 1899), 44 Atl. 1068; Musick v. Latrobe, 184 Pac. 375; 39 Atl. 226; 42 W. N. C. 209; Smedley v. Hestonville, M. & F. Pass. R. Co., 184 Pa. St. 620; 39 Atl. 544; 42 W. N. C. 169; 9 Am. & Eng. R. Cas. N. S. 649; Goodhart v. Penn. R. R. Co., 117 Pac. 1; 35 Atl. 191; 38 W. N. C. 545; 5 Am. & Eng. R. Cas. N. S. 364; Penn. R. R. Co. v. Wilson, 132 Pa. St. 27; 18 Atl. 1087; Penn. & Ohio Canal Co. v. Graham, 63 Pa. St. 290; 3 Am. Rep. 549; Missouri, K. & T. R.

measure of damages, therefore, furnished in law other than the enlightened conscience of impartial jurors, under the evidence and instructions of the court, and it is for the jury to estimate and recompense for pain and suffering on the ground of human experience, guided by the facts and circumstances of the particular case.²

§ 216. **Pain and suffering—Evidence as to.**—The existence of pain may be inferred upon proof of a physical injury, the degree of pain, of course, differing according to the nature and character of the injury. So pain and suffering is proved by evidence of mangling and crushing.³ And evidence may be introduced as to the existence of pains, the use of opiates, etc., since the injury, as showing that pains resulted from the injury. So a person was permitted to testify as to pains suffered by her in her back and the back of her neck, as tending to show pains resulting from the injuries described in the declaration.⁴ And evidence that a person had never used opiates prior to the injury, but that since then he had used morphine all the time and could not live without it, has also been held admissible, as tend-

Co. v. Hannig, 91 Tex. 347; 43 S. W. 508, rev'g 41 S. W. 196; Howard Oil Co. v. Davis, 76 Tex. 630; Texas Brew. Co. v. Dickey, 20 Tex. C. A. 606; 49 S. W. 935; Texas & P. R. Co. v. Malone, 15 Tex. C. A. 56; 38 S. W. 538; Houston & T. C. R. Co. v. Berling, 14 Tex. C. A. 544; 37 S. W. 1083; Missouri, K. & T. R. Co. v. Hansom, 13 Tex. C. A. 552; 36 S. W. 289; San Antonio & A. P. R. Co. v. Keller, 11 Tex. C. A. 569; 32 S. W. 847; Houston & T. C. R. Co. v. Rowell (Tex. C. A.), 45 S. W. 763, aff'd 46 S. W. 630; 11 Am. & Eng. R. Cas. N. S. 597; Giblin v. McIntyre, 2 Utah, 384; Fulsome v. Concord, 46 Vt. 135; Thompson v. National Exp. Co. (Vt.), 29 Atl. 311; Robinson v. Marino, 3 Wash. 434; 28 Pac. 752; Washington & G. R. Co. v. Patterson, 25 Wash. L. Rep. 36; 9 App. D. C. 423; Carpenter v. Mexico Nat. R. Co., 17 Wash. L. R. 630; Boltz v.

Sullivan, 101 Wis. 608; 77 N. W. 870; 5 Am. Neg. Rep. 508; Phillips v. Southwestern Ry. Co., 42 B. D. 406.

² Illinois C. R. Co. v. Barrow, 5 Wall. (U. S.) 90; Western & A. R. Co. v. Young (Ga.), 7 S. E. 912; North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466; 54 N. E. 483, aff'g 79 Ill. App. 632; Chicago, etc., R. Co. v. Warner, 108 Ill. 538; Salina Mill & Elev. Co. v. Hoyne (Kan. App. 1900), 63 Pac. 660; Merrill v. St. Louis, 12 Mo. App. 466; Leeds v. Metropolitan Gas L. Co., 99 N. Y. 26; Goodhart v. Penn. R. Co., 177 Pa. St. 1; Bamford v. Pittsburg & B. Traction Co. (Pa. 1899), 44 Atl. 1068. See also cases cited in first note in this section.

³ Chicago, etc., R. R. Co. v. Warner, 108 Ill. 538.

⁴ Thompson v. National Expr. Co. (Vt.), 29 Atl. 311.

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ing to show continued physical suffering requiring the use of morphine.⁵ Again, where in an action by a woman, for personal injuries it was shown that after the accident her menstruation had stopped for a period of two months, it was held that she might testify that on its return she was subjected to great pain and spasms.⁶

§ 217. Pain and suffering—Effect of prior injury or disease.—Though a person may have a weak constitution, or be subject to a disease which will render him more susceptible to suffering in case of an injury, the fact of the existence of such a disease will not prevent a recovery for the pain and suffering caused solely by such injury.⁷ And a person who has shortly before an accident sustained an injury causing pain may recover for the increase of pain and suffering caused by the subsequent injury.⁸ So though the amount of damages which a person sustains as a result of a personal injury may be increased by reason of his weak or unsound constitution, yet the fact that they are increased by such cause will not prevent his recovery of all damages suffered by him, including the increased amount.⁹ And it is not competent to ask the plaintiff questions for the purpose of showing that several years previous to the injury he suffered with a disease, which, though dormant until the injury, may be the cause of his present sufferings, since they relate to matters too remote and conjectural.¹⁰

⁵ *Missouri, K. & T. R. Co. v. Hanson*, 13 Tex. Civ. App. 552; 36 S. W. 289.

⁶ *Cannon v. Brooklyn City R. Co.*, 9 Misc. (N. Y.) 282; 61 N. Y. St. R. 147; 29 N. Y. Supp. 722.

⁷ *Hall v. Cadillac*, 114 Mich. 99; 4 Det. L. N. 499; 72 N. W. 33. In this case it was held where a person had fallen and bruised her knee and hip, that the fact that she had previously had rheumatism thus rendering her more susceptible to pain, would not prevent recovery for the pain and suffering caused solely by the injury. See also *Shumway v. Walworth & M. Mfg. Co.*, 98 Mich.

411; 57 N. W. 251; *Leclerc v. Montreal*, Rap. Jud. Quebec, 15 C. S. 205; *Litten v. Detroit*, 119 Mich. 495; 78 N. W. 543; 5 Det. L. N. 857.

⁸ *Schwingschlegl v. Monroe*, 113 Mich. 683; 72 N. W. 7; 4 Det. L. N. 447. Where the pain and suffering resulting from an injured ankle was subsequently increased by a fall on a defective sidewalk, it was held that there might be a recovery for such increased pain and suffering.

⁹ *Loranger v. Dominion Transport Co.*, Rap. Jud. Quebec, 15 C. S. 195.

¹⁰ *North Chic. Street R. Co. v. Cotton*, 29 N. E. 899, aff'd 41 Ill. App. 311.

§ 218. **Mental suffering—Physical injury.**—Mental suffering is an element to be considered and for which damages may be awarded in an action to recover for bodily injuries.¹¹ In this

¹¹ *Robertson v. Cornelson*, 34 Fed. 716; *Kennon v. Gilmer*, 131 U. S. 22; *District of Columbia v. Woodbury*, 136 U. S. 450; 10 S. Ct. 990; *South & North A. R. Co. v. McLendon*, 68 Ala. 266; *St. Louis & S. W. R. Co. v. Dobbins*, 60 Ark. 481; 30 S. W. 887, reh'g denied, 60 Ark. 486; 31 S. W. 147; *Trabing v. Cal. Nav. & Imp. Co.*, 133 Cal. —; 65 Pac. 478; *Thomas v. Gates* (Cal. 1899), 58 Pac. 315; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Masters v. Warren*, 27 Conn. 293; *Seger v. Barkhamsted*, 22 Conn. 290; *Jones v. Bell*, 8 Houst. (Del.) 562; *Brush Elec. L. & P. Co. v. Simonsohn*, 107 Ga. 70; 32 S. E. 902; *West Chicago St. R. Co. v. Foster*, 175 Ill. 396; 51 N. E. 690, aff'g 74 Ill. App. 414; *Chicago City R. Co. v. Taylor*, 170 Ill. 49; 48 N. E. 831; 9 Am. & Eng. Rep. Cas. N. S. 513, aff'g 69 Ill. App. 613; *Western Brewery Co. v. Meredith*, 166 Ill. 309; 46 N. E. 720, aff'g 66 Ill. App. 454; *Central R. Co. v. Serfass*, 153 Ill. 379; 39 N. E. 119, aff'g 53 Ill. App. 448; *Pittsburg, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1; 49 N. E. 582; 9 Am. & Eng. R. Cas. N. S. 792; *Wabash W. R. Co. v. Morgan* (Ind.), 31 N. E. 661; *Wolf v. Trimble*, 103 Ind. 355; *Wright v. Compton*, 53 Ind. 337; *Miller v. Boone County* (Iowa, 1895), 63 N. W. 352; *Root v. Sturdivant*, 70 Iowa, 55; *Ferguson v. Davis Co.*, 57 Iowa, 601; *Morris v. Chicago, etc., R. Co.*, 45 Iowa, 29; *Union Street R. Co. v. Stone*, 54 Kan. 83; 37 Pac. 1012; 47 Am. & Eng. Rep. Cas. 90; *Atchison, T. & S. F. R. Co. v. Midgett* (Kan. App.), 40 Pac. 995; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578; *Louisville & N. R. Co. v. Greer* (Ky. 1895), 29 S. W. 337; 16 Ky. L. Rep. 667; *Wyman v. Leavitt*, 71 Me. 229; *Prentiss v. Shaw*, 56 Me. 427; *Mason v. Ellsworth*, 32 Me. 271; *Sloan v. Edwards*, 61 Md. 89; *Bannon v. Baltimore, etc., R. R. Co.*, 24 Md. 108; *Smith v. Holcomb*, 99 Mass. 552; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; *Geveke v. Grand Rap. & I. R. Co.*, 57 Mich. 589; *Hansberger v. Sedalia Elec. R. L. & P. Co.*, 82 Mo. App. 566; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; 36 Am. Rep. 454; *West v. Forrest*, 22 Mo. 344; *Schmitz v. St. Louis, I. M. & S. R. Co. (Mo.)*, 23 L. R. A. 250; 24 S. W. 472; *Plummer v. Milan*, 79 Mo. App. 439; 1 Mo. A. Rep. 600; *American Waterworks Co. v. Dougherty* (Neb.), 55 N. W. 1051; *Quigley v. Central P. R. Co.*, 11 Nev. 350; *Shay v. Camden & S. Ry. Co. (N. J. 1901)*, 49 Atl. 547; *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 457; 38 Atl. 684; 10 Am. & Eng. R. Cas. N. S. 753, aff'g 59 N. J. L. 297; 36 Atl. 100; *Quinn v. Long Island R. R. Co.*, 34 Hun (N. Y.), 331; 106 N. Y. 643; *Drinkwater v. Dinsmore*, 80 N. Y. 390, rev'g 16 Hun, 250; *O'Neil v. Dry Dock, E. B. & B. R. Co.*, 36 N. Y. St. R. 934; 59 N. Y. Supr. 123; 15 N. Y. Supp. 84, aff'd 129 N. Y. 125; 41 N. Y. St. R. 107; 29 N. E. 84; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 28; *Ranson v. New York & E. R. Co.*, 15 N. Y. 415; *Matteson v. New York Cent. R. R. Co.*, 62 Barb. (N. Y.) 364; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 280; *Demann v. Eighth Ave. R. Co. (C. P.)*, 10 Misc. (N. Y.) 191;

connection the following words of the court in a recent Federal case are pertinent: "In the briefs of counsel there is a lengthy discussion of the question whether fright or mental distress alone constitutes such an injury that the law will allow a recovery for it. This question is not involved in this case. . . . Whatever the rule in such cases may be, en passant, we apprehend that it will depend upon the particular facts in each case. There is no conflict in the authorities upon the question that when by the negligence of the defendant's acts, the plaintiff receives a bodily injury, he is entitled to recover damages not only for such injury but for all the injurious results which are a reasonable and natural consequence thereof and were accurately and proximately occasioned thereby. We all know by common knowledge that serious results may follow from bodily injuries. . . . The body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injuries. A nervous shock without a blow to the person might, under some circumstances, be so great as to cause bodily injury. In estimating the amount of damages which the defendants in error were entitled to recover, the jury had the right to take into consideration all the testimony as to the surrounding facts and circumstances at the time of and incident to the collision including the position and situation in which Mrs. Roller was placed thereby; in order to arrive at the truth as to the extent of the bodily injuries she received and the character and extent of the fright or shock, if any, to her system resulting from and directly attributable to the collision and injury. In a case like

62 N. Y. St. R. 476; 30 N. Y. Supp. 926; *Wallace v. Western, etc., R. Co.*, 104 N. C. 442; *Smith v. Pittsburg, etc., R. Co.* 23 Ohio St. 10; *Scott v. Montgomery*, 95 Penn. St. 444; *Penn. & Ohio Canal Co. v. Graham*, 63 Penn. St. 290; 3 Am. Rep. 549; *Gillman v. Florida, C. & P. R. Co.*, 53 S. C. 210; 31 S. E. 224; 12 Am. & Eng. R. Cas. N. S. 125; *Galveston, H. & S. A. Ry. Co. v. Hampton* (Tex. Civ. App. 1900), 59 S. W. 928; *Howard Oil Co. v. Davis*, 76 Tex. 630; *Houston & T. C. R. Co. v. Berling*, 14 Tex.

Civ. App. 544; 37 S. W. 1083; *Galveston, H. & S. A. R. Co. v. Clark*; 21 Tex. Civ. App. 167; 51 S. W. 276; *San Antonio & A. P. R. Co. v. Keller*, 11 Tex. Civ. App. 569; 32 S. W. 847; *Gibbin v. McIntyre*, 2 Utah, 484; *Robinson v. Marino*, 3 Wash. 434; *Carpenter v. Mexico Nat. R. Co.*, 17 Wash. L. R. 630; *Boltz v. Sullivan*, 101 Wis. 608; 77 N. W. 870; 5 Am. Neg. Rep. 508; *Fenelon v. Butts*, 53 Wis. 344; *Blake v. Midland R. Co.*, 18 Q. B. 110. See *Joyce on Electric Law*, secs. 825, 825n, 826, 826n.

the present the proximate damages which the person injured is entitled to recover are the ordinary and natural results of the collision and injury, and are such as might reasonably be expected would follow therefrom. This general principle, wherever discussed, is expressly recognized by all the authorities which hold that damages cannot be recovered for mere fright alone, without any bodily injury. If there was any fright or shock which resulted from her bodily injury in connection with the collision, the accompanying explosion, fire and wreckage of the cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, there is no substantial reason why she should not be allowed to recover all damages naturally and reasonably and approximately arising therefrom."¹²

§ 219. *Same subject continued.*—Such suffering must proceed from the injury as the natural and proximate result thereof, for if independent of and unconnected with any injury, it will not of itself in this class of cases be a ground for recovery.¹³ But it has been held that in case of wilful injuries or of negligence which is gross or amounts to recklessness, this limitation

¹² *Denver & R. G. R. Co. v. Roller*, 100 Fed. 748, 749, per Hawley, D. J. This was an action for damages for injury to a passenger resulting from a collision.

¹³ *Kennon v. Gilmer*, 131 U. S. 22; *The Queen*, 40 Fed. 694; *Texarkana & Ft. S. Ry. Co. v. Anderson* (Ark.), 53 S. W. 673; *Chicago City R. Co. v. Taylor*, 170 Ill. 49; 48 N. E. 831; 9 Am. & Eng. R. Cas. N. S. 513, aff'g 69 Ill. App. 613; *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; 4 Chic. L. J. Wkly. 41, aff'd 182 Ill. 298; 55 N. E. 366; *Brann v. Craven*, 175 Ill. 40; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202; 47 N. E. 694; *Mahoney v. Dankwart*, 108 Iowa, 321; 79 N. W. 134; 6 Am. Neg. Rep. 278; 4 Chic. L. J. Wkly. 417; *Ferguson v. Davis Co.*, 57 Iowa, 601;

Atchison, etc., R. Co. v. McGinnis, 46 Kan. 109; *Wyman v. Leavitt*, 71 Me. 227; *McMahon v. Northern Central R. Co.*, 39 Md. 438; *White v. Sander*, 168 Mass. 296; 47 N. E. 90; *Canning v. Williamstown*, 1 Cush. (Mass.) 451; *Smith v. Holcomb*, 99 Mass. 552; *Keyes v. Minneapolis, etc., R. Co.*, 36 Minn. 290; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; *Denning v. Chicago, R. I. & P. R. Co.*, 80 Mo. App. 152; 2 Mo. App. Rep. 547; *Johnson v. Wells*, 6 Nev. 224; *Consol. Traction Co. v. Lambertson*; 60 N. J. L. 457; 10 Am. & Eng. R. Cas. N. S. 753; 38 Atl. 684, aff'g 59 N. J. L. 297; 36 Atl. 100; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74; 54 N. Y. Supp. 96. See *Joyce on Electric Law*, sec. 987. Also secs. 825-830.

of the rule is not applicable.¹⁴ Though the general rule in the above class of cases requires that the mental suffering must proceed from or be connected with an injury, yet the fact that the injury is a slight one will not prevent the consideration of such suffering as an element of damage.¹⁵ Again, in the case of a physical injury the effect thereof on the mind of the person may be aggravated by the motive or wantonness of the person inflicting such an injury, and in such case the damages may be larger than where there is a similar physical injury caused through mere carelessness.¹⁶ But in order to authorize a recovery for mental suffering, proof as to the damages sustained in dollars and cents, on account of such suffering is not essential,¹⁷ and direct evidence that the plaintiff has suffered mental anguish is unnecessary.¹⁸

§ 220. **Fright—Not result of physical injury.**—In an action for negligence no damages are recoverable for fright, terror, alarm, or distress, of mind where no physical injuries have been sustained in connection therewith.¹⁹ So mental anxiety as to the

¹⁴ *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202; 47 N. E. 694; *Spade v. Lynn & B. R. Co.*, 168 Mass. 285; 47 N. E. 88; 38 L. R. A. 512; 14 Nat. Corp. Rep. 869; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134; 16 L. R. A. 203; *Williams v. Underhill*, 63 App. Div. (N. Y.) 223; 71 N. Y. Supp. 291.

¹⁵ *Masters v. Warren*, 27 Conn. 293; *Canning v. Williamstown*, 1 Cush. (Mass.) 452; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; *Sidekum v. Wabash, etc., Ry. Co.*, 93 Mo. 400; 4 S. W. 701.

¹⁶ *Howes v. Knowles*, 114 Mass. 518. See *Kellyville Coal Co. v. Yehuka*, 94 Ill. App. 74.

¹⁷ *Bell v. Gulf & O. R. Co.*, 76 Miss. 71; *International & G. N. R. Co. v. Rhodes*, 21 Tex. Civ. App. 459; 51 S. W. 517, reh'g denied in 54 S. W. 979.

¹⁸ *International & G. N. R. Co. v.*

Mitchell (Tex. Civ. App. 1901), 60 S. W. 996.

¹⁹ *Lehigh & H. R. Co. v. Marchant* (C. C. App. 2d C.), 55 U. S. App. 427; 28 C. C. A. 544; 84 Fed. 870; *The Queen*, 40 Fed. 694; *St. Louis, I. M. & S. R. Co. v. Bragg* (Ark. 1901), 64 S. W. 226; *Braun v. Craven*, 175 Ill. 401; 51 N. E. 657; 42 L. R. A. 199; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202; 47 N. E. 694; *Mahoney v. Dankwart*, 106 Iowa, 321; 79 N. W. 134; 6 Am. Neg. Rep. 278; 4 Chic. L. J. Wkly. 417; *Salina v. Trosper*, 27 Kan. 544; *Spade v. Lynn & B. R. Co.*, 168 Mass. 285; 38 L. R. A. 512; 47 N. E. 88; 14 Nat. Corp. Rep. 869; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134; *Darrah v. Illinois C. R. Co.*, 65 Miss. 14; *Johnson v. Wells*, 6 Nev. 224; *Buchanan v. New Jersey R. R. Co.*, 23 Vr. (N. J.) 265; *Ward v. West Jersey & S. R. Co.* (N. J. Sup. 1900), 47 Atl. 561; *Consoli-*

safety of the plaintiff or of his family, unaccompanied by physical injury, and caused solely by negligent blasting, as a result of which rocks were thrown upon his land and buildings, is not an element for which recovery may be had.²⁰ And where a stone was thrown into a room it was held that there could be no recovery for injuries sustained by the wife of the owner who was in such room where such injuries were merely the result of fright alone, though the throwing was done with intention to injure the house but with no knowledge of her being in the room and with no intention to injure her.²¹ And in another case it was held that the act of a landlord in suddenly appearing at the open door of a woman's bedroom in which she was packing her goods and his forbidding her to move, accompanied by loud and angry words on his part and a waving of his arms together with threats to call the constable, were not such acts as would constitute negligence which would render him liable for her resulting excitement and fright in consequence of which chorea or St. Vitus dance resulted.²² Nor can damages be recovered for fright which produces a miscarriage, such fright being caused by a quarrel between defendant, plaintiff's husband and another, within her hearing but out of her sight, and it not appearing that the defendant knew that she heard it or knew of her condition;²³ nor can there be a recovery for fright in the case of a seaman thrown into the water by a collision, in the absence of evidence showing inability to pursue his employment, some sub-

dated *Traction Co. v. Lambertson*, 59 N. J. L. 297; 36 Atl. 100, aff'd 38 Atl. 683; 60 N. J. L. 457; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107; 45 N. E. 354, rev'g 77 Hun, 607; 59 N. Y. St. R. 892; 25 N. Y. Supp. 844; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74; 54 N. Y. Supp. 96; 58 Alb. L. J. 347; *Gulf, etc., R. Co. v. Trott*, 86 Tex. 412; 25 S. W. 419; *Victorian Ry. Commrs. v. Coultas*, 13 App. Cas. 222; *Lynch v. Knight*, 9 H. L. Cas. 598; *Rock v. Denis*, 4 Mont. L. R. 356. But see *Mack v. South Bound R. Co.*, 52 S. C. 323; 40 L. R. A. 679; 29 S. E. 905; 3 Chic. L. J. Wkly. 272; *Gulf C. & S.*

F. R. Co. v. Trott, 86 Tex. 412; 25 S. W. 419; *Henderson v. Canada Atlantic R. Co.*, 4 Ont. App. 437. See in this connection *Joyce on Electric Law*, secs. 825-831, 987, 988.

²⁰ *Wyman v. Leavitt*, 71 Me. 227.

²¹ *White v. Sander*, 168 Mass. 296; 47 N. E. 90. See also *Bucknam v. Great Northern R. Co.* (Minn.), 6 Am. Neg. Rep. 302; 79 N. W. 98.

²² *Braun v. Craven*, 175 Ill. 401; 51 N. E. 657; 42 L. R. A. 199, aff'g 73 Ill. App. 189; 3 Chic. L. J. Wkly. 77. But see *Brownback v. Frailey*, 78 Ill. App. 262.

²³ *Phillips v. Dickerson*, 85 Ill. 11; 27 Am. Rep. 607.

stantial injury, or expense resulting therefrom.²⁴ But where, owing to the negligence of a railroad company, a carriage was struck by one of its trains and the person riding therein was thrown to the ground, it was held that such person might recover damages for fright and nervous shock, although the injury sustained was entirely due to the nervous shock.²⁵

§ 221. **Fright—Physical injury resulting from.**—In some cases it may happen that physical injuries are not the direct result of a negligent act, but that fright alone is, and that as a result of such fright, nervous shock or some physical injury subsequently ensues. In this class of cases the weight of authority supports the rule that there can be no recovery for such injury or shock, since such injury cannot be considered as a consequence which in the ordinary course of things would flow from the negligent act.²⁶ Thus it was declared in an English case,²⁷ where, by the negligence of the gateman of a railroad company, a man and his wife while driving across the track were almost struck by the train and she suffered greatly from fright which resulted in illness, that "her fright was caused by seeing the train approaching and thinking that they were going to be killed. Damages arising from mere sudden terror, unaccompanied by

²⁴ *The Queen*, 40 Fed. 694.

²⁵ *Warren v. Boston & M. R. Co.* (Mass.), 40 N. E. 895.

²⁶ *Braun v. Craven*, 175 Ill. 401; 51 N. E. 657; 42 L. R. A. 199, aff'g 73 Ill. App. 189; 3 Chic. L. J. Wkly. 77; *Mahoney v. Dankwart*, 108 Iowa, 321; 79 N. W. 134; 6 Am. Neg. Rep. 278; 4 Chic. L. J. Wkly. 417; *Spade v. Lynn & B. R. Co.*, 168 Mass. 285; 38 L. R. A. 512; 47 W. E. 88; 14 Nat. Corp. Rep. 869; *Deming v. Chicago, R. I. & P. R. Co.*, 80 Mo. App. 152; 2 Mo. App. Rep. 152; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107; 45 N. E. 354, rev'g 77 Hun, 607; 59 N. Y. St. R. 892; 25 N. Y. Supp. 844; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74; 54 N. Y. Supp. 96; 58 Alb. L. J. 347. See also *Haile v. Texas & P. R. Co.*, 23 U. S. App. 80;

60 Fed. 557; 9 C. C. A. 134; 23 L. R. A. 774; *Ewing v. Pittsburg, C. C. & St. L. R. Co.*, 147 Pa. St. 40; 14 L. A. 666; *Joyce on Electric Law* sec. 831. But see *Sloan v. Southern Cal. Ry. Co.*, 111 Cal. 698; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134; 16 L. R. A. 203; *Mack v. South Bound R. Co.*, 52 S. C. 323; 40 L. R. A. 679; 29 S. E. 905; 3 Chic. L. J. Wkly. 272; *Bell v. Great Northern Ry. Co.*, 26 L. R. (Ire.) 428; *Henderson v. Canada Atlantic R. Co.*, 4 Ont. App. 437. But see *Brownback v. Frailey*, 78 Ill. App. 262. The questions of mental suffering and fright may be found discussed in *Joyce on Electric Law*, secs. 825-831, 987, 988.

²⁷ *Victorian Ry. Commr. v. Coultas*, 13 App. Cas. 222.

any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances (their lordships think), be considered a consequence which in the ordinary course of things, would flow from the negligence of the gatekeeper.”²⁸ So where a blast was negligently set off it was held that there could be no recovery for sickness or disease occasioned not as a direct result of the blast, but by apprehension on the part of the plaintiff as to her mother’s safety.²⁹ And in another case it was held where a person was thrown to the ground and injured by an electric shock that there could be no recovery for injuries produced by fright alone, but that they formed a basis of recovery when accompanied by the harm occasioned by the fall.³⁰

§ 222. *Same subject continued.*—In a case before the courts of Ireland, however, the doctrine is asserted that even though no actual physical injury results by impact from the negligent act of another, yet if a person is so frightened by such act that a nervous shock ensues, resulting in subsequent physical injury, recovery may be had for such injury.³¹ The evidence in this case showed that as a result of the negligence of the railroad company, the plaintiff was greatly frightened; that a nervous shock resulted therefrom; that she was unable to perform her work; and that she might suffer from paralysis. It was claimed by the defense that though there might be a nervous shock, yet, if it arose from mere fright, unaccompanied by actual physical injury, damages therefor were too remote to be recoverable. In the opinion in this case the decision in *Victorian Railway Commissioners v. Coultas*,³² is referred to, and criticized, and the court declines to follow it, holding that damages for injury to health, resulting from fright, are recoverable, and saying in conclusion that “I am of the opinion that as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is

²⁸ Per Sir R. Couch.

²⁹ *Mahoney v. Dankwart*, 108 Iowa, 321; 79 N. W. 134; 6 Am. Neg. Rep. 278; 4 Chic. L. J. Wkly. 417.

³⁰ *O’Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. (N. Y.) 74; 54 N. Y. Supp. 96; 58 Abb. L. J. 347.

³¹ *Bell v. Great Northern Ry. Co.*, 26 L. R. Ire. 428, cited in *Mack v. South Bound R. Co.*, 52 S. C. 323; 40 L. R. A. 679; 29 S. E. 905; 3 Chic. L. J. Wkly. 417.

³² 18 App. Cas. 222.

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impossible for any court to lay down, as a matter of law, that if negligence-cause fright, and such fright, in its turn so affects such structures as to cause injury to health, such injury cannot be a consequence, which in the ordinary course of things would flow from the negligence, unless such injury 'accompany such negligence in point of time.'"³³ In this case in criticising the Coultas decision,³⁴ it was also said by the court that "although one witness spoke of nervous shock as contradistinguished from physical damage, the question would still have been open for the jury whether the nervous shock was not, as in the generality of, if not indeed in all cases, it must necessarily be—physical injury." In California³⁵ it is also held in the case of the ejection of a passenger from a train that paroxysms of the nervous system, resulting from the mental suffering of the passenger, constituted a bodily injury, and that damages were recoverable therefor.³⁶

§ 223. Mental suffering—Fear of consequences of injury—Bite of dog.—In some cases of physical injury the character thereof is such that unusual and excessive pain and suffering and possibly death, will naturally and frequently result therefrom. In such cases the fear and anxiety of such result may be an element to be considered in determining the amount of damages recoverable. So, where an injury is inflicted by the bite of a dog, the mental suffering of the person injured, his fear and apprehension as to poison and hydrophobia are elements to be considered.³⁷

§ 224. Mental suffering of injured person—Disfigurement.—Mental suffering arising from disfigurement, deformity, or a knowledge by the injured person that his earning capacity is impaired for life, is a proper element of damage.³⁸

³³ Per Palles, C. B.

³⁴ 13 App. Cas. 222.

³⁵ Sloan v. Southern Cal. R. Co., 111 Cal. 668; 44 Pac. 320; 111 Cal. 668.

³⁶ See sec. 221 herein on fright in connection with physical injury—expulsion of passenger.

³⁷ Warner v. Chamberlain, 7 Houst. (Del.) 18; Godeau v. Blood, 52 Vt. 251; 36 Am. Rep. 751; Robinson v. Marino, 3 Wash. 434; 28 Pac. 752. But see Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690; 46 S. W. 389.

³⁸ Mayor of Birmingham v. Lewis,

So it was held not to be error to instruct the jury in an action where it appeared that the boy's legs had been amputated, that damages might be awarded for mortification and anguish of mind which he has suffered and will suffer in the future by reason of the mutilation of his body, and the fact that he has become an object of curiosity or ridicule among his fellows.³⁹

§ 225. Mental suffering—Action by husband for injury to wife—Parent and child.—In actions to recover for physical injuries attributable to negligence, recovery for mental suffering is confined to the person receiving the physical injury.⁴⁰ So the mental suffering of the wife is not an element to be considered in an action by the husband for injuries to her.⁴¹ And in an action by a wife, the mental suffering of the husband, as a consequence of injuries to her, is not an element to be considered in the estimation of the damages which she may recover.⁴² So, also, in an action by a parent to recover for injuries to a child, the mental suffering of the parent is not to be considered.⁴³

§ 226. Mental suffering—Pleading—Evidence.—In an action for personal injuries, damages for mental suffering arising from the injury itself may be recovered although not specially

92 Ala. 352; Atlanta, etc., R. Co. v. Wood, 48 Ga. 565; Newbury v. Getchel, etc., Mfg. Co., 100 Iowa, 441; Brush Elec. L. & P. Co. v. Simonsohn, 107 Ga. 70; 32 S. E. 902; Sherwood v. Chic. & W. M. R. Co., 82 Mich. 374; Schmitz v. St. Louis, I. M. & S. R. Co., 119 Mo. 256; 24 S. W. 472; 23 L. R. A. 250; Rockwell v. Eldred, 7 Pa. Super. Ct. 95; Nichols v. Brabazon, 94 Wis. 549; 69 N. W. 342; Missouri, K. & T. Ry. Co. v. Miller (Tex. Civ. App. 1901), 61 S. W. 978; Heddles v. Chicago, etc., R. R. Co., 77 Wis. 228; City of Decatur v. Hamilton, 89 Ill. App. 561. But see Chicago City R. Co. v. Anderson, 80 Ill. App. 71; 4 Chic. L. J. Wkly. 41; West Chicago St. R. Co. v. James, 69 Ill. App. 609; Chicago & G. T. R.

Co. v. Spurney, 69 Ill. App. 549; Chicago, B. & Q. R. Co. v. Hines, 45 Ill. App. 299; Chicago, etc., R. Co. v. Caulfield, 63 Fed. 396; 11 C. C. A. 552.

³⁹ Heddles v. Chicago City R. Co., 77 Wis. 228; 46 N. W. 115. See also Central R. & Bkg. Co. v. Lanier, 83 Ga. 587; 10 S. E. 279.

⁴⁰ Hyatt v. Adams, 16 Mich. 180.

⁴¹ Hyatt v. Adams, 16 Mich. 180. But see Campbell v. Harris, 4 Tex. Civ. App. 636; 23 S. W. 85.

⁴² Long v. Morrison, 14 Ind. 595.

⁴³ Black v. Carrollton R. Co., 10 La. App. 33; Cowden v. Wright, 24 Wend. (N. Y.) 429; Penn. R. R. Co. v. Kelly, 31 Penn. St. 372; Galveston v. Barbour, 62 Tex. 172; Flemington v. Smithers, 2 C. & P. 292; contra, Trimble v. Spiller, 7 Mon. (Ky.) 394.

alleged.⁴⁴ But in order to admit proof of such suffering there must, in the absence of any allegation thereof, be facts from which it may be directly inferred.⁴⁵ And again, no direct evidence of mental suffering is necessary in order to warrant a recovery where the physical injury appears to be serious and its effect permanent.⁴⁶ But it is declared that in the absence of any evidence showing that the plaintiff suffered in the slightest degree from apprehension, it is error in an action for personal injuries to submit apprehension as an element of damages recoverable.⁴⁷

⁴⁴ *Chicago City R. Co. v. Taylor*, 170 Ill. 49; 48 N. E. 831; 9 Am. & Eng. R. Cas. N. S. 513, aff'g 68 Ill. App. 613; *Western Brewery Co. v. Meredith*, 160 Ill. 306; 46 N. E. 720, aff'g 66 Ill. App. 454; *Ft. Scott, W. & W. Ry. Co. v. Lightburn* (Kan. App. 1899), 58 Pac. 1033; *McCoy v. Milwaukee Street R. Co.* (Wis.), 59 N. W. 453.

⁴⁵ *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238.

⁴⁶ *San Antonio v. Krensel*, 17 Tex. Civ. App. 594; 43 S. W. 615. But see *Atchison, T. & S. F. R. Co.*, 7 Kan. App. 594; 52 Pac. 460.

⁴⁷ *Gilbertson v. Forty-Second St., M. & St. N. Ave. R. Co.*, 14 App. Div. (N. Y.) 294; 43 N. Y. Supp. 782.

CHAPTER IX.

LOSS OF TIME, EARNINGS AND IMPAIRED EARNING CAPACITY.

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| <p>§ 227. Loss of time—Earnings—Diminished capacity to labor.</p> <p>228. Loss of time—Earnings—Evidence of must be given.</p> <p>229. Evidence—Loss of time—Earnings and diminished ability.</p> <p>230. Same subject continued.</p> <p>231. Loss of time—Earnings—Not recoverable where wages are paid—Evidence.</p> <p>232. Prospect of increased earnings.</p> <p>233. Loss of time—Business.</p> <p>234. Loss of time—Partners—Evidence.</p> <p>235. Loss of profits.</p> <p>236. Loss of time—Earnings—Professional men.</p> | <p>237. Loss of time—Earnings—Cannasser or travelling salesman on percentage basis.</p> <p>238. Loss of time—Earnings—Peddler.</p> <p>239. Total or partial incapacity—English workmen's act—Construction of.</p> <p>240. Loss of time, earnings, etc.,—Pleading of as special damages.</p> <p>241. Loss of time, earnings, etc.,—Recovery for and evidence admissible under general allegations.</p> <p>242. Loss of time, earnings, etc.,—Recovery for and evidence admissible under general allegations—Continued.</p> |
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§ 227. **Loss of time—Earnings—Diminished capacity to labor.**—As a result of physical injuries a person is in most cases incapacitated either partially or entirely from pursuing his profession, business, or occupation. Where such a result follows the law requires that the person responsible for the injury shall make compensation to the person injured for the loss of time which he has sustained, or in other words give damages to him for the loss which he has suffered in his income, wages, or earnings or diminished capacity to labor as a result of such injury, the pecuniary loss, which is the measure of damages, varying in each case according to his business or occupation and the degree and duration of his disability.¹ And the mere possi-

¹ *Wade v. Leroy*, 20 How. (U. S.) 34; *Vicksburg, etc., R. R. Co. v. Putnam*, 118 U. S. 545; *District of Columbia v. Woodbury*, 136 U. S. 450; *Rouse v. Hornsby* (C. C. App. 8th C.), 67 Fed. 219; *Carpenter v. Mexi-*

bility that physical injuries which result in one being disabled from engaging in manual labor may result in his being compelled to enter another and more lucrative field of employment will

can Nat. R. R. Co., 39 Fed. 315; Nebraska v. Campbell, 2 Black (U. S.), 590; Beardsley v. Swann, 4 McLean (C. C. U. S.), 333; South & N. A. R. R. Co. v. McLendon, 63 Ala. 266; Masters v. Warren, 27 Conn. 293; Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269; 46 Atl. 1114; Jones v. Bell, 8 Houst. (Del.) 562; Warner v. Chamberlain, 7 Houst. (Del.) 18; Cooper v. Mullins, 30 Ga. 146; West Chicago St. R. Co. v. Foster, 175 Ill. 396; 51 N. E. 690, aff'g 74 Ill. App. 414; West Chicago St. R. Co. v. Carr, 170 Ill. 478; 43 N. E. 992, aff'g 67 Ill. App. 530; Consol. Coal Co. v. Haenni, 146 Ill. 614; Sheridan v. Hibbard, 119 Ill. 307; Peoria Bridge Assoc. v. Loomis, 20 Ill. 235; Chicago v. Elzeman, 71 Ill. 131; Pierce v. Millay, 44 Ill. 189; Ripley v. Leverenz, 83 Ill. App. 603; Galesbury v. Hall, 45 Ill. App. 290; Indianapolis v. Gaston, 58 Ind. 224; Linton Coal v. M. Co., 15 Ind. App. 69; 43 N. E. 651; American Strawboard Co. v. Foust (Ind. App. 1895), 39 N. E. 891; Keyes v. Cedar Falls, 107 Iowa, 509; 78 N. W. 227; Stafford v. Oskaloosa, 64 Ia. 251; Haden v. Sioux City & P. R. R. Co. (Iowa, 1895), 60 N. W. 537; McKinley v. Chicago & N. W. R. R. Co., 44 Ia. 314; Chicago, R. I. & P. R. R. Co. v. Posten, 59 Kan. 449; 11 Am. & Eng. R. Cas. N. S. 138; 53 Pac. 465; Missouri, K. & T. R. Co. v. Weaver, 16 Kan. 456; Kentucky, C. R. Co. v. Ackley, 87 Ky. 278; Eden v. Lexington, etc., R. R. Co., 14 B. Mon. (Ky.) 204; Parker v. Jenkins, 3 Bush (Ky.), 587; Rutherford v. Shreveport & H. R. R. Co., 41 La. Ann. 793; Sanford v. Augusta, 32 Me. 536; Stockton v. Frey, 4 Gill (Md.), 406; Jordon v. Middlesex, 138 Mass. 425; Braithwaite v. Hall, 168 Mass. 38; 46 N. E. 398; 1 Am. Neg. Rep. 623; Harmon v. Old Colony R. R. Co. (Mass. S. J. C. 1897), 2 Am. Neg. Rep. 717; Canning v. Williamstown, 1 Cush. (Mass.) 451; Ballou v. Farman, 11 Allen (Mass.), 73; Ostrander v. Lansing, 115 Mich. 224; 73 N. W. 110; 4 Det. L. N. 833; Moore v. Kalamazoo, 109 Mich. 176; 66 N. W. 1089; 3 Det. L. M. 52; 66 N. W. 1089; Kinney v. Folkerts, 84 Mich. 616; 48 N. W. 283; Memphis, etc., R. R. Co., 44 Miss. 466; Gerdes v. Christopher & S. A. Iron & F. Co., 124 Mo. 347; 27 S. W. 615; Stephen v. Hannibal & S. J. R. R. Co., 96 Mo. 207; Whalen v. St. Louis, etc., R. R. Co., 60 Mo. 323; Pryor v. Met. St. Ry. Co., 85 Mo. App. 387; Carpenter v. McDavitt, 66 Mo. App. 1; Charrand v. Southern R. R. Co., 57 Mo. App. 425; Rogan v. Montana C. R. Co., 20 Mont. 503; 52 Pac. 206; Chicago & C. R. R. Co. v. Starmer, 26 Neb. 630; 42 N. W. 706; Cohen v. Eureka & P. R. R. Co., 14 Neb. 376; Hopkins v. Atlantic R. Co., 36 N. H. 9; Drinkwater v. Dinsmore, 80 N. Y. 390, rev'g 16 Hun (N. Y.), 250; Sheehan v. Edgar, 58 N. Y. 631; Feinstein v. Jacobs, 15 Misc. (N. Y.) 474; 72 N. Y. St. R. 698; 37 N. Y. Supp. 345; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Beckwith v. New York Central R. R. Co., 64 Barb. (N. Y.) 299; Masterton v. Mount Vernon, 58 N. Y. 391, 396; Curtis v. Rochester, etc., R. R. Co., 20 Barb. (N. Y.) 282; Cass v. Third Ave. R. Co., 20 App. Div. (N. Y.) 91; 47 N. Y. Supp. 356; Phylfe v. Manhattan Ry. Co., 30 Hun (N. Y.), 377; Klein v. Second Ave.

not deprive him of the right to recover damages based on his diminished earning power in the vocation which he has followed.² Damages for lost time are not to be assessed at the arbitrary discretion of a jury, but must be determined on a pecuniary basis, since the loss is purely a pecuniary loss or injury for which only a fair and just compensation should be given.³

§ 228. Loss of time—Earnings—Evidence of must be given.

—If in an action to recover damages for physical injuries a claim is made for loss of time, evidence showing the value of such time and of the damages sustained must be given, or there can be no award therefor, except nominal damages.⁴ In deter-

R. R. Co., 22 J. & S. (N. Y.) 164; Brignoli v. Chicago & G. E. Ry. Co., 4 Daly (N. Y.), 182; Grant v. Brooklyn, 41 Barb. (N. Y.) 381; Wallace v. Western N. C. R. Co., 104 N. C. 442; Oliver v. Northern P. R. Co., 3 Oreg. 84; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. St. 297; Scott v. Montgomery, 95 Pa. St. 444; McLaughlin v. Corry, 77 Pa. St. 109; Penn., etc., Canal Co. v. Graham, 63 Pa. St. 290; Hanover R. R. Co. v. Coyle, 55 Pa. St. 396; Howard Oil Co. v. Davis, 76 Tex. 630; San Antonio & P. R. R. Co. v. Keller, 11 Tex. Civ. App. 569; 32 S. W. 847; Washington & G. R. Co. v. Patterson, 25 Wash. L. R. 36; 9 App. D. C. 423; Carpenter v. Mexico Nat. R. R. Co., 17 Wash. L. R. 630; Woodward v. Boscobel, 84 Wis. 226; 54 N. W. 332; Kinney v. Crocker, 18 Wis. 74; Phillips v. Southwestern Ry. Co., 4 Q. B. D. 406; Leclerc v. Montreal, Rap. Jud. Quebec, 15 C. S. 205.

² Ostrander v. Lansing, 115 Mich. 224; 73 N. W. 110; 4 Det. L. N. 833.

³ Leeds v. Metropolitan Gas L. Co., 90 N. Y. 26.

⁴ Alabama Mineral R. R. Co. v. Marcus (Ala. S. C. 1897), 2 Am. Neg. Rep. 490; Seaboard Mfg. Co. v.

Woodson, 98 Ala. 378; 11 So. 733; Greensboro v. McGibbony, 93 Ga. 672; 20 S. E. 37; Britton v. Grand Rapids R. Co., 90 Mich. 159; Howell v. Independence, 67 Mo. App. 317; O'Brien v. Loomis, 43 Mo. App. 29; Baker v. Manhattan Ry. Co., 118 N. Y. 533; 29 N. Y. St. R. 936; 23 N. E. 885, aff'g 7 N. Y. St. R. 68; 54 Supr. 394; Staal v. Grand St. & N. R. R. Co., 107 N. Y. 625; 1 Silv. C. A. 516; 11 N. Y. St. R. 352; 26 Wkly. Dig. 241; Leeds v. Metropolitan Gas L. Co., 90 N. Y. 26; Niendorff v. Manhattan R. Co., 4 App. Div. (N. Y.) 46; 88 N. Y. Supp. 690; Seitz v. Dry Dock E. B. & C. R. Co., 32 N. Y. St. R. 56; 16 Daly, 264; 10 N. Y. Supp. 1; Wood v. Watertown, 34 N. Y. St. R. 808; 58 Hun (N. Y.), 298; Wynne v. Atlantic Ave. R. Co., 14 Misc. (N. Y.) 414; 35 N. Y. Supp. 1034; 70 N. Y. St. R. 737; McHugh v. Schlosser, 159 Pa. St. 480; 23 L. R. A. 574; 28 Atl. 291; 34 W. N. C. 33; 24 Pitts. L. J. N. S. 285; International & G. N. R. Co. v. Sincock, 81 Tex. 503; Houston City St. R. Co. v. Artusey (Tex. Civ. App. 1895), 31 S. W. 319; Gulf C. & S. F. R. Co. v. Daniels (Tex. Civ. App.), 29 S. W. 426. But see Fisher v. Jansen, 128 Ill. 549; 21 N. E. 598.

mining what is sufficient proof of the value of plaintiff's time to permit the consideration of this element by the jury, it is decided that evidence of what the plaintiff usually did and of the value per day of such services is sufficient.⁵ So in another case it was held sufficient where the plaintiff testified that as a result of the injury she was unable to do the work which she had formerly done or any other work and there was sufficient evidence upon which an estimate could be made by the jury as to the length of her disability though there was no proof as to the exact time thereof.⁶ And again where loss of time was shown, but there was no evidence of what the plaintiff actually lost in money, it was held that nominal damages might be given.⁷ But proof merely of the fact that the plaintiff had been engaged in business prior to the injury but had not been able to attend to the same since is not sufficient to permit the consideration of loss of time by the jury, there being no evidence as to the value of his time, the business in which he was engaged or any other facts from which the jury might be able to estimate the value of the time lost.⁸ Although in the case of an action to recover for personal injuries to a minor it is held that though there may be no evidence specially bearing upon the question of the plaintiff's earning capacity after reaching the age of twenty-one it will not prevent the allowance of loss of future earnings as an element of the damages which he may recover.⁹

§ 229. Evidence—Loss of time—Earnings and diminished ability.—For the purpose of showing the pecuniary injury sustained by reason of loss of time and diminished ability to labor, evidence is admissible of the earnings of the person injured before and at the time of the injury and subsequent thereto.¹⁰

⁵ *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. (N. Y.) 414; 35 N. Y. Supp. 1034; 70 N. Y. St. R. 737.

⁶ *Howell v. Independence*, 67 Mo. App. 317.

⁷ *Niendorff v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46; 38 N. Y. Supp. 690.

⁸ *Leeds v. Me. Gas L. Co.*, 90 N. Y. 26.

⁹ *Bartley v. Trorlicht*, 49 Mo. App. 214.

¹⁰ *Louisville & N. R. Co. v. Woods*, 115 Ala. 527; 22 So. 33; *Alabama M. R. Co. v. Marcus*, 115 Ala. 389; 22 So. 135; *Alabama M. R. Co. v. Griffith*, 63 Ark. 491; 39 S. W. 550; *Roche v. Redington*, 125 Cal. 174; 57 Pac. 890; *Atlantic Consol. St. R. Co. v. Bates*, 103 Ga. 333; 30 S. E. 41; *Broyles v. Priscock*, 97 Ga. 643; 25 S. E. 389; *City of Kankakee v. Steinbach*, 89 Ill. App. 513; *City of*

So in showing an impairment of earning capacity in a certain employment, evidence is admissible of the wages usually paid therein for expert help and that plaintiff had been accustomed to do expert work, but can no longer.¹¹ And though plaintiff may at time of injury have been engaged in other than his regular employment, yet evidence is admissible of his average earnings in his regular employment.¹² So, also, though the plaintiff may not have been engaged in any employment for several years prior to the injury, yet for the purpose of showing what business he understood and could enter upon, and what wages would be open to him but for his injuries, evidence is admissible as to the occupation he was formerly engaged in.¹³ And it has been held proper for plaintiff to testify as to the rea-

- Elgin v. Anderson*, 89 Ill. App. 527; *Chataworth v. Rowe*, 166 Ill. 114; 46 N. E. 763, aff'g 66 Ill. App. 55; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305; 45 N. E. 290; *Bailey v. Centreville*, 108 Iowa, 20; 78 N. W. 831; *Grimmelmman v. Union Pac. R. Co.* (Iowa, S. C. 1897), 1 Am. Neg. Rep. 237; *Braithwaite v. Hale*, 168 Mass. 38; 46 N. E. 398; *Murdock v. N. Y. & B. Desp. Co.* (Mass. S. J. C. 1897), 1 Am. Neg. Rep. 263; *McKormick v. West Bay City*, 110 Mich. 265; 68 N. W. 148; 3 Det. L. N. 342; *Palmer v. Winona Ry. & L. Co.* (Minn. 1899), 80 N. W. 869; *Lincoln v. Beekman*, 23 Neb. 677; 37 N. W. 593; *Ehrgott v. New York*, 96 N. Y. 264; *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9; *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 280; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 260; *Brignioli v. Chicago & Great E. Ry. Co.*, 4 Daly (N. Y.), 182; *Palmer v. Conant*, 58 Hun (N. Y.), 33; 34 N. Y. St. R. 816; 128 N. Y. 577; *Stone v. Poland*, 81 Hun (N. Y.), 132; 62 N. Y. St. R. 731; 30 N. Y. Supp. 748; *Simonin v. N. Y. L. E. & W. R. R. Co.*, 36 Hun (N. Y.), 214; *Carple v. New York & H. R. Co.*, 16 App. Div. (N. Y.) 158; 44 N. Y. Supp. 670; *Quinn v. O'Keefe*, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116; *Miller v. Manhattan R. Co.*, 73 Hun (N. Y.), 512; 56 N. Y. St. R. 189; 26 N. Y. Supp. 162; *Symons v. Met. St. R. Co.*, 58 N. Y. Supp. 327; 27 Misc. 502; *Campbell v. Syracuse*, 20 Wkly. Dig. (N. Y.) 449; *Wallace v. Western N. C. R. R. Co.*, 104 N. C. 442; 10 S. E. 552; *Alliance v. Campbell* (C. C.), 3 Ohio Dec. 630; *Wade v. Leroy*, 20 How. (U. S.) 343; *Parshall v. Minneapolis, etc., R. R. Co.*, 35 Fed. 649; *Phillips v. Southw. R. R. Co.*, 5 C. P. Div. 280; 5 Q. B. Div. 78; 4 Q. B. Div. 406.
- ¹¹ *Finken v. Elm City Brass Co.*, 73 Conn. 423; 47 Atl. 670.
- ¹² *Galesburg v. Hall*, 45 Ill. App. 290. See also *Rayburn v. Central Iowa Ry. Co.*, 74 Iowa, 637.
- ¹³ *Peterson v. Seattle Traction Co.* (Wash. 1901), 65 Pac. 543, aff'g 63 Pac. 539. Where, however, plaintiff had been engaged in no employment for a period of five years prior to the injury, evidence as to the wages he had formerly received therein was held inadmissible. *West Chic. St. R. Co. v. Maday*, 188 Ill. 308; 58 N. E. 933, aff'g 88 Ill. App. 49.

sonable worth of his time after the date of the injury, if he had been in his usual health.¹⁴ But where a person is working for a certain sum per day, week or month, the wages actually lost is the measure of damages and not the market value of the average wages of a man of the plaintiff's average capacity working in the same employment.¹⁵ And evidence as to the circumstances of the continuance of the plaintiff in the employ of a company after he was injured, for the purpose of showing the character of the work performed by him, both before and after the injury, is competent upon the question of how much the injuries have impaired his earning capacity.¹⁶ But evidence of the plaintiff's aggregate earnings which are the result of the use of capital, and do not depend upon his skill or services, is inadmissible.¹⁷ Nor is it proper for a plaintiff to testify as to what his time is worth to him. The evidence should be as to the reasonable value of his time.¹⁸ And again, under general allegations of loss arising from inability to work, evidence is not admissible of the inability to fulfill a special engagement, but the evidence should be confined to the ordinary earnings or wages of plaintiff.¹⁹

§ 230. Same subject continued.—Where in an action for personal injuries the plaintiff seeks a recovery for loss of time or diminished capacity for earnings, evidence is admissible as to the occupation of the injured person prior to the injury and that he received a stated monthly salary, and that as a result of the injury he has been deprived of his position and salary for a certain length of time.²⁰ And he may show that in addition to his salary from his regular employment his earnings were increased by other means.²¹ So evidence is admissible of the fact that plaintiff was accustomed to go out nursing, and that since the

¹⁴ *Gulf C. & S. F. Ry. Co. v. Bell* (Tex. Civ. App. 1900), 58 S. W. 614.

¹⁵ *Braithwaite v. Hall* (Mass. S. J. C. 1897), 1 Am. Neg. Rep. 623.

¹⁶ *Texas & P. R. Co. v. Volk*, 151 U. S. 73; 38 L. Ed. 78; 14 Sup. Ct. Rep. 239.

¹⁷ *Johnson v. Manhattan Ry. Co.*, 52 Hun (N. Y.), 111; 23 N. Y. St. R. 388; 4 N. Y. Supp. 848; *Hartel v.*

Holland, 19 Wkly. Dig. (N. Y.) 312.

¹⁸ *Atchison v. Atchison*, 9 Kan. App. —; 57 Pac. 248.

¹⁹ *North Chicago L. & R. Co. v. Barber*, 77 Ill. App. 277.

²⁰ *Broyles v. Prisock*, 97 Ga. 643; 25 S. E. 389.

²¹ *Wilkie v. Raleigh & C. F. R. Co.*, 127 N. C. 203; 37 S. E. 204.

injury she had had several calls to go out for this purpose.²² And evidence that a person was, prior to the injury, engaged for a period of two years in studying a profession, and that since the injury he had been unable to labor, was held admissible, such evidence in connection with his appearance and the testimony of physicians that he was permanently disabled by disease, being held sufficient to justify a finding of impairment of earning capacity.²³ As evidence of the occupation of an injured person is admissible, so on the other hand it is proper to admit evidence that the plaintiff has learned no business or trade, has no education and can do no office work.²⁴ But evidence of the wages paid in larger towns to journeymen during the period of an injured journeyman's disability, where, prior to the injury, he was working for less wages than those sought to be proved, has been held to be inadmissible.²⁵ And in an action by a draughtsman for injuries to his hands, fancy drawings and sketches made by him, but which have no connection with his business, are inadmissible on the question of special damages claimed by him for inability to continue his business.²⁶

§ 231. Loss of time—Earnings—Not recoverable where wages are paid—Evidence.—In an action to recover damages for a physical injury, loss of time or earnings is not an element to be considered in the estimation of such damages, if it appear that the injured person has been paid his regular salary and been in receipt of the same earnings during the period of his disability that he was before the injury.²⁷ Therefore, if in such an action, evidence of loss of wages has been given, evidence is competent to show that the employer paid the plaintiff's wages while he was disabled.²⁸ But where evidence is introduced

²² *Heddle v. City Elec. R. Co.*, 112 Mich. 547; 70 N. W. 1096; 4 Det. L. N. 104.

²³ *McGanahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211; 50 N. E. 610.

²⁴ *McCoy v. Milwaukee St. R. Co.* (Wis.), 59 N. W. 453.

²⁵ *Omaha & R. V. R. Co. v. Ryburn* (Neb.), 58 N. W. 541.

²⁶ *Freeland v. Brooklyn Heights R.*

Co., 54 App. Div. (N. Y.) 90; 66 N. Y. Supp. 321.

²⁷ *Ephland v. Missouri P. R. Co.*, 57 Mo. App. 147; *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *Chelinsky v. Hoopes & T. Co.*, 1 Marv. (Del.) 273; 40 Atl. 127.

²⁸ *Drinkwater v. Dinsmore*, 80 N. Y. 390; 36 Am. Rep. 624, rev'g 16 Hun 250.

showing that the plaintiff had received other employment subsequent to his injury in the same line in which he was employed at the time he received the injury, it is held that he may give in evidence the fact that he required and received help from others in his work.²⁹

§ 232. Prospect of increased earnings.—As a general rule in order to authorize a recovery for any loss in the future as a result of personal injuries, such loss must be reasonably certain and not a merely possible loss or damage which may ensue. So in such an action evidence is not admissible, as bearing on the question of damages, of an injured person's possible chances of promotion or of his obtaining higher wages.³⁰ The prospect of increased wages or earnings of an injured person may, however, in some cases be so reasonably certain as to permit of a recovery therefor. So where an injured person was, as a result of an injury, obliged to give up her position, it was held that evidence was admissible that she had been promised an increase of salary within a short time by her employer.³¹ And in another case it was held proper to instruct the jury as to a prospect of increased earnings as well as to a diminution of capacity to earn money with advanced age, though there was no allegation in reference thereto, where evidence had been given without objection as to such earning capacity.³²

§ 233. Loss of time—Business.—In an action to recover for an injury sustained by a person engaged in business, loss of time is an element to be considered in estimating the damages recoverable therefor, and in order to assist the jury in arriving at a fair estimate of the compensation allowable for this element, it is proper to consider the business the plaintiff is engaged in, the nature and extent of such business, the importance of his personal oversight and superintendence in conducting it, and the

²⁹ *International & G. N. R. Co. v. Zapp* (Tex. Civ. App.), 49 S. W. 673.

³⁰ *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266; 3 Sup. Ct. Rep. 837; 3 L. Ed. 728.

³¹ *Bryant v. Omaha & C. B. R. & B. Co.*, 98 Iowa, 483; 67 N. W. 392.

³² *Atlanta Consol. St. R. Co. v. Owings*, 97 Ga. 663; 33 L. R. A. 798; 25 S. E. 377; 5 Am. & Eng. R. Cas. N. S. 1.

consequent loss arising from his inability to prosecute it.²⁸ So in a New York case²⁹ it was said by the court that "the plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him and, if he could, the compensation usually paid to persons doing such business for others."³⁰ So for the purpose of showing the extent of the plaintiff's business in an action by a contractor for personal injuries, evidence is admissible of a particular contract into which he has entered.³¹ And an official stenographer may in an action to recover for personal injuries sustained by him, testify as to the employment of typewriters by him before the injury, and the amount he was paying them per month, such evidence being relevant as to the extent of the decrease of his business.³² So again it has been held proper to permit the plaintiff to testify that he had been compelled to sell out his business by reason of his being unable to attend to same, although it was said that the fact that he had sold out the business was not material to the question of damages, but that the fact that he was unable to carry on the same was.³³ But though evidence is admissible of the nature of the plaintiff's business and the value of his services, yet the opinions of witnesses as to the amount of his loss is held not admissible.³⁴ Again, it may be impracticable in some cases to accurately measure the value of the plaintiff's services in his busi-

²⁸ *Nebraska v. Campbell*, 2 Black (U. S.), 590; *Wade v. Leroy*, 20 How. (U. S.) 34; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478; 48 N. E. 992, affg' 67 Ill. App. 530; *Keyes v. Cedar Falls*, 107 Iowa, 509; 78 N. W. 227; *Chicago, R. I. & P. R. Co. v. Posten*, 59 Kan. 449; 53 Pac. 465; 11 Am. & Eng. R. Cas. N. S. 138; *Silaby v. Mich. Car Co.*, 95 Mich. 204; 54 N. W. 761; *Joslin v. Grand Rapids Ice Co.*, 53 Mich. 322; *Rogan v. Montana C. R. Co.*, 20 Mont. 508; 52 Pac. 206; *New Jersey Express Co. v. Nichols*, 33 N. J. L. 484; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 260; *Beckwith v. New York Cent. R. R. Co.*, 64 Barb. (N. Y.) 299; *Masterton v. Mount Vernon*, 58 N.

Y. 391; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *Lynch v. Brooklyn City R. Co.*, 5 N. Y. Supp. 811; 1 Sil. 361; 123 N. Y. 657; *Kinney v. Crocker*, 18 Wis. 74.

³¹ *Masterton v. Mt. Vernon*, 58 N. Y. 391.

³² Per Grover, J. See also *Silaby v. Michigan Car Co.*, 95 Mich. 204; 54 N. W. 761.

³³ *Schwartz v. North Jersey St. Ry. Co.* (N. J. Sup. 1901), 49 Atl. 676.

³⁴ *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212; 38 S. E. 756.

³⁵ *Keyes v. Cedar Falls*, 107 Iowa, 509; 78 N. W. 227.

³⁶ *Lincoln v. Saratoga R. R. Co.*, 23 Wend. (N. Y.) 425.

ness by any general scale of remuneration, owing to the nature of the business. In a case of this kind it was held not erroneous to instruct the jury that the amount of compensation to be awarded for time lost was left to the "sound discretion of the jury under the evidence."⁴⁰ In another case where the plaintiff was engaged in the restaurant business on her own account, it was held proper to admit evidence of what was the market value of her services to others in that business, though she had never worked for any other person.⁴¹

§ 234. Loss of time—Partners—Evidence.—Where the business in which a person injured was engaged was a partnership one, he may give evidence of his earnings from such business, where the partnership was one which merely employed the services of the parties.⁴² And evidence of the value of the services of a partner to his firm both before and after the accident is admissible.⁴³ And without regard to a person's interest in a partnership he may, in case of physical injury causing a loss of time to him in such business, recover the value of his services.⁴⁴ But where a person was in partnership with another engaged in the business of a steam thresher, which he had sold out but in which he proposed to engage in again, an estimate by such person of the annual value of his labor was held incompetent to show the extent of his damages, especially where it was not shown in what proportions the earnings of the former business were divided between the partners.⁴⁵ Again, where one of the members of a partnership is injured, an agreement entered into between the partners, subsequent to the accident, as to the amount which shall be deducted from the injured partner's share in the business, is held to be inadmissible in an action by him to recover damages for such injury.⁴⁶

⁴⁰ *Rogan v. Montana C. R. Co.*, 20 Mont. 503; 52 Pac. 206.

⁴¹ *Harmon v. Old Colony R. R. Co.* (Mass. S. J. C. 1897), 2 Am. Neg. Rep. 717.

⁴² *Thomas v. Union R. Co.*, 18 App. Div. (N. Y.) 185; 45 N. Y. Supp. 920.

⁴³ *Mt. Adams & E. P. I. P. R. Co. v. Isaacs*, 18 Ohio C. C. 177.

⁴⁴ *Kendall v. Albia*, 73 Iowa, 241.

⁴⁵ *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334; 39 L. Ed. 1006; 15 Sup. Ct. Rep. 830.

⁴⁶ *Mt. Adams & E. P. I. P. R. Co. v. Isaacs*, 18 Ohio C. C. 177.

§ 235. **Loss of profits.**—In many cases where the plaintiff has been engaged in business there has been an endeavor to recover for a loss of profits which he claims to have sustained. There may be instances where the profits may be reasonably estimated by calculation, and where they are so definite and certain that this is possible, then damages for loss thereof may be allowed, but as a general rule they are too uncertain in amount and subject to too many contingencies to constitute a safe guide in determining the amount of compensation.⁴⁷ So the loss of profits in conducting a business in which the labor of others is employed is not an element of damages in an action for personal injuries;⁴⁸ but the value of the plaintiff's services in conducting such a business is the measure of damages.⁴⁹ And where evidence was offered by plaintiff to show the profits of his business and was admitted under objections, it was held not to be such as to enable the jury to intelligently perform its duty of finding the earnings of the plaintiff after allowing for interest on capital invested and for the energy and skill of his partners.⁵⁰ But it has been held proper to instruct the jury that "if a man has an ordinary business, yielding ordinary receipts, he will be entitled to recover the diminution of those receipts resulting from such injury."⁵¹

§ 236. **Loss of time—Earnings—Professional men.**—In actions by professional men to recover for physical injuries sustained by them, evidence is admissible of past earnings in order to enable the jury to properly estimate the value of their serv-

⁴⁷ *Boston & A. R. R. Co. v. O'Reilly*, 158 U. S. 334; *Lombardi v. California Street Cable R. Co.*, 124 Cal. 311; 57 Pac. 66; *Silsby v. Michigan Car Co.*, 95 Mich. 204; 54 N. W. 761; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Blate v. Third Ave. R. Co.*, 29 App. Div. (N. Y.) 368; 51 N. Y. Supp. 590; *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.), 111; 4 N. Y. Supp. 848; *Mark v. Long Island R. R. Co.*, 3 N. Y. St. R. 562; *Goodhart v. Penn. R. Co.*, 177 Pa. St. 1; 35 Atl. 191; 5 Am. & Eng. R. Cas. N. S. 364; 38 W. N. C. 545; *Bierbach v. Goodyear*

Rubber Co., 54 Wis. 208; 41 Am. Rep. 19; *Kinney v. Crocker*, 18 Wis. 74.

⁴⁸ *Silsby v. Michigan Car Co.*, 95 Mich. 204; 54 N. W. 761; *Blate v. Third Ave. R. Co.*, 29 App. Div. N. Y. 388; 51 N. Y. Supp. 590; *Marks v. Long Island R. R. Co.*, 3 N. Y. St. R. 562.

⁴⁹ *Silsby v. Michigan Car Co.*, 95 Mich. 204; 54 N. W. 761; *Marks v. Long Island R. R. Co.*, 3 N. Y. St. R. 562.

⁵⁰ *Boston & A. R. R. Co. v. O'Reilly*, 158 U. S. 334.

⁵¹ *Kinney v. Crocker*, 18 Wis. 74.

ices, and therefore the damages recoverable for loss of earnings and diminished capacity for labor. Although the earnings of professional men may in a certain sense be uncertain and for this reason have been said to be similar to profits of a business, yet they differ from the latter in that they are entirely the result of personal labor and skill aside and independent of the use of capital and the labor of others, while the latter are not as a general rule. The earnings of a professional man depend upon his personal ability, skill and learning personally and individually applied to the pursuit of his profession, and receipts in past years therefrom are reasonably certain of continuance subsequent to the injury to the same or to an increased extent, so that the loss of earnings sustained by a professional man as the result of an injury, may be calculated to a reasonably certain degree by proof of his earnings prior to the injury.⁵² So a phy-

⁵² *Nebraska City v. Campbell*, 2 Black (U. S.), 590; *Wade v. Leroy*, 20 How. (U. S.) 34; *Parshall v. M. & St. L. R. Co.*, 35 Fed. 649; *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266; 46 N. E. 665; 8 Am. & Eng. R. Cas. N. S. 48; *Indianapolis v. Gaston*, 58 Ind. 224; *City of Warsaw v. Fisher* (Ind. App. 1899), 55 N. E. 42; *Stafford v. Oskaloosa*, 64 Iowa, 251; *Holmes v. Halde*, 74 Me. 28; *Collins v. Dodge*, 37 Minn. 503; *Mason v. St. Louis, I. M. & S. R. Co.*, 75 Mo. App. 1; 1 Mo. App. Rep. 295; *New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166; *Quinn v. O'Keefe*, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116; *Nash v. Sharp*, 19 Hun (N. Y.), 365; *Baker v. Manhattan Ry. Co.*, 54 N. Y. Super. 394; *MacLennan v. Long Island R. Co.*, 20 J. & S. (N. Y.) 22; *Phillips v. L. & S. W. Ry. Co.*, 5 Q. B. Div. 78; 41 L. T. S. 121, aff'g 4 Q. B. Div. 406. The admissibility of such evidence, however, was commented upon in the case of *Masterton v. Mount Vernon*, 58 N. Y. 391, in the following terms: "In *Walker v. Erie Railway*

Company, 63 Barb. (N. Y.) 260, it was held that proof of the amount of income derived by the plaintiff for the year preceding the injury from the practice of his profession as a lawyer was competent. This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business may, I think, well be doubted. There is no such uniformity in the amount of different years, as a general rule, to make such inference reliable." This case, however, was one of the considerations of profits from business as an element of damages, and did not involve the question of evidence as to past earnings or income of professional men. The principle we have stated in the text is sustained by the weight of authority.

sician may introduce evidence of the extent of his practice and of his earnings prior to the injury and subsequent thereto,⁵³ and of the loss of certain patients as a result of the injury,⁵⁴ and that his profession was his only means of support.⁵⁵ And in a similar action by a lawyer proof of the income derived from his practice for the year preceding his injury is admissible.⁵⁶ So also in the case of an architect, evidence of his average yearly earnings is proper.⁵⁷ Where, however, a physician seeks to recover for loss of practice sustained as a result of an injury, the defendant may introduce evidence as to his professional reputation and as to the unlawfulness of his practice.⁵⁸ But though a practicing physician may have no such medical degree as would entitle him to maintain an action for his services as a physician, yet he may recover for loss of business resulting from personal injuries due to the negligence of another.⁵⁹

§ 237. Loss of time—Earnings—Canvasser or travelling salesman on percentage basis.—A canvasser or travelling salesman whose income is not a definite fixed sum but is determined on a percentage basis, the gross amount thereof depending upon the individual's personal ability and skill, may, as in the cases of professional men where a physical injury has been sustained, show the amount of his earnings in previous years. The income of this class of men, like that of a professional man, may vary in the years prior to the injury, and be uncertain for any period subsequent thereto, yet the proof of past earnings will furnish the best possible basis to estimate the pecuniary loss. This evi-

⁵³ *Nebraska City v. Campbell*, 2 Black (U. S.), 590; *Wade v. Leroy*, 20 How. (U. S.) 34; *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266; 46 N. E. 675; 8 Am. & Eng. R. Cas. N. S. 48; *Mason v. St. Louis, I. M. & S. R. Co.*, 75 Mo. App. 1; 1 Mo. App. Rep. 295; *Quinn v. O'Keefe*, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116; *MacLennan v. Long Island R. R. Co.*, 20 J. & S. (N. Y.) 22; *Phillips v. L. & S. W. R. Co.*, 4 Q. B. Div. 406; 5 Q. B. Div. 78.

⁵⁴ *MacLennan v. Long Island R. R.*

Co., 20 J. & S. (N. Y.) 22; *Phillips v. L. & S. W. R. Co.*, 4 Q. B. Div. 406.

⁵⁵ *Stafford v. Oskaloosa*, 64 Iowa, 251.

⁵⁶ *Walker v. Erie R. R. Co.*, 63 Barb. (N. Y.) 260.

⁵⁷ *New Jersey Ex. Co. v. Nichols*, 32 N. J. L. 166.

⁵⁸ *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn. 61; 19 Am. Rep. 483.

⁵⁹ *Holmes v. Halde*, 74 Me. 28; 43 Am. Rep. 567.

dence of past earnings shows what the services of the plaintiff were worth to himself, and what he was capable of earning, and show with sufficient certainty what his earnings would have been subsequent to the injury.⁶⁰ So it is proper to admit evidence of the annual earnings of a book canvasser, who was working on a percentage basis, for a period of six or seven years prior to the accident.⁶¹ And where one had been engaged in selling electrical apparatus, evidence of his previous earnings, consisting of the difference between the price he was required to obtain for the manufacturer, and that at which the apparatus was sold, was held admissible.⁶²

§ 238. Loss of time—Earnings—Peddler.—A peddler suing to recover damages for a negligent physical injury may give evidence of his occupation, the amount of his annual sales, and the percentage made thereon in the usual course of business, such evidence being competent for the purpose of enabling the jury to properly estimate the damages for the loss of time which he has sustained.⁶³

§ 239. Total or partial incapacity—English workmen's act—Construction of.—The English Workmen's Compensation Act of 1897⁶⁴ provided that in case of a workman being totally or partially incapacitated by an injury, he should receive a compensation of a weekly payment, during the period of his incapacity after the second week, not exceeding fifty per cent of his average weekly earnings, during the previous twelve months, if he had been so long employed, but if not, then for such period as he had been in the employ of the same employer. In determining the average weekly wages under this act, it is held that

⁶⁰ *Illinois C. R. Co. v. Davidson* (C. C. App. 7th C.), 76 Fed. 517; 46 U. S. App. 300; 22 C. C. A. 306; 1 Chic. L. J. Wkly. 583; *Rio Grande & Western R. Co.*, 5 Col. App. 121; 38 Pac. 76; *Paul v. Omaha & St. L. Ry. Co.*, 82 Mo. App. 500; *Ehrgott v. New York*, 96 N. Y. 264, rev'g 66 How. Pr. 161.

⁶¹ *Ehrgott v. New York*, 96 N. Y. 264, rev'g 66 How. Pr. 161.

⁶² *Illinois C. R. Co. v. Davidson* (C. C. App. 7th C.), 76 Fed. 517; 46 U. S. App. 300; 22 C. C. A. 306; 1 Chic. L. J. Wkly. 583.

⁶³ *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396. See also *Fenistein v. Jacobs*, 15 Misc. (N. Y.) 474; 72 N. Y. St. R. 698; 37 N. Y. Supp. 345.

⁶⁴ Sched. 1, cl. 1 (b).

if the employment is under the same employer, the entire twelve months are to be considered, and this is not altered by the fact of a change in the character of the employment or of the amount of wages.* In order, however, to consider the entire twelve months, the period of employment must have been a continuous one. Thus where, during the previous twelve months there had been a strike, during which the employee had not worked, it was held that in determining his average weekly wages only the period of time he had worked subsequent to the termination of the strike under a new agreement was to be considered, and not the period preceding the strike.* The injury, however, must, it would seem, be of such a character as to cause a decrease in the employee's earning capacity or earnings, in order that he may be entitled to the benefits of the act. So where an employee lost a part of his thumb in the course of his employment, it was held that he was not entitled to compensation or payment under the act, as for a partial incapacity for that period of time, subsequent to the accident, during which he was employed, though in a different line of work, at the same wages which he received prior to the accident.*

§ 240. Loss of time, earnings, etc.—Pleading of, as special damages.—As a general rule, if, in an action for personal injuries, the plaintiff seeks to recover for any special loss which he has sustained as a consequence of such injury, the pleadings must contain an allegation of such special damage. So there are numerous cases which hold that in such an action there can be no evidence admitted as to, and no recovery for, loss of time, earnings, diminished earning capacity, or any permanent injury, unless the loss thereof is averred as special damages in the complaint.* So it has been held that there must be allegations of

* *Price v. Maraden* (C. A.) [1899], 1 Q. B. 493; 68 L. J. Q. B. N. S. 307. *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, 43 Conn. 562;

* *Jones v. Ocean Coal Co.* (C. A.) [1899], 2 Q. B. 124; 68 L. J. Q. B. N. S. 731. *Denton v. Ordway*, 108 Iowa, 487; 79 N. W. 271; *Shultz v. Griffith*, 108 Iowa, 150; 72 N. W. 445; 40 L. R. A. 117; *Homan v. Franklin Co.* (Iowa), 57 N. W. 703; *Baldwin v. Western Railroad*, 4 Gray (Mass.), 333; *Edwards v. St. Louis K. & S. R. Co.*, 79 Mo. App. 257; 2 Mo. App. Rep. 412;

* *Irons v. Davis* (C. A.) [1899], 2 Q. B. 330; 68 L. J. Q. B. N. S. 673.

* *Fitchburg R. Co. v. Donnelly* (C. C. App. 7th C.), 87 Fed. 135; 50 U. S. App. 706; 30 C. C. A. 580;

special damage to permit evidence of former earnings;⁶⁶ of damages to the business of a farmer;⁶⁷ of occupation and means of earning support;⁶⁸ of loss of time and wages;⁶⁹ of disability to carry on business;⁷⁰ of future pain and anguish,⁷¹ and of the permanency of personal injuries.⁷²

§ 241. Loss of time—Earnings—Recovery for and evidence admissible under general allegations.—Although as we have stated in the preceding section there are numerous cases holding that to permit a recovery for loss of time, earnings, or diminished earning capacity there must be special averments of such damage, yet there is also a large number of cases in which such damage has not specially been alleged, but the court has permitted evidence of and recovery for such loss under general allegations. So a plaintiff may recover in an action for personal injuries for inability to work at his ordinary and usual employment though the declaration contains only a general averment of such inability caused by the injury, and consequent loss and damage.⁷³ And evidence is admissible as to the amount

Saffer v. Dry Dock E. B. & B. R. Co., 5 N. Y. Supp. 700; 24 N. Y. St. R. 210; 2 Silv. S. C. 43; *Texas & P. R. Co. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165. But see *Ava v. Grenawalt*, 73 Ill. App. 633; *Heltonville Mfg. Co. v. Fields* (Ind.), 36 N. E. 529; *Bartley v. Trorlicht*, 49 Mo. App. 214; *Schmitz v. St. Louis, I. M. & S. R. Co.* (Mo.), 23 L. R. A. 250; 24 S. W. 472; *Howard v. Stiles*, 54 Neb. 26; 74 N. W. 399; *Rosevelt v. Man. R. Co.*, 37 N. Y. St. R. 894; 59 N. Y. Supp. 197; 13 N. Y. Supp. 598, aff'd 133 N. Y. 537; 44 N. Y. St. R. 929; 30 N. E. 1148; *Tyler v. Third Ave. R. Co.*, 18 Misc. (N. Y.) 165; 75 N. Y. St. R. 913; 41 N. Y. Supp. 26. Also see cases in next section where such evidence is held admissible and recovery allowed under general allegations.

⁶⁶ *Fitchburg R. Co. v. Donnelly* (C. C. App. 7th C.), 87 Fed. 135; 59 U. S. App. 708; 30 C. C. A. 580.

⁶⁷ *Homan v. Franklin Co.* (Iowa), 57 N. W. 703.

⁶⁸ *Baldwin v. Western Railroad Co.*, 4 Gray (Mass.), 333.

⁶⁹ *Edwards v. St. Louis K. & S. R. Co.*, 79 Mo. App. 257; 2 Mo. App. Rep. 412.

⁷⁰ *Saffer v. Dry Dock R. Co.*, 5 N. Y. Supp. 700; 24 N. Y. St. R. 210; 2 Silv. S. C. 43.

⁷¹ *Shultz v. Griffith*, 103 Iowa, 150; 40 L. R. A. 117; 72 N. W. 445.

⁷² *Denton v. Ordway*, 108 Iowa, 487; 79 N. W. 271. In another case in this same state evidence of plaintiff's future disability was held admissible under an allegation that plaintiff "believes her injuries will incapacitate her from performing manual labor for the rest of her life." *McFarland v. Muscatine*, 98 Iowa, 199; 67 N. W. 233.

⁷³ *Chicago City Ry. Co. v. Anderson*, 182 Ill. 298; 55 N. E. 366, aff'd 80 Ill. App. 71; *Chicago & E. R. Co.*

of wages earned by the plaintiff under an allegation that he is prevented from attending to his duties as a manufactory employee.⁷⁷ Again, where the declaration contained no statement as to any business in which plaintiff was engaged or that he was obliged to relinquish the same as the result of the injury, it was held, nevertheless, that evidence was admissible as to the business in which he was engaged and that he was incapacitated from pursuing the same, as exhibiting the extent of the injury, and that it was followed by loss of time which had to him a pecuniary value.⁷⁸ And again, an averment that plaintiff was "hindered from transacting her business affairs" was held sufficient to authorize the admission of evidence that she was engaged in work for which she received one dollar per day.⁷⁹ And under a similar averment evidence of the income of the plaintiff before and after the injury,⁸⁰ and of her employment as a nurse and of her earnings in such capacity⁸¹ has been held admissible. So where the defendant fails to move for a more specific statement, a prayer for judgment because of a permanent injury to plaintiff's limb has been held sufficient to permit the plaintiff to prove damages for loss of earning capacity resulting from such injury.⁸² And an allegation that prior to the injury the plaintiff was healthy, active, and able-bodied, but that as a result of such

v. Meech, 163 Ill. 305; 45 N. E. 290. But it is held in this last case that if the plaintiff seeks to recover for loss of profits or earnings, which are dependent upon the performance of some special contract or engagement, such special contract or engagement together with the facts on which it is based must be set out in the declaration.

⁷⁷ *Russell v. Met. St. Ry. Co.*, 35 Misc. Rep. (N. Y.) 293; 71 N. Y. Supp. 765.

⁷⁸ *Wade v. Leroy*, 20 How. (U. S.) 34.

⁷⁹ *Chatsworth v. Rowe*, 166 Ill. 114; 46 N. E. 763, aff'g 66 Ill. App. 55. See also *North Chicago Street R. Co. v. Brown*, 178 Ill. 187; 52 N. E. 864, aff'g 76 Ill. App. 654, where recovery

was allowed for lessened capacity to attend to business, the allegation being that she was prevented "from attending to the transaction of her affairs." See also *Luck v. Ripon*, 53 Wis. 196. But in a case in Connecticut it was held that evidence of plaintiff's occupation and earnings was inadmissible under an allegation that he was "prevented from attending to his ordinary business." *Tomlinson v. Derby*, 43 Conn. 562.

⁸⁰ *Chicago & E. R. Co. v. Meech*, 163 Ill. 305; 45 N. E. 290.

⁸¹ *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; 4 Chic. L. J. Wkly. 41, aff'd 182 Ill. 298; 55 N. E. 366.

⁸² *Bailey v. Centerville*, 108 Iowa, 20; 78 N. W. 881.

injury she has been totally incapacitated from any work or exercise, has become permanently disabled and will not be able to do any work or exercise, has been held sufficient to permit evidence of inability to perform work subsequent to the injury and of what she could have earned by ordinary labor.⁸⁵ And plaintiff may, it is held, show loss of earnings where the complaint alleges that he is unfitted from carrying on his vocation and has lost and will lose the earnings of his labor.⁸⁴

§ 242. Loss of time—Earnings, etc.—Recovery for and evidence admissible under general allegations—Continued.—Under an allegation that as a result of injuries sustained “plaintiff has suffered great bodily and mental anguish and has been unable to follow his business or perform any kind of labor,” evidence is admissible of his inability to earn such wages subsequent to the injury as he had received before.⁸⁵ So, also, under the allegation that plaintiff has been rendered “incapable of labor,” evidence of his customary earnings is admissible.⁸⁶ And again, evidence of loss of earnings was held to be properly admitted under an allegation that plaintiff had been compelled to remain from work for six weeks,⁸⁷ and for a period of one month.⁸⁸ And similar evidence is admissible under a general averment of damages in an action for personal injuries, though the complaint contains no allegation as to loss from inability to pursue his ordinary vocation.⁸⁹ So again, recovery was permitted for loss of customers and consequent profits under a general allegation of damages by an accident in which the plaintiff received personal injuries, and his milk wagon and horse were injured, where

⁸⁵ *McKormick v. West Bay City*, 110 Mich. 265; 68 N. W. 148; 3 Det. L. N. 342. But see *Slaughter v. Met. St. R. Co.*, 116 Mo. 269; 23 S. W. 760, where it is held that evidence is not admissible of loss of time and earnings under an allegation that the “injury is permanent and will render the plaintiff a cripple for life.”

⁸⁴ *Gerdes v. Christopher & S. A. I. & F. Co.* (Mo.), 25 S. W. 557, *aff'd* 27 S. W. 616.

⁸⁶ *Gurley v. Mo. Pac. R. Co.* (Mo.), 26 S. W. 953.

⁸⁶ *Popp v. New York Central Railroad*, 26 N. Y. St. R. 639; 7 N. Y. Supp. 249.

⁸⁷ *Carples v. N. Y. & H. R. R. Co.*, 16 App. Div. (N. Y.) 158; 44 N. Y. Supp. 670.

⁸⁸ *Doherty v. Lord*, 8 Misc. (N. Y.) 227.

⁸⁹ *Cabot v. McKane*, 1 N. Y. St. R. 495.

there was no special averment of such damage.⁹⁰ So, also, though the complaint contained no allegation as to the rate of earnings of the plaintiff, it was held that evidence was admissible as to the rate of his earnings under allegations stating that the plaintiff was a skillful carpenter, the nature of the injuries which were necessarily such as to impair his ability to perform the work of his calling, and permanent disability from transacting his business.⁹¹ And evidence of plaintiff's diminished earning capacity has been held admissible under an allegation of incapacity to make a livelihood.⁹² So again, under the allegation that the plaintiff had lost the permanent and efficient use of her foot and leg and was a cripple for life.⁹³ And damages for loss of time may be awarded under an averment that plaintiff was confined to his bed for a certain length of time and stating the amount which he was earning at such time.⁹⁴ And in trespass on the case to recover for injuries caused by gunshot wounds inflicted by defendant's servants, it is held that evidence of the loss of power to have offspring, resulting directly and proximately from the nature of the wound, may be received and considered by the jury, although the declaration does not specify such loss as one of the results of the wound.⁹⁵

⁹⁰ *O'Connor v. Nat. Ice Co.*, 21 N. Y. St. R. 907; 4 N. Y. Supp. 587, aff'd 121 N. Y. 661; 30 N. Y. St. R. 1014; 24 N. E. 1092.

⁹¹ *Christie v. Galveston City R. Co.*, 39 S. W. 638; 2 Am. Neg. Rep. 260.

⁹² *San Antonio & A. P. R. Co. v. Beam* (Tex. Civ. App.), 50 S. W. 411.

⁹³ *Missouri, K. & T. R. Co. v. Johnson* (Tex. Civ. App.), 37 S. W. 771.

⁹⁴ *Galveston, H. & S. A. R. Co. v. Templeton* (Tex. Civ. App.), 25 S. W. 135, aff'd 26 S. W. 1066; 59 Am. & Eng. R. Cas. 191.

⁹⁵ *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597; 1 Russell & Winslow's Syllabus Dig. U. S. Rep. 1118.

CHAPTER X.

PERMANENT INJURIES—PROSPECTIVE LOSS.

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| <p>§ 243. Permanent injuries—Prospective loss—Generally.</p> <p>244. Prospective loss—Must be reasonably certain.</p> <p>245. Same subject continued.</p> <p>246. Prospective loss—Permanent injuries—Must be evidence as to.</p> <p>247. Permanent injury or disability may be inferred.</p> | <p>248. Prospective loss—Permanent injury—Mode of assessing damages for.</p> <p>249. Prospective loss—Permanent injury—Mode of assessing damages for—Continued.</p> <p>250. Past and prospective loss—Recovery for in one action.</p> |
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§ 243. Permanent injuries—Prospective loss—Generally.
 —Where a personal injury has been sustained, the loss or damage resulting therefrom may exist not only in the past or up to the time of the trial, but may also be a continuing loss extending into the future. There may be an impairment of the mental or physical powers which is a permanent one, causing future suffering and pain as well as a prospective decrease in earnings and earning ability. For this future or prospective damage there can be no positive fixed measure of compensation, yet in all such cases it is the policy of the law that the one responsible for the injury or damage shall make compensation to the person injured for such prospective loss based upon the facts and evidence in each case.¹

¹ Vicksburg & M. R. R. Co. v. Putnam, 118 U. S. 545; Campbell v. Pullman Pal. C. Co., 42 Fed. 484; Robertson v. Cornelson, 34 Fed. 716; Steamer New World v. King, 16 How. (U. S.) 472; South & N. A. R. Co. v. McLennon, 63 Ala. 266; Eddy v. Wallace (C. C. App. 8th C.), 4 U. S. App. 264; 49 Fed. 801; Union P. R. Co. v. Jones (C. C. App. 8th C.), 4 U. S. App. 115; 49 Fed. 343; St. Louis S. W. R. Co. v. Dobbins, 60 Ark. 481; 30 S. W. 887; Bay Shore R. Co. v. Harris, 67 Ala. 6; Malone v. Hawley, 46 Cal. 409; Brown v. Green, 1 Penn. (Del.) 535; 42 Atl. 991; Atlanta, etc., R. R. Co. v. Johnson, 66 Ga. 259; North Chicago St. R. Co. v. Shreve, 171 Ill. 438; 49 N. E. 534, aff'g 70 Ill. App. 666; Central R. Co. v. Serfass, 153 Ill. 379; 39 N. E. 119, aff'g 53 Ill. App. 448; Lake Shore,

§ 244. Prospective loss—Must be reasonably certain.—In order to authorize the recovery of present damages for a prospective loss, it must appear that the occurrence of such loss or

etc., R. R. Co. v. Johnson, 135 Ill. 641; 26 N. E. 510; Sheridan v. Hibbard, 119 Ill. 307; Chicago & A. R. R. Co. v. Wilson, 63 Ill. 167; Kerr v. Forgue, 54 Ill. 482; 5 Am. Rep. 146 and note 148; Chicago & E. I. R. Co. v. Cleminger, 77 Ill. App. 186, aff'd 53 N. E. 320; 178 Ill. 536; Wabash W. R. Co. v. Morgan (Ind.), 31 N. E. 661; Indianapolis v. Gaston, 58 Ind. 224; Louisville & N. R. Co. v. Williams, 20 Ind. App. 576; 51 N. E. 128; Nappanee v. Ruckman, 7 Ind. App. 361; 34 N. E. 609; Laird v. Chicago, R. I. & P. R. Co., 100 Iowa, 336; 69 N. W. 414; Knapp v. Sioux City & P. R. Co., 71 Iowa, 41; Fry v. Dubuque & S. W. R. R. Co., 45 Iowa, 416; Collins v. Council Bluffs, 32 Iowa, 324; Miller v. Boone County, 95 Iowa, 5; 63 N. W. 352; Townsend v. Paola, 41 Kan. 591; Kan. Pac. R. R. Co. v. Pointer, 9 Kan. 620; Central P. R. R. Co. v. Kuhn, 86 Ky. 578; Wardle v. New Orleans City R. R. Co., 35 La. Ann. 202; Jones v. City of Deering, 94 Me. 165; 47 Atl. 140; McMahon v. N. C. R. R. Co., 39 Ind. 438; Johnson v. Northern Pac. R. R. Co., 47 Minn. 430; 50 N. W. 473; Memphis, etc., R. R. Co. v. Whitfield, 44 Miss. 466; Taylor v. Scherpe & K. Architectural Iron Co., 133 Mo. 349; 34 S. W. 581; Gorham v. Kansas City, etc., R. R. Co., 113 Mo. 408; Plummer v. Milan, 79 Mo. App. 439; 1 Mo. A. Rep. 600; Sioux City & P. R. Co. v. Smith, 22 Neb. 775; 36 N. W. 285; Cohen v. Eureka & P. R. R. Co., 14 Nev. 376; Holyoke v. G. T. Ry. Co., 48 N. H. 542; Shaler v. Bdwy Imp. Co., 162 N. Y. 641; 57 N. E. 1124, aff'g 22 App. Div. 102; 47 N. Y. Supp. 815; Ayres v. Del., etc., R. R. Co., 158 N. Y. 254; Kane v. N. Y. N. H. & H. R. R. Co., 132 N. Y. 160; 43 N. Y. St. R. 494; 30 N. E. 256; Dollard v. Roberts, 130 N. Y. 269; 41 N. Y. St. R. 253; 14 L. R. A. 238; 29 N. E. 104; Feeney v. Long Island R. R. Co., 116 N. Y. 375; 26 N. Y. St. R. 729; 22 N. E. 402; Filer v. New York Cent. R. R. Co., 49 N. Y. 42; Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49; Curtis v. Rochester, etc., Ry. Co., 18 N. Y. 534; Crank v. Forty-Second St., etc., Ry. Co., 53 Hun (N. Y.), 425; 25 N. Y. St. R. 53; 6 N. Y. Supp. 229, aff'd 127 N. Y. 648; 37 N. Y. St. R. 906; 27 N. E. 856; Record v. Saratoga Springs, 46 Hun (N. Y.), 448; 12 N. Y. St. R. 395; 27 W. D. 500, aff'd 120 N. Y. 646; 31 N. Y. St. R. 998; 24 N. E. 1102; Macer v. Third Ave. R. R. Co., 15 J. & S. (N. Y.) 461; Pill v. Brooklyn Heights R. Co., 6 Misc. (N. Y.) 267; 57 N. Y. St. R. 783; 27 N. Y. Supp. 230; Beckwith v. N. Y. Central R. R. Co., 64 Barb. (N. Y.) 299; Walker v. Erie R. R. Co., 63 Barb. (N. Y.) 260; Morse v. Auburn & Syracuse R. R. Co., 10 Barb. (N. Y.) 621; Clark v. Westcott, 2 App. Div. (N. Y.) 503; 37 N. Y. Supp. 1111; Wallace v. Western R. R. Co., 104 N. C. 442; Smedley v. Hestonville, M. & F. Pass. R. Co., 184 Pa. St. 620; 39 Atl. 544; 9 Am. & Eng. R. Cas. N. S. 649; 42 W. N. C. 169; McLaughlin v. Corry, 77 Pa. St. 109; Pittsburg, A. & M. R. R. Co. v. Donahue, 70 Penn. St. 119; Fort Worth & D. C. R. Co. v. Robertson (Tex. 1892), 14 L. R. A. 781; 16 S. W. 1093; Giblin v. McIntyre, 2 Utah, 384; Fulsome v. Concord, 46 Vt. 135; Whitney v. Clarendon, 18 Vt. 252; Waterman v. Chicago, etc., R. R. Co., 82 Wis. 613; 52

the existence of a disability in the future is something more than a mere possibility or probability. That it is possible or probable that pain and suffering will exist in the future as a result of the injury, or that a person's earning capacity will be less in the future than it was before the injury as a result thereof, or that he has been permanently injured, is not of itself sufficient to authorize a recovery for prospective loss. Such loss or future consequences for which damages are sought must be such as in the ordinary course of nature are reasonably certain to result from the injury.² In this connection it is said in

N. W. 247; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147; 40 N. W. 653; *Hulihan v. Green Bay W. & S. P. R. Co.*, 68 Wis. 520; *Weisenberg v. Appleton*, 26 Wis. 56; 7 Am. Rep. 39; *Phillips v. Southwestern R. Co.*, 4 Q. B. D. 406, aff'd 5 Q. B. Div. 78; *Hodgson v. Stallebrass*, 11 Ad. & E. 301; *Fair v. London & N. W. Ry. Co.*, 21 L. T. Rep. 326; *Fox v. St. John*, 23 N. B. 244. See chapter IX, herein on loss of time, earnings and impaired earning capacity.

² *Washington, etc., R. R. Co. v. Harmon*, 147 U. S. 571; *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88; 37 Atl. 39; *Swift v. Raleigh*, 54 Ill. App. 44; *Ford v. Des Moines*, 106 Iowa, 94; 75 N. W. 630; *Chicago, R. I. & P. R. Co. v. Kennedy*, 2 Kan. App. 693; 43 Pac. 802; *McBride v. St. Paul City R. Co.*, 72 Minn. 291; 75 N. W. 231; *L'Herault v. Minneapolis*, 69 Minn. 261; 72 N. W. 73; *Covell v. Wabash R. Co.*, 82 Mo. App. 180; *Chilton v. St. Joseph*, 143 Mo. 192; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Ayres v. Del. L. & W. R. R. Co.*, 158 N. Y. 254; 5 Am. Neg. Rep. 683; *Kane v. N. Y. N. H. & H. R. R. Co.*, 132 N. Y. 160; 43 N. Y. St. R. 494; 30 N. E. 256, aff'g 31 N. Y. St. R. 741; 9 N. Y. Supp. 879; *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375; *Tozer v. New York Cent. R. R. Co.*, 105 N.

Y. 617; 6 N. Y. St. R. 447; 11 N. E. 369; 1 Silv. C. A. 371, rev'g 38 Hun, 100; *Strohm v. N. Y. L. E. & W. R. R. Co.*, 96 N. Y. 306; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 42; *Curtis v. Rochester R. Co.*, 18 N. Y. 534; *Webb v. Union Ry. Co.*, 44 App. Div. (N. Y.) 413; 60 N. Y. St. R. 1087; *Miller v. Ft. Lee Park & Steamboat Co.*, 73 Hun (N. Y.), 150; 56 N. Y. St. R. 94; 25 N. Y. Supp. 924; *Mee-ter v. Manhattan R. Co.*, 63 Hun (N. Y.), 533; 18 N. Y. Supp. 561; 45 N. Y. St. R. 704; *Gregory v. N. Y. L. E. & W. R. R. Co.*, 55 Hun (N. Y.), 303; 28 N. Y. St. R. 726; 8 N. Y. Supp. 525; *Miley v. Broadway & Seventh Ave. R. R. Co.*, 29 N. Y. St. R. 107; 8 N. Y. Supp. 455; *Koetter v. Man. R. Co.*, 36 N. Y. St. R. 611; 13 N. Y. Supp. 458, aff'd 129 N. Y. 668; 42 N. Y. St. R. 946; 30 N. E. 65; *Clark v. Nevada Land, etc., Co.*, 6 Nev. 203; *Root v. Monroeville (Ohio C. C.)*, 1 Toledo Leg. News, 208; Mo. Pac. R. R. Co. v. *Mitchell*, 75 Tex. 77; 41 Am. & Eng. R. Cas. 224; 12 S. W. 810; *Cameron v. Union Tr. Line*, 10 Wash. 507; 39 Pac. 128; *Kenyon v. Mondovi*, 98 Wis. 50; 73 N. W. 314; *Groundwater v. Washington*, 92 Wis. 56; 65 N. W. 871; *Kucera v. Merrill Lumber Co.*, 91 Wis. 637; 65 N. W. 374; 2 Am. & Eng. Corp. Cas. N. S. 590; *Block v. Milwaukee St. R. Co.*,

one case, "Future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury."³ And where the evidence shows that an injury is permanent and that subsequent mental or physical pain is reasonably certain, there is sufficient basis for compensation for future suffering.⁴

§ 245. Same subject continued.—An instruction in an action for personal injuries that recovery may be had for such pain and suffering as the plaintiff is "likely to endure in the future" as a result of the injury is erroneous.⁵ As is also an instruction that the jury may award damages for injuries likely to be permanent.⁶ And an instruction that to justify a recovery of damages for permanent injuries there must be a "reasonable probability" of the permanency of the injury is also erroneous.⁷ But it is not error to instruct the jury that they may award damages for such future pain and suffering as they "may be

89 Wis. 371; 27 L. R. A. 365; 61 N. W. 1101. But see *Ball v. Mabry* (Ga.), 18 S. E. 64.

³ *Strohm v. N. Y. L. E. & W. R. R. Co.*, 96 N. Y. 305, and quoted in *Ayres v. Del. L. & W. R. R. Co.*, 158 N. Y. 254; 5 Am. Neg. Rep. 683.

⁴ *Smiley v. St. Louis & H. Ry. Co.*, 160 Mo. 629; 61 S. W. 667.

⁵ *Kucera v. Merrill Lumber Co.*, 91 Wis. 637; 65 N. W. 374; 2 Am. & Eng. Corp. Cas. N. S. 590; *Hardy v.*

Milwaukee R. Co., 89 Wis. 183; 61 N. W. 771. But see *Scott v. Montgomery*, 95 Pa. St. 444; *Cameron v. Union Trunk Line*, 10 Wash. 507; 39 Pac. 128.

⁶ *Meeteer v. Manhattan R. Co.*, 63 Hun (N. Y.), 533; 18 N. Y. Supp. 561; 45 N. Y. St. R. 704.

⁷ *Block v. Milwaukee St. R. Co.*, 89 Wis. 371; 27 L. R. A. 365; 61 N. W. 1101. But see *Bailey v. Centerville*, 108 Iowa, 20; 78 N. W. 831.

lieve from the evidence" the plaintiff will endure.⁸ And an instruction was sustained which stated that if the jury were satisfied from the evidence that the plaintiff's injury was permanent, they might assess damages for such pain, suffering and impairment of ability to earn a livelihood as he must suffer in the future.⁹ So, also, a charge that there might be a recovery for "all damages present or future which, from the evidence, can be treated as the necessary result of the injury," was held not to be erroneous where the court also enumerated all the elements of damage and recovery.¹⁰ But it is proper to refuse to instruct the jury that they should not assess damages for merely possible or even probable future effects not then apparent, since such an instruction would tend to convey the impression that the future results for which recovery might be had must be not merely reasonably certain, but absolutely certain.¹¹

§ 246. Prospective loss—Permanent injuries—Must be evidence as to.—As a general rule, in order to justify an allowance of damages for permanent injuries or any prospective loss as the result of a personal injury, there must be some evidence before the jury upon which to base it, and the proof must be such as shows that the consequences for which an allowance is sought are reasonably certain to exist in the future.¹² So where

⁸ *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Taylor v. Scherpe & K. Architectural Iron Co.*, 133 Mo. 349; 34 S. W. 581; *Cameron v. Union Trunk Line*, 10 Wash. 507; 39 Pac. 128.

⁹ *Kenyon v. Mondovi*, 98 Wis. 50; 73 N. W. 314.

¹⁰ *Fordyce v. Jackson*, 56 Ark. 601; 20 S. W. 597, denying reh'g 56 Ark. 594; 20 S. W. 528.

¹¹ *Kansas City, F. S. & M. R. Co. v. Stoner* (C. C. App. 8th C.), 4 U. S. App. 109; 49 Fed. 209; 1 C. C. A. 231.

¹² *Western Un. Teleg. Co. v. Morrison* (C. C. App. 8th C.), 55 U. S. App. 211; 83 Fed. 992; 28 C. C. A. 56; *Dudley v. Front St. Cable R. Co.* (C. C. D. Wash.), 73 Fed. 128; *South Chicago City R. Co. v. Walters*, 70 Ill. App.

271; *Wheeler v. Boone*, 108 Iowa, 235; 78 N. W. 909; 44 L. R. A. 821; *Ford v. Des Moines*, 106 Iowa, 94; 75 N. W. 630; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907; 65 N. W. 1043; *Crawford v. Del. L. & W. R. R. Co.*, 121 N. Y. 652; 24 N. E. 1092; 23 J. & S. 255; *Mosher v. Russell*, 44 Hun (N. Y.), 12; 6 N. Y. St. R. 407; 26 W. D. 234; *Staal v. Grand St. & N. R. R. Co.*, 107 N. Y. 625; 1 Silv. C. A. 516; 11 N. Y. St. R. 352; 25 W. D. 241, rev'g 36 Hun, 208; *Dawson v. Troy*, 49 Hun (N. Y.), 322; 17 N. Y. St. R. 559; 2 N. Y. Supp. 137; *Bloom v. Manhattan Elev. R. Co.*, 43 N. Y. St. R. 378; 17 N. Y. Supp. 812; *Hayes v. Third Ave. R. Co.*, 18 Misc. (N. Y.) 582; 42 N. Y. Supp. 708; *La Fave v. City of Superior* (Wis.

there is no evidence as to future pain, or that the earnings of the plaintiff will be affected, or in any other way showing the injury to be permanent, it is error to submit the issue of permanent injury to the jury or to instruct them that damages may be given for future pain or loss of earnings.¹³ And a charge which authorizes the assessment of damages for permanent impairment of health, where there is no evidence upon which to base them, is declared to be a ground for reversal unless it clearly appears that it has done no harm.¹⁴ So an instruction as to recovery of damages for future pain and suffering is also held to be erroneous where there is no evidence to warrant it.¹⁵ And where it is merely shown that pain or suffering may exist in the future it is not sufficient to authorize an allowance for any prospective loss or permanent injury.¹⁶ So testimony by a physician that the plaintiff was likely to be bothered with the injury for several years and might be always, at least under certain conditions, such as overuse, was held not sufficient to authorize the allowance of damages for permanent injuries.¹⁷ Again, where the plaintiff seeks to recover for the future impairment of earning capacity, it is held that to justify an award of damages therefor, there must be evidence of his skill and capacity for earning, and that the injury will affect such earning capacity.¹⁸ And as a general rule, a plaintiff who seeks to recover prospective damages in an action for personal injuries has the burden of showing that his injury is reasonably certain to be permanent.¹⁹

§ 247. Permanent injury or disability may be inferred.—
Although as a general rule evidence must be given to show that

1899), 80 N. W. 742; *Collins v. Janesville*, 99 Wis. 464; 75 N. W. 88.

¹³ *Maimone v. Dry Dock, E. B. & B. R. Co.*, 58 App. Div. (N. Y.) 383; 68 N. Y. Supp. 1073.

¹⁴ *Western Union Teleg. Co.*, 55 U. S. App. 211; 83 Fed. 992; 28 C. C. A. 56; *Ross v. Kansas City*, 48 Mo. App. 440; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb. 907; 65 N. W. 1043.

¹⁵ *Wheeler v. Boone*, 108 Iowa, 235; 78 N. W. 909; 44 L. R. A. 821.

¹⁶ *Ford v. Des Moines*, 106 Iowa, 94; 75 N. W. 630.

¹⁷ *Collins v. Janesville*, 99 Wis. 464; 75 N. W. 88.

¹⁸ *Staal v. Grand St. & N. R. R. Co.*, 107 N. Y. 625; 1 Silv. C. A. 516; 11 N. Y. St. R. 352; 25 W. D. 241; *Bretton v. Grand Rapids Street R. Co.* (Mich.), 51 N. W. 276; *La Fave v. City of Superior* (Wis. 1899), 80 N. W. 742.

¹⁹ *Dudley v. Front St. Cable R. Co.* (C. C. D. Wash.), 73 Fed. 128.

an injury is permanent in order that recovery may be had therefor, yet it is not strictly necessary that direct evidence to establish this be given in all cases, since there are many instances where an injury is such that it may reasonably be inferred from the nature thereof that it will be permanent.²⁰ So in the absence of direct evidence that an injury will be permanent, if there is testimony from which such fact may be inferred, an instruction authorizing the jury to assess damages therefor is properly given.²¹ And in a New York case it is said that "prospective disablement may be inferred from the nature of the injury or proved by the opinion of experts."²² And in another case in this state it was held that though there was no expert testimony showing that an injury would be permanent, yet the court was justified in instructing the jury that they might consider "the lasting or permanent character of the injury" where it appeared from the evidence that the plaintiff was struck a violent blow upon the back or spine, and that though at the time of the accident she was a strong, healthy woman fifty years of age, yet that at the time of the trial, nearly three years later, she was still suffering from that injury and under treatment therefor, and was reduced in weight, and was physically feeble.²³

§ 248. Prospective loss—Permanent injury—Mode of assessing damages for.—If in an action for personal injuries it appears that the plaintiff has suffered an injury or disability which will be permanent, damages therefor may be awarded, the jury taking into consideration the age and reasonable expectancy of life of the plaintiff, the amount he could earn before the injury

²⁰ Louisville & N. R. Co. v. Williams, 20 Ind. App. 576; 51 N. E. 128; Cook v. Mo. Pac. R. R. Co., 19 Mo. 329; Ayres v. Del. L. & W. R. R. Co., 158 N. Y. 254; 5 Am. Neg. Rep. 683; Record v. Saratoga Springs, 46 Hun (N. Y.), 448; 12 N. Y. St. R. 395; 27 W. D. 500, aff'd 120 N. Y. 646; 31 N. Y. St. R. 998; 24 N. E. 1102; Horowitz v. Hamburg-American Packet Co., 18 Misc. (N. Y.) 24; 41 N. Y. Supp. 54; 13 Nat. Corp. Rep. 212.

²¹ Louisville & N. R. Co. v. Williams, 20 Ind. App. 576; 51 N. E. 128.

²² Ayres v. Saratoga Springs, 46 Hun (N. Y.), 448; 12 N. Y. St. R. 395; 27 W. D. 500, aff'd 120 N. Y. 646; 31 N. Y. St. R. 998; 24 N. E. 1102, per Vann, J.

²³ Horowitz v. Hamburg-American Packet Co., 18 Misc. (N. Y.) 24; 41 N. Y. Supp. 54; 13 Nat. Corp. Rep. 212.

and the amount he was able to earn subsequent thereto, and also any future pain and suffering.²¹ The amount of compensation, however, for future pain and suffering is not capable of exact proofs by any pecuniary standard but must be estimated by the jury in connection both with the evidence before them and with their knowledge, observation and experience in the affairs of life.²² And where injuries are permanent, the jury may, in estimating the damages, consider the fact that the plaintiff may suffer more from other ailments which she may have than she would have suffered had it not been for the injury.²³ So testimony by a surgeon is admissible that plaintiff's injuries are of such a character that childbearing will be perilous to life.²⁴ The compensation, however, for future disability and loss of earnings, while not susceptible of being computed by a strictly mathematical calculation, is capable of more exact calculation than is that for future pain and suffering and is based upon evidence showing the age of the person injured, his expectancy of life, business habits, and his earning capacity and the decrease or reduction therein.²⁵ In this connection it is said in a recent case: "Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in

²¹ *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775; 36 N. W. 285.

²² *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466; 54 N. E. 483, aff'g 79 Ill. App. 632.

²³ *Crank v. Forty-Second St., etc.*, R. Co., 53 Hun (N. Y.), 425; 25 N. Y. St. R. 53; 6 N. Y. Supp. 229, aff'd 127 N. Y. 648; 37 N. Y. St. R. 966; 27 N. E. 856.

²⁴ *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514; 9 So. 722; 47 Am. & Eng. R. Cas. 500. See *South Covington &*

C. St. Ry. Co. v. Bolt, 22 Ky. Law Rep. 906; 59 S. W. 26.

²⁵ *Denver v. Sherret*, 60 U. S. App. 104; 31 C. C. A. 449; 88 Fed. 226; 5 Am. Neg. Rep. 520; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; 11 So. 733. And see *East Tennessee, V. & G. R. Co. v. McClure*, 94 Ga. 658; 20 S. E. 93; *Savannah, A. & M. R. Co. v. McLeod*, 94 Ga. 530; 20 S. E. 434. See chapter IX on loss of earnings, time and impaired earning capacity.

their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters."²⁹ And in estimating such damages it is held also that due allowance must be made for the decrease in earning capacity naturally resulting from increased age.³⁰

§ 249. Prospective loss—Permanent injury—Mode of assessing damages for—Continued.—The amount which would purchase a life annuity equal to the difference between the earning capacity of a person before and after the injury, is held to be the measure of damages for permanent disability or impairment of earning capacity.³¹ But where payments for future earnings, for the loss of which damages are claimed, are to be anticipated and capitalized in the verdict, only the present worth of such earnings should be allowed.³² But it is proper to refuse an instruction which limits the recovery to such sum as would represent the present worth of future earnings, calculated on a basis of a certain per cent per annum.³³ Again, it is competent for a witness to testify as to the present worth of the services of the plaintiff, based upon his expectation of life, upon the basis of his ability to earn annually the dif-

²⁹ *Denver v. Sherret*, 60 U. S. App. 104; 31 C. C. A. 449; 88 Fed. 226; 5 Am. Neg. Rep. 520, per Shiras, D. J., citing *Railroad Co. v. Putnam*, 118 U. S. 545; 7 Sup. Ct. R. 1; *Railway Co. v. Needham*, 10 U. S. App. 339, 351; 3 C. C. A. 129, 148; 52 Fed. R. 371, 378.

³⁰ *Savannah, A. & M. R. Co. v. McLeod*, 94 Ga. 580; 20 S. E. 434.

³¹ *Baltimore & O. R. Co. v. Henthorne* (C. C. App. 6th C.), 43 U. S. App. 113; 73 Fed. 634; *Houston & T. C. R. R. Co.*, 53 Tex. 318; 37 Am. Rep. 756. See *Morrison v. Long Island R. R. Co.*, 3 App. Div. (N. Y.) 205; 73 N. Y. St. R. 732; 38 N. Y. Supp. 393.

³² *St. Louis & S. F. R. Co. v. Farr* (C. C. App. 8th C.), 56 Fed. 994;

6 C. C. A. 211; *Goodhart v. Penn. R. Co.*, 177 Pa. St. 1; 35 Atl. 191; 5 Am. & Eng. R. Cas. N. S. 364; 38 W. N. C. 545. See also *The William Branfoot*, 48 Fed. 914; *Kinney v. Tolkerts*, 84 Mich. 616; *Fulsome v. Concord*, 46 Vt. 135. But where there was evidence that plaintiff's earning capacity had not been totally destroyed, it was held to be reversible error to instruct the jury that if they find that plaintiff is entitled to recover, they will find what his earnings will or would be for the length of time he is expected to live, and then reduce it to its present value. *Central of Ga. R. R. Co. v. Johnston*, 106 Ga. 130; 32 S. E. 78; 12 Am. & Eng. R. Cas. N. S. 286.

³³ *Galveston, H. & S. A. Ry. Co. v.*

ferent amounts which the evidence tends to show.³⁴ But an allowance as damages of such sum as will at legal interest produce the annual amount of plaintiff's earnings in previous years is not proper;³⁵ nor is it the rule that the jury must determine the number of years that the disability will continue to exist and then multiply this number by the yearly compensation the party has earned in the past.³⁶ And in a case in Georgia it is held that the present worth of future earnings is not correctly arrived at by ascertaining the entire amount of such earnings and deducting seven per cent from the whole.³⁷ In Massachusetts it has been decided that where a judge is acting without a jury, he may assess the damages at a sum equivalent to the worth of an annuity for a certain number of years, computing the interest at a specified rate, and this though there be no evidence of what an annuity of such an amount would cost for such a length of time.³⁸ In another case in the same state where the plan proposed by the plaintiff's counsel for determining the amount to be awarded for a permanent impairment of earning capacity was the capitalization of the annual impairment, a charge which pointed out the injustice of such method and stated the principle upon which annuities were computed, but which did not suggest the adoption of either method by the jury, leaving it for them to adopt such method as the facts might warrant, was held not to be erroneous where the defendant made no request for an instruction on the point.³⁹ And where a charge did not contain any rule for the estimation of damages for the loss of future earnings, but stated that the jury might consider plain-

Kief (Tex. Civ. App. 1900), 58 S. W. 625.

³⁴ Storrs v. Grand Rapids, 110 Mich. 483; 68 N. W. 258; 3 Det. L. N. 474.

³⁵ Gregory v. New York, L. E. & W. R. R. Co., 55 Hun (N. Y.), 303; 28 N. Y. St. R. 726; 8 N. Y. Supp. 525; Houston & T. C. R. R. Co. v. Willie, 53 Tex. 318; 37 Am. Rep. 715. And see McDonald v. Chicago, etc., R. Co., 26 Iowa, 124; Morrison v. Long Island R. R. Co., 3 App. Div. (N. Y.) 205; 38 N. Y. Supp. 393; 73

N. Y. St. R. 732; Rapson v. Cubitt, 1 Car. & Marsh. 64.

³⁶ Denver v. Sherret, 60 U. S. App. 104; 31 C. C. A. 449; 88 Fed. 226; 5 Am. Neg. Rep. 520.

³⁷ Macon, D. & S. R. Co. v. Moore, 99 Ga. 229; 25 S. E. 460; 5 Am. & Eng. R. Cas. N. S. 355.

³⁸ Copson v. N. Y. N. H. & H. R. Co., 171 Mass. 233; 50 N. E. 613.

³⁹ Rooney v. N. Y. N. H. & H. R. Co., 173 Mass. 222; 53 N. E. 435; 14 Am. & Eng. R. Cas. N. S. 425; 6 Am. Reg. Rep. 78.

tiff's earning ability before the injury and also subsequent thereto, and "allow him such amount as you believe from the evidence he is justly entitled to," it was held not erroneous.⁴⁰

§ 250. Past and prospective loss—Recovery for in one action.—Where a physical injury is the result of a single act, not only may past damages be recovered, but also those which will arise in the future as a direct result of the injury. And since in such cases successive actions cannot be brought for damages as they may accrue, if a person seeks to recover for permanent injury or prospective loss, the recovery therefor not only may but must be had in the same action as that brought to recover for past loss or injury, since there can only be one recovery of damages in this class of cases.⁴¹ So it is said that "successive actions cannot be brought by the plaintiff for the recovery of damages, as they may accrue from time to time, resulting from the injury complained of, as would be the case for a continuous wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages."⁴² And again, "As there can be but one recovery, it may include damages not only for what has actually been suffered from the disabling effect of the injury down to the time of the trial, but also for such pain or inconvenience as is reasonably certain in the future."⁴³ And in another case a charge that the plaintiff was entitled to recover for "the injuries that he has sustained and that the jury can look to the future as well as to the past, because plaintiff can maintain no other action" was held correct.⁴⁴ As was also a charge that the jury might consider past damages, and also "such as appears from the evidence with reasonable certainty, are prospective."⁴⁵

⁴⁰ *Lamb v. Cedar Rapids*, 108 Iowa, 629; 79 N. W. 366.

⁴¹ The numerous cases which we have cited in the preceding sections generally sustain the text.

⁴² *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42.

⁴³ *Ayres v. Del. L. & W. R. R. Co.*, 158 N. Y. 254; 5 Am. Neg. Rep. 683.

⁴⁴ *Kane v. N. Y. N. H. & H. R. R. Co.*, 132 N. Y. 160; 43 N. Y. St. R. 494; 30 N. E. 256, aff'g 31 N. Y. St. R. 741; 9 N. Y. Supp. 879.

⁴⁵ *Shaler v. Broadway Imp. Co.*, 162 N. Y. 641; 57 N. E. 1124, aff'g 22 App. Div. 102; 47 N. Y. Supp. 815.

CHAPTER XI.

EXPENSES—PHYSICAL INJURIES.

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| <p>§ 251. Expenses of treating injury—Generally.</p> <p>252. Expenses of treating injury—Evidence as to, necessary.</p> <p>253. Evidence as to expenses in action by married woman.</p> <p>254. Surgical and medical treatment—Medicines and drugs.</p> <p>255. Medical expenses—Payment for, not prerequisite to recovery.</p> <p>256. Expenses for nursing.</p> | <p>257. Services of physician—Evidence of payment or value of—Whether necessary.</p> <p>258. Same subject continued.</p> <p>259. Same subject—Conclusion.</p> <p>260. Expenses in the future—Recovery of.</p> <p>261. Expense for work of substitute in place of injured person.</p> <p>262. Expense of repairing wagon.</p> |
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§ 251. Expenses of treating injury—Generally.—In an action to recovery for physical injuries such reasonable sums as have been necessarily expended or incurred in treating such injury and in effecting a cure are recoverable,¹ and it is an error to

¹ Vicksburg, etc., R. R. Co. v. Putnam, 118 U. S. 545; Wade v. Leroy, 20 How. (U. S.) 34; Whelan v. N. Y. L. E. & W. R. R. Co., 38 Fed. 15; Davidson v. South Pac. Co., 44 Fed. 476; Alabama G. S. R. Co. v. Yarbrough, 83 Ala. 238; 3 So. 447; Adams v. Clymer, 1 Marv. (Del.) 80; 36 Atl. 1104; Robinson v. Simpson, 8 Houst. (Del.) 398; 32 Atl. 287; West Chicago St. R. Co. v. Carr, 170 Ill. 478; 48 N. E. 992, aff'd 67 Ill. App. 530; Peoria Bridge Assoc. v. Loomis, 20 Ill. 235; Chicago & E. I. R. Co. v. Cleminger, 77 Ill. App. 186, aff'd 178 Ill. 536; 53 N. E. 320; Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 409; 1 West. 868; Ellsworth v. Fletcher, 59 Kan. 772; 51 Pac. 904; Alexander v. Humber, 86 Ky. 565; 6 S. W. 453; Cent. Pass. R. Co. v. Kuhn, 86 Ky. 578; 6 S. W. 441; Parker v. Jenkins, 3 Bush (Ky.), 587; Sanford v. Augusta, 32 Me. 536; McGanahan v. N. Y. N. H. & H. R. Co., 171 Mass. 211; 50 N. E. 610; Schwingschlegl, 113 Mich. 683; 72 N. W. 7; 4 Det. L. N. 447; Sherwood v. Chic. & W. M. R. Co., 82 Mich. 374; 44 Am. & Eng. R. Cas. 337; 46 N. W. 773; Memphis, etc., R. R. Co. v. Whitfield, 44 Miss. 466; Cobb v. St. Louis & H. R. Co., 149 Mo. 609; 50 S. W. 894; 13 Am. & Eng. R. Cas. N. S. 632; Robertson v. Wabash R. R. Co. (Mo. 1899), 53 S. W. 1082; Chartrand v. Southern R. Co., 57 Mo. App. 427; Howitt v. Eisenbart, 36 Neb. 794; 55 N. W. 252; Corliss v. Worcester, N. & R. R. Co., 63 N.

charge the jury that such expenses may be allowed without limiting them to such as are reasonable and necessary.² In determining what expenses are of this nature, it has been held that where, upon the advice of a physician, a person goes to a distant city to be specially treated for troubles resulting from an injury, the expense incurred pursuant to such advice is a reasonable and necessary outlay in an attempt to effect a cure and is recoverable.³ And where, owing to the unskillful treatment of an injury by a surgeon, it has been necessary to pay an increased amount to another surgeon to effect a cure, such amount may properly be considered by the jury in estimating the damages, but this is declared to be the proper limit.⁴ The expenses reasonably and necessarily incurred in effecting a cure may, it is decided, be recovered, though not specially alleged, an allegation of general damage being sufficient.⁵

§ 252. Expenses of treating injury—Evidence as to, necessary.—The general rule seems to be that in order to permit a recovery for the expense reasonably and necessarily incurred in treating the injury and effecting a cure, there must be some evidence offered in reference thereto.⁶ So there can be no recovery

H. 404; 1 New Eng. 163; Leighton v. Sargent, 31 N. H. 119; Drinkwater v. Dinsmore, 80 N. Y. 390, rev'g 16 Hun, 250; Sheehan v. Edgar, 58 N. Y. 631; Metcalf v. Baker, 57 N. Y. 662; Ganiard v. Rochester City & B. R. Co., 50 Hun (N. Y.), 22; 18 N. Y. St. R. 692, aff'd 121 N. Y. 661; Oliver v. North Pac. Tr. Co., 3 Oreg. 84; Smedley v. Hestonville, M. & F. Pass. R. Co., 184 Pa. St. 620; 39 Atl. 544; 9 Am. & Eng. R. Cas. N. S. 649; 42 W. N. C. 169; Goodhart v. Penn. R. R. Co., 177 Pa. St. 1; 35 Atl. 191; 5 Am. & Eng. R. Cas. N. S. 364; 38 W. N. C. 545; Wilson v. Penn. R. R. Co., 132 Pa. St. 27; 18 Atl. 1087; Smith v. East Mauch Chunk, 3 Super. Ct. (Pa.) 495; Hart v. Charlotte C. & A. R. Co., 33 S. C. 427; 12 S. E. 9; 10 L. R. A. 794; Houston & T. C. R. Co. v. Rowell, 92 Tex. 147; 46 S. W. 630;

11 Am. & Eng. R. Cas. N. S. 597, aff'g 45 S. W. 763; Folsom v. Underhill, 36 Vt. 580; Richmond & D. R. Co. v. Norment, 64 Va. 167; 4 S. E. 211.

² Houston & T. C. R. Co. v. Rowell, 92 Tex. 147; 46 S. W. 630; 11 Am. & Eng. R. Cas. N. S. 597, aff'g 45 S. W. 763.

³ Sherwood v. Chic. & W. M. R. Co., 82 Mich. 374; 46 N. W. 773; 44 Am. & Eng. R. Cas. 337.

⁴ Leighton v. Sargent, 31 N. H. 119.

⁵ Folsom v. Underhill, 36 Vt. 580.

⁶ Alabama G. S. R. Co. v. Davis, 119 Ala. 572; 24 So. 862; Little Rock & M. R. Co. v. Barry, 58 Ark. 198; 25 L. R. A. 386; 23 S. W. 1097; Chatsworth v. Rowe, 53 Ill. App. 387; Eckerd v. Chic., etc., R. R. Co., 70 Iowa, 353; 30 N. W. 615; Reed v. Chic., etc., R. R. Co., 57 Iowa, 23; 10 N. W. 285; Nixon

for medical attendance or aid unless there is some evidence introduced as to the nature of such medical attendance and the amount of liability therefor.⁷ And it was held improper to instruct the jury that the plaintiff might recover for moneys expended and for which she was liable as a result of the accident, where there was no proof that she had expended any money or had incurred any liability for such expense.⁸ And in another case where it merely appeared that the plaintiff had been treated in a city hospital and it was not shown that she had expended any money or incurred any liability for such treatment or for any medical services as a result of the injury, and no evidence was given of the value of the services rendered in the hospital, it was held that there could be no recovery for medical services or treatment.⁹ In a case in Massachusetts, however, it is held that though there be no distinct proof of the amount expended for sickness and medical attendance as a result of the injury, yet the jury may allow a reasonable sum for such expenses.¹⁰ But where such expenses were not claimed in the plaintiff's petition, it was held that though he was erroneously permitted to testify as to the probable amount of liability incurred by him, therefor, such error might be cured by a remittitur of the amount stated in such testimony.¹¹

§ 253. Evidence as to expenses in action by married woman.—Evidence is admissible as to the value of medical services

- v. Hannibal & St. J. R. Co., 141 Mo. 425; 42 S. W. 942; Duke v. Mo. Pac. R. R. Co., 99 Mo. 347; 12 S. W. 636. Smith v. Chicago & A. R. Co., 108 Mo. 243; 18 S. W. 971; Evans v. Joplin, 76 Mo. App. 20; 1 Mo. A. Rep. 485; Hewitt v. Eisenbart, 36 Neb. 794; 55 N. W. 252; McKenna v. Brooklyn Heights R. Co., 41 App. Div. (N. Y.) 255; 58 N. Y. Supp. 402; Page v. Delaware & H. Canal Co., 34 App. Div. (N. Y.) 618; 54 N. Y. Supp. 442; Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.), 43 S. W. 1049; Fry v. Hillan (Tex. Civ. App.), 37 S. W. 359; But see Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198; Scullane v. Kellogg, 169 Mass. 544; 48 N. E. 622.
- ⁷ Page v. Delaware & H. Canal Co., 34 App. Div. (N. Y.) 618; 54 N. Y. Supp. 442; Nixon v. Hannibal & St. J. R. Co., 141 Mo. 425; 42 S. W. 942; Evans v. Joplin, 76 Mo. App. 20; 1 Mo. A. Rep. 485; Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.), 43 S. W. 1049.
- ⁸ Chatsworth v. Rowe, 53 Ill. App. 387.
- ⁹ Duke v. Mo. Pac. R. R. Co., 99 Mo. 347; 12 S. W. 636.
- ¹⁰ Scullane v. Kellogg, 169 Mass. 544; 48 N. E. 622.
- ¹¹ Galveston, H. & S. A. R. Co. v.

rendered in an action by a married woman as tending to show that credit therefor was extended solely to her.¹²

§ 254. Surgical and medical treatment—Medicines and drugs.—Such reasonable sums as have been paid or incurred for surgical or medical treatment and for medicines rendered necessary as a result of the injury are included in those expenses which may be recovered.¹³ And it has been held that where there is evidence as to the employment of physicians by the plaintiff, the question of medical expenses may properly be submitted to the jury.¹⁴ So evidence showing that the plaintiff was attended by a practicing physician or surgeon will justify a finding that such professional services were rendered for a pecuniary recompense.¹⁵ And evidence of the continued and necessary use of morphine since the injury, and that before the injury the plaintiff had never used opiates, is admissible to show a continued expense on the part of the plaintiff which did not exist before the injury.¹⁶ Again although the amount expended for medicine and medical attendance is not alleged

Duelin, 86 Tex. 450; 25 S. W. 406, aff'g 23 S. W. 596; 24 S. W. 334.

¹² Vergin v. City of Saginaw (Mich. 1901), 84 N. W. 1075; 7 Det. L. N. 602. See City of San Antonio v. Porter (Tex. Civ. App. 1900), 59 S. W. 922. See secs. 325 et seq. herein, as to recovery by married woman.

¹³ Whelan v. N. Y. L. E. & W. R. Co. (C. C. M. D. Ohio), 38 Fed. 15; Alabama G. S. R. Co. v. Siniard (Ala.), 26 So. 698; Warner v. Chamberlain, 7 Houst. (Del.) 18; Washington & G. R. Co. v. Patterson, 9 App. D. C. 423; 25 Wash. L. Rep. 36; Chic. & E. I. R. Co. v. Holland, 122 Ill. 461; 13 N. E. 145; 11 West. 51; McDonald v. Illinois C. R. Co. (Iowa), 155 N. W. 102; McGanahan v. N. Y. N. H. & H. R. Co., 171 Mass. 211; 50 N. E. 610; Kupferschmid v. Southern Elec. R. Co., 70 Mo. App. 438; Chartrand v. Southern R. Co., 57 Mo. App. 425; McLean v. Kansas City, 2 Mo. A.

Rep. 681; Feeney v. Long Island R. R. Co., 116 N. Y. 375; 26 N. Y. St. R. 729; 22 N. E. 402; 35 L. R. A. 544; 39 Am. & Eng. R. Cas. 639; Morsemann v. Manhattan R. Co., 16 Daly (N. Y.), 249; 10 N. Y. Supp. 105; Farley v. Charleston Basket & V. Co., 51 S. C. 222; 28 S. E. 193, reh'g denied 28 S. E. 401; Dallas v. Jones (Tex. Civ. App.), 54 S. W. 606; Missouri, K. & T. R. Co. v. Dickey (Tex. Civ. App.), 48 S. W. 626; Missouri, K. & T. R. Co. v. Hanson, 13 Tex. Civ. App. 552; 36 S. W. 289; San Antonio & A. P. R. Co. v. Keller, 11 Tex. Civ. App. 569; 32 S. W. 847.

¹⁴ Farley v. Charleston Basket & V. Co., 51 S. C. 222; 28 S. E. 193, reh'g denied 28 S. E. 401.

¹⁵ McGanahan v. N. Y. N. H. & H. R. Co., 171 Mass. 211; 50 N. E. 610.

¹⁶ Missouri, K. & T. R. Co. v. Hanson, 13 Tex. Civ. App. 552; 36 S. W. 289.

in the petition in an action for personal injuries, yet it is held that evidence of the amount expended by the plaintiff for such purposes is admissible under an averment that the plaintiff has incurred great expense for medicine and medical attendance.¹⁷ In another case, however, under an averment similar to the above, and which also contained the additional statement that the plaintiff would in the future have to incur such expense to her damage in an amount stated, it was held that such averment was too general to furnish proper notice to the defendants of the facts intended to be established thereunder.¹⁸ Where evidence as to the amount of expense incurred for medicines has been improperly admitted, it is held that this is not sufficient ground for reversal of a judgment in plaintiff's favor if the extent of the injuries have been thoroughly shown by the evidence in the case and the amount of such account is remitted by the plaintiff.¹⁹

§ 255. Medical expenses—Payment for, not prerequisite to recovery.—The fact that the bills for surgical or medical treatment or for medicines rendered necessary as a result of an injury have not been paid, will not prevent a recovery therefor.²⁰ In many of the cases it is declared that it is sufficient

¹⁷ *Kupferschmid v. Southern Electric Co.*, 70 Mo. App. 438.

¹⁸ *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; 41 S. W. 117.

¹⁹ *Galveston, H. & S. A. R. Co. v. Duellin* (Tex. Civ. App.), 23 S. W. 596; 24 S. W. 334.

²⁰ *Denver & R. G. R. Co. v. Lorentzen* (C. C. App. 8th C.), 79 Fed. 291; 24 C. C. A. 592; 49 U. S. App. 81; *Donnelly v. Hufschmid*, 79 Cal. 74; 21 Pac. 546; *Chicago & E. R. Co. v. Cleminger*, 178 Ill. 536; 53 N. E. 320, aff'g 77 Ill. App. 186; *Chicago & A. R. Co. v. Harrington*, 77 Ill. App. 499; *Consol. Coal Co. v. Scheiber*, 65 Ill. App. 304; *Flanagan v. Balt. & O. R. Co.* (Iowa), 50 N. W. 60; *Hutchinson v. Van Cleve*, 7 Kan. App. 676; 53 Pac. 888; *Abilene v. Wright*, 4 Kan. App. 708; 46 Pac. 715; *Lammi-*

man v. Detroit Citizens, St. R. Co., 112 Mich. 602; 71 N. W. 153; 4 Det. L. N. 134; *Lacas v. Detroit R. Co.*, 92 Mich. 412; 52 N. W. 745; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500; 46 S. W. 170; *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408; 20 S. W. 1060; *Omaha St. R. Co. v. Cleminger*, 57 Neb. 240; 12 Am. & Eng. R. Cas. N. S. 188; 77 N. W. 675; *McNair v. Manhattan Ry. Co.*, 22 N. Y. St. R. 840; 4 N. Y. Supp. 310, aff'd 123 N. Y. 664; 34 N. Y. Supp. 1010; 26 N. E. 750; *Reynolds v. Niagara Falls, 81 Hun* (N. Y.), 353; 63 N. Y. St. R. 118; 30 N. Y. Supp. 954; *Gries v. Zeck*, 24 Ohio St. 329; *Parker v. So. Car. & Ga. Ry. Co.* (S. C. 1897), 1 Am. Neg. Rep. 681; *Wilson v. Southern Pac. R. R. Co.*, 13 Utah, 352; 44 Pac. 1040; 4 Am. & Eng. R. Cas. N. S. 1040. But see

if the plaintiff has incurred liability for such expenses. So it is held that a recovery for reasonable and necessary medical and surgical aid is justified by evidence that the plaintiff has incurred liability to a specified amount.²¹ And in another case it is held that the plaintiff may recover for medical services, though not paid, upon proof that the physicians have charged for their services and that the charge is reasonable.²² And again it is declared that recovery for medical and surgical expenses may be had where they have been actually incurred, though not paid.²³ And in Missouri it has been decided that in order to entitle plaintiff to recover for medical services, he must either have paid the same or be liable therefor.²⁴ And in another case in the same state it was held to be error to instruct the jury that there might be a recovery for such services in the absence of any evidence showing that the plaintiff had incurred any liability on that account.²⁵ We think, however, that the rule is somewhat broader than this and that the courts are not inclined to restrict the plaintiff's right to recover such expenses to those cases where he has actually paid them or become liable therefor. Thus it is declared that it is immaterial, as affecting the plaintiff's recovery, what arrangement may have been made by him for the payment or whether he ever paid them.²⁶ And though medical services and treatment may be rendered gratuitously, yet this will not prevent the recovery by the injured person of the fair value of such services, since the giving of such services is intended to be for the benefit of the person injured and cannot be considered as for the benefit of the person at fault.²⁷ So

Madden v. Mo. Pac. R. Co., 50 Mo. App. 666.

²¹ Chicago & E. R. Co. v. Cleminger, 178 Ill. 536; 53 N. E. 320, aff'g 77 Ill. App. 186; Consol. Coal Co. v. Scheiber, 65 Ill. App. 304; Omaha St. R. Co. v. Emminger, 57 Neb. 240; 12 Am. & Eng. R. Cas. N. S. 188; 77 N. W. 675.

²² Reynolds v. Niagara Falls, 81 Hun (N. Y.), 353; 63 N. Y. St. R. 118; 30 N. Y. Supp. 954.

²³ Wilson v. Southern Pac. Co., 13 Utah, 352; 44 Pac. 1040; 4 Am. & Eng. R. Cas. N. S. 40.

²⁴ Morris v. Grand Ave. R. Co., 144 Mo. 500; 46 S. W. 170. See also Robertson v. Wabash R. Co. (Mo. 1899), 53 S. W. 1082.

²⁵ Madison v. Missouri P. R. Co., 60 Mo. App. 44.

²⁶ Denver & R. G. R. Co. v. Lorentzen (C. C. App. 8th C.), 79 Fed. 291; 24 C. C. A. 592; 49 U. S. App. 81. But see Morris v. Grand Ave. R. Co., 144 Mo. 500; 46 S. W. 170.

²⁷ Brosnan v. Sweetser, 127 Ind. 1; Penn. R. R. Co. v. Marion, 104 Ind. 239; Indianapolis v. Gaston, 58 Ind.

again, it is held that though such expenses may have been paid by a stranger, this will not defeat recovery therefor.²⁸ Nor can recovery therefor be defeated by evidence that the plaintiff could have obtained such services for nothing.²⁹ In Illinois it has been held that where medical services have not been paid for and they cannot be recovered from the injured person by reason of any incapacity, the latter cannot recover them from the person causing the injury.³⁰ In a case in Missouri it is held to be error to give an instruction to the jury authorizing them to allow the plaintiff the amount which he has paid or obligated himself to pay for medical services, without also instructing them that they must determine whether such amount was reasonable.³¹

§ 256. Expenses for nursing.—A person injured by the negligence or wrongful act of another is entitled to recover the reasonable and necessary expense incurred for nursing as a result of the injury sustained.³² And there may be a recovery for such expenses, though there is no evidence as to their value, the jurors being presumed to be reasonably familiar with the value of such services.³³ So also the fact that mem-

227; *Varnham v. Council Bluffs*, 52 Iowa, 698; 3 N. W. 792; *Klein v. Thompson*, 19 Ohio St. 569. But see *Minster v. Citizens R. Co.*, 53 Mo. App. 276.

²⁸ *Klein v. Thompson*, 19 Ohio St. 569.

²⁹ *Kendall v. Albia*, 73 Iowa, 241; 34 N. W. 833.

³⁰ *Chicago v. Honey*, 10 Ill. App. 535. See also *Dixon v. Bell*, 1 Starkie, 287. And see sections 305, 306, 310, 322, 325, "Married women"—"minors."

³¹ *Orscheln v. Scott*, 79 Mo. App. 534; 2 Mo. A. Rep. 477.

³² *Jones v. Bell*, 8 Houst. (Del.) 562; *Warner v. Chamberlain*, 7 Houst. (Del.) 18; *Brown v. Green*, 1 Penn. (Del.) 535; 42 Atl. 991; *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461; 13 N. E. 145; 11 West. 51; *Brosnan v. Sweetser*, 127 Ind. 1;

Lamb v. Cedar Rapids, 108 Iowa, 629; 79 N. W. 366; *Kendall v. Albia*, 73 Iowa, 241; *Varnham v. Council Bluffs*, 52 Iowa, 698; *Consol. Kan. City S. & B. Co. v. Tinchert*, 5 Kan. App. 130; 44 Pac. 889; *Capitthorne v. Hardy*, 173 Mass. 400; 53 N. E. 915; *Turner v. Boston & M. R. R. Co.*, 158 Mass. 261; 33 N. E. 520; *Murray v. Mo. Pac. R. R. Co.*, 101 Mo. 236; 13 S. W. 817; *Buck v. Peoples*, etc., R. Co., 40 Mo. App. 555; *Goodhart v. Penn. R. R. Co.*, 177 Pa. St. 1; 5 Am. & Eng. R. Cas. N. S. 364; 35 Atl. 191; 38 W. N. C. 545; *Mo. K. & T. R. Co. v. Holman*, 15 Tex. Civ. App. 16; 39 S. W. 130; *May v. Hahn* (Tex. Civ. App.), 54 S. W. 416; *Crouse v. Chicago & N. W. R. Co.*, 102 Wis. 196; 14 Am. & Eng. R. Cas. N. S. 780; 78 N. W. 446.

³³ *Murray v. Mo. Pac. R. R. Co.*, 101 Mo. 236; 13 S. W. 817.

bers of the injured person's family could have given him the care and attention needed without expense, is no defense to an allowance of the amount paid for the services of a trained nurse.³⁴ And though the services in nursing are gratuitously rendered by a member of the family, there may be a recovery of the fair value of such services,³⁵ and the value of the wife's services may be recovered.³⁶ In some cases, however, it has been held that in absence of an express contract to pay for the services of a wife or child in nursing a person who has suffered a personal injury, there can be no recovery therefor.³⁷ But a parent may recover for the services of a daughter who has nursed him, though such services were gratuitous.³⁸ And the mother of the plaintiff may testify as to what was a fair charge for services rendered by her to the plaintiff.³⁹ In the absence, however, of any evidence of any charge being made by the members of the family for care and attention given to an injured person, there should be some evidence of the value of the services rendered.⁴⁰ Where a child has been injured it is held that the parent may recover a reasonable compensation for nursing.⁴¹

§ 257. **Services of physician—Evidence of payment or value of—Whether necessary.**—The plaintiff in an action for personal injuries is not entitled to recover for the services of a physician in the absence of some evidence either of payment or of the value of such services. While payment is not a prerequisite to recovery therefor, yet in the absence of proof of payment there should be some evidence showing the value of the services rendered.⁴² In this connection the following words from a late

³⁴ *Kendall v. Albia*, 73 Iowa, 241.

³⁵ *Brosnan v. Sweetser*, 127 Ind. 1; *Varnham v. Council Bluffs*, 52 Iowa, 698; *Capithorne v. Hardy*, 173 Mass. 400; 53 N. E. 915; *Dormer v. Alcatraz Pav. Co.*, 16 Pa. Super. Ct. 407.

³⁶ *Mo. K. & T. R. Co. v. Holman*, 15 Tex. Civ. App. 16; 39 S. W. 130; *Crouse v. Chic. & N. W. R. Co.*, 102 Wis. 196; 14 Am. & Eng. R. Cas. N. S. 780; 78 N. W. 446, citing some of the cases here given.

³⁷ *Goodhart v. Penn. R. R. Co.*, 177

Pa. 1; 5 Am. & Eng. R. Cas. 364; 35 Atl. 191; 38 W. N. C. 545. But see *Peoria, etc., R. R. Co. v. Johns*, 43 Ill. App. 83.

³⁸ *Varnham v. Council Bluffs*, 52 Iowa, 698.

³⁹ *Capithorne v. Hardy*, 173 Mass. 400; 53 N. E. 915.

⁴⁰ *Trapnell v. Red Oak Junction (Iowa)*, 39 N. W. 884.

⁴¹ *Buck v. Peoples, etc., R. Co.*, 40 Mo. App. 555.

⁴² *Bedford v. Moody (Ind. App. 1899)*, 55 N. E. 499; *Bowsher v.*

Pennsylvania decision are pertinent: "There was no evidence showing the amount of money expended for these services, nor what the services were reasonably worth. The learned trial judge, however, held that in estimating the damages the jury should allow for the direct expenses incurred by the plaintiff by reason of the injury, and instructed the jury that 'the mere fact that it does not appear from the evidence that she has paid her medical aid will not prevent her from recovering in this case for what would reasonably compensate her physicians.' It is quite true, as the learned judge suggests, that the fact that the plaintiff had not paid her physician, would not prevent her recovering the value of his services. But that is not the question. In the absence of any evidence of the value of such services, or what they are reasonably worth, was the plaintiff entitled to recover anything on account thereof? It seems to us rather singular that when the physicians who rendered these services were on the witness stand, and detailed the character and extent of their services, they were not interrogated as to their value. It is contended by the learned counsel for the plaintiff that in the light of their testimony 'the average jury, from their own experience, could estimate with considerable accuracy what would be reasonable compensation.' We cannot assent to this proposition. On the contrary, the average jurymen is not a professional man and is not presumed to know the value of such services. What would have been reasonable compensation for the medical services rendered the plaintiff might have been shown by the physicians who attended her, or by others who were acquainted with the value of similar services in the community in which they were rendered. It was incumbent on the plaintiff before she could recover from the defendant compensation for medical aid, to furnish the jury

Chic. B. & Q. R. Co. (Iowa, 1901), 84 N. W. 958; Reed v. Chic. R. I. & R. Co., 57 Iowa, 23; Gumb v. Twenty-Third St. Ry. Co., 114 N. Y. 411; 23 N. Y. St. R. 748, rev'g 21 J. & S. 466; Schmitt v. Dry Dock E. B. & B. R. R. Co., 3 N. Y. St. R. 257; 2 City Ct. 359; Scott v. Banks, 60 N. Y. Supp. 397; Olliger v. City of Toledo, 20 Ohio Cir. Ct. R. 142; 10 O. C. D. 762; Wheeler v. Tyler S. E. R. Co., 91 Tex. 356; 48 S. W. 876, rev'g 41 S. W. 517; Gulf C. & S. F. R. Co. v. Campbell, 76 Tex. 174; 41 Am. & Eng. R. Cas. 100; 13 S. W. 19; Houston & T. C. R. Co. v. Pereira (Tex. Civ. App.), 45 S. W. 767.

evidence from which they could determine what had been paid for such services or such amounts as the services were reasonably worth."⁴³

§ 258. Same subject continued.—The amount charged by a physician or surgeon for his services is not sufficient, in the absence of other testimony showing the services were worth the sum charged, to authorize a recovery for such expenses.⁴⁴ Nor is the proper measure of damages the usual charge by the particular physician who is testifying, but rather the usual and reasonable charges of the profession generally.⁴⁵ But it has been decided that an injured person may recover the reasonable value of an attending physician's services, though there is no intention to make any charge for the same.⁴⁶ The amount of the bill rendered, however, is admissible as an item of the evidence establishing the value of such services,⁴⁷ although other evidence should supplement it showing that the bill was a reasonable one.⁴⁸ And it is held to be error to permit evidence of the amount charged by the physician of the plaintiff where no evidence is introduced either of payment of such bill or the value of such services.⁴⁹ So in a case in the same state it is decided that there can be no recovery of the amount of a physician's bill where it is not shown either that the bill had been paid or that the services were worth the amount charged in the bill.⁵⁰ And in another case, it was held to be error to admit evidence of the amount which a physician had charged for his services, where but a small part of such bill had been paid and no other evidence was given as to the value of his services.⁵¹ But if the bill has been paid, evidence of such fact and of the amount thereof is

⁴³ *Brown v. White* (Penn. S. C. 1902), 51 Atl. 962, per Mestrezat, J.

⁴⁴ *Bowsher v. Chic. B. & Q. R. Co.* (Iowa, 1901), 84 N. W. 958; *Houston & T. C. R. Co. v. Pereira* (Tex. Civ. App.), 45 S. W. 767.

⁴⁵ *Chic. City Ry. Co. v. Wall*, 93 Ill. App. 411. See *Bowsher v. Chic. B. & Q. R. Co.* (Iowa, 1901), 84 N. W. 958.

⁴⁶ *Olliger v. City of Toledo*, 20 Ohio Cir. Ct. R. 142; 10 O. C. D. 762.

⁴⁷ *Clarke v. Westcott*, 2 App. Div. (N. Y.) 503; 37 N. Y. Supp. 1111.

⁴⁸ *Chicago City R. Co. v. Meneely*, 78 Ill. App. 679.

⁴⁹ *Gumb v. Twenty-Third St. R. Co.*, 114 N. Y. 411; 23 N. Y. St. R. 748, rev'g 21 J. & S. 466.

⁵⁰ *Schmitt v. Dry Dock E. B. & B. R. R. Co.*, 3 N. Y. St. R. 257; 2 City Ct. 359.

⁵¹ *Bedford v. Moody* (Ind. 1899), 58 N. E. 499.

admissible without proof of the value of the services rendered by him.³² So where the plaintiff sought to recover for the services of a nurse, evidence of the fact that one hundred dollars had been paid a nurse for services was decided to be some evidence of the value of such services authorizing the consideration of that item by the jury.³³ In a case in the United States circuit court, however, it has been held that though there may be no evidence as to the reasonableness of the amount charged by a physician for services rendered on account of an injury, yet evidence of the amount of his bill may be submitted to the jury.³⁴

§ 259. Same subject—Conclusion.—It will be seen from the foregoing cases that the authorities are not in harmony as to the admission in evidence of the amount charged by a physician and surgeon. In some, it is determined that evidence of such amount is not admissible in the absence of evidence of payment, or of the value of the services. From these cases the conclusion may be drawn that evidence, either of payment or of the value of the services rendered, is sufficient to justify the admission of the amount charged. In other decisions, it is held that evidence of the value of the services is necessary in addition to evidence of payment, and that evidence of payment is some evidence of the value of the services and sufficient to authorize the consideration of that item by the jury. And in the United States circuit court of appeals, evidence of the amount is held admissible, though no evidence be given as to value. It would seem that the true rule in this class of cases would be that evidence either of payment or of the value of the services would be sufficient and necessary to justify the admission of the amount charged and to entitle the plaintiff to recover for such services. Evidence of the value of the services would probably enable the

³² *Morsemann v. Manhattan R. Co.*, (N. Y.), 463; 46 N. Y. St. R. 225; 19 10 N. Y. Supp. 105; 16 Daly, 249; 32 N. Y. St. R. 61. But see *Wheeler v. Tyler S. E. R. Co.*, 91 Tex. 356; 43 S. W. 876, rev'g 41 S. W. 517, where it is held that though the bill has been paid evidence of such fact and of the amount is not sufficient, but the value of the services must be shown. And see *Schinpff v. Sliter*, 64 Hun

(N. Y.), 463; 46 N. Y. St. R. 225; 19 N. Y. Supp. 644.

³³ *Colwell v. Manhattan Ry Co.*, 57 Hun (N.Y.), 452; 30 N. Y. St. R. 991; 10 N. Y. Supp. 636. As to recovery for services of nurse, see sec. 305, herein.

³⁴ *Western Gas Const. Co. v. Danner* (U. S. C. C. A. Cal.), 97 Fed. 882.

jury to estimate the allowance for this item on a better basis than mere evidence of payment. Proof of payment however, would seem to be some evidence as to the value of the services rendered, or at least, of the amount expended therefor, but would give the jury less foundation upon which to determine whether the amount of the bill was reasonable. Such proof should, however, we believe, be sufficient to entitle the plaintiff to recover for this item of damages, and we cannot view with favor the proposition that he cannot recover therefor on proof of payment alone, but must also show the value of the services rendered.

§ 260. Expenses in the future—Recovery of.—In actions for personal injuries, where it is sought to recover for prospective or future loss, the rule is that in order to authorize any allowance therefor, the loss must be such as is reasonably certain to ensue. So the rule applies in order that there may be an allowance made for the expense of medical attention which will be needed in the future.⁵⁵ And the evidence should show what such expenses will be. So an instruction that the plaintiff might recover "his reasonable expenses incident to his condition in the future" was held to be erroneous where there was no evidence showing what the expenses had been or would be, though the necessity of medical care and of the services of an attendant had been shown.⁵⁶

§ 261. Expense for work of substitute in place of injured person.—Where a person as a result of an injury is incapacitated from his business or occupation, and is under the expense of hiring another person to do the work which he customarily did, he may recover such expense in an action for damages resulting from such injury.⁵⁷ But in order to recover this item of damages, it must be alleged in the complaint.⁵⁸

⁵⁵ *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375; 26 N. Y. St. R. 729; 22 N. E. 402, aff'g 5 N. Y. St. R. 63.

⁵⁶ *McKenna v. Brooklyn H. R. Co.*, 41 App. Div. (N. Y.) 255; 58 N. Y. Supp. 462.

⁵⁷ *Ashcroft v. Chapman*, 38 Conn. 230; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463; *Langworth v. Green Twp.*, 88 Mich. 207; 50 N.

W. 130; *Gumb v. Twenty-Third St. Ry. Co.*, 114 N. Y. 411; 23 N. Y. St. R. 748. See *Lombardi v. California St. Cable Co.*, 124 Cal. 311; 57 Pac. 66. But see *Blackman v. Gardiner Bridge*, 75 Me. 514; *Chic. R. I. & P. R. Co. v. Sheldon*, 6 Kan. App. 347; 51 Pac. 808.

⁵⁸ *Gumb v. Twenty-Third St. Ry. Co.*, 114 N. Y. 411; 23 N. Y. St. R.

§ 262. **Expense of repairing wagon.**—In an action to recover damages for injuries sustained from being thrown from his wagon as a result of a collision with cars of defendant, evidence that a certain amount was expended in repairing the wagon is declared to be inadmissible, unless it also appear that such repairs were proper and worth the sum paid.⁵⁹

748, rev'g 26 J. & S. 7; 30 N. Y. St. R. 253; 9 N. Y. Supp. 316; Haszlacher v. Third Ave. Ry. Co., 26 Misc. (N. Y.) 865; 56 N. Y. Supp. 380. See also North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463.
⁵⁹ Edge v. Third Ave. R. Co., 57 App. Div. (N. Y.) 29; 67 N. Y. Supp. 1002.

CHAPTER XII.

EVIDENCE IN PHYSICAL INJURY CASES.

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| <p>§ 263. Evidence as to plaintiff's condition in life.</p> <p>264. Same subject continued.</p> <p>265. Evidence as to defendant's condition in life.</p> <p>266. Evidence as to character of plaintiff—Chastity of female.</p> <p>267. Evidence as to expectancy of life—Mortality tables.</p> <p>268. Same subject continued.</p> <p>269. Same subject continued—Cases.</p> <p>270. Presumption against seriousness of injury—Evidence to rebut.</p> <p>271. Admission in evidence of deposition charging attempt to make injuries appear worse, erroneous—Case.</p> <p>272. Action against city—Judgment roll conclusive in action on bond.</p> <p>273. Exemplary damages—Evidence in mitigation of.</p> <p>274. Expert and opinion evidence—Future consequences of physical injuries.</p> <p>275. Same subject continued.</p> <p>276. Expert evidence not admissible as to speculative or possible future consequences.</p> <p>277. Same subject continued.</p> <p>278. Evidence of physician based on examination of injured person as to his condition.</p> | <p>279. Expert evidence based on statements of injured person.</p> <p>280. Expert and opinion evidence—Appearance and condition before and after injury.</p> <p>281. Expert evidence as to cause of condition.</p> <p>282. Same subject continued.</p> <p>283. Expert evidence—Ordinary results from injury of like character.</p> <p>284. Expert and opinion evidence—Malpractice—Cases.</p> <p>285. Opinions as to amount of damages—Elements of damages.</p> <p>286. Evidence as to feigning—Personal injuries.</p> <p>287. Hypothetical questions.</p> <p>288. Expert and opinion evidence—Cases generally.</p> <p>289. Same subject continued.</p> <p>290. Statements and complaints of injured person.</p> <p>291. Same subject continued.</p> <p>292. Same subject concluded.</p> <p>293. Physical examination of injured person.</p> <p>294. Same subject continued.</p> <p>295. Physical examination of plaintiff—New York.</p> <p>296. Same subject continued.</p> <p>297. Exhibiting injuries to jury.</p> <p>298. Evidence admissible under pleadings—Cases.</p> <p>299. Same subject continued.</p> |
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§ 263. Evidence as to plaintiff's condition in life.—As a general rule it may be stated that evidence of the financial con-

dition of the plaintiff in an action for personal injuries or of the fact that he has a wife, children or others dependent upon him for support, is not admissible for the purpose of enhancing the damages. The admission of such evidence would in many cases tend to arouse the sympathy of the jury and cause them to render a verdict in excess of the amount properly justified under the facts of the case.¹ So in a late case,² it was said: "The court erred in allowing plaintiff to prove that he was a married man with three young children. The United States supreme court in *Railroad Company v. Roy*³ held: 'In such a case the injured passenger being entitled only to compensatory damage, evidence of his poverty or the number and ages of his children is irrelevant.'" This court has held such evidence improper and erroneous.⁴ It is very readily perceptible that such evidence appealed

¹ *Penn. Co. v. Roy*, 102 U. S. 451; *Baltimore & O. R. Co. v. Camp* (C. C. App. 6th C.), 54 U. S. App. 110; 81 Fed. 807; 26 C. C. A. 626; *Alabama G. S. R. Co. v. Carroll* (C. C. App. 5th C.), 52 U. S. App. 442; 84 Fed. 772; 28 C. C. A. 207; 9 Am. & Eng. R. Cas. N. S. 759; *Postal Teleg. Cable Co. v. Hulsey*, 115 Ala. 193; 22 So. 854; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645; 18 So. 75; *Barbour Co. v. Horn*, 48 Ala. 566; *Shea v. Potrero*, etc., *Railroad Co.*, 44 Cal. 414; *Wilcox v. Wilmington City R. Co.* (Del.) 44 Atl. 686; *Central R. Co. v. Moore*, 51 Ga. 151; *Joliet v. Conway*, 119 Ill. 489; 10 N. E. 223; *Pittsburgh, F. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Denton v. Ordway*, 108 Iowa, 487; 79 N. W. 271; *Union P. R. Co. v. Young*, 57 Kan. 168; 45 Pac. 580; *Fort Scott, W. & W. Ry. Co. v. Lightburn* (Kan. App.), 58 Pac. 1033; *Junction City v. Blades*, 1 Kan. App. 85; 41 Pac. 677; *Standard Oil Co. v. Tierney*, 13 Ky. L. Rep. 626; 14 L. R. A. 677; 11 Ry. & Corp. L. J. 92; 49 Am. & Eng. R. Cas. 117; 17 S. W. 1025; *Stockton v. Frey*, 4 Gill (Md.), 406; *Shaw v. Boston*, etc., *R. R. Co.*, 8 Gray (Mass.), 45; *Ross v. Kansas City*, 48 Mo. App.

440; *Alberti v. New York, L. E. & W. R. R. Co.*, 118 N. Y. 77; 27 N. Y. St. R. 865; 23 N. E. 35, aff'd 43 Hun, 421; *Moody v. Osgood*, 50 Barb. (N. Y.) 628; *Galion v. Lauer*, 55 Ohio St. 392; 45 N. E. 1044; 37 Ohio L. J. 97; *Nutt v. Southern P. R. Co.* (Oreg.), 35 Pac. 653; *Louisville & N. R. R. Co. v. Gower*, 85 Tenn. 466; *Mo. Pac. R. Co. v. Lyde*, 57 Tex. 505; *Gulf C. & S. F. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; 42 S. W. 358; *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 600; 46 S. W. 389; *Mulcairns v. Zanesville*, 67 Wis. 24; 29 N. W. 565. But see *Robertson v. Cornelson*, 34 Fed. 716; *McNamara v. King*, 7 Ill. 432; *Hunt v. Chic.*, etc., *R. R. Co.*, 26 Iowa, 363; *Stafford v. Oskaloosa*, 64 Iowa, 251; *Eltringham v. Earhart*, 67 Miss. 488; *Carpenter v. McDavitt*, 66 Mo. App. 1; *Dailey v. Houston*, 58 Mo. 361; *Youngblood v. So. Car. & G. R. Co.*, 60 S. C. 9; 38 S. E. 232.

² *Sesler v. Rolfe Coal & Coke Co.* (W. Va. 1902), 41 S. E. 216, per *Brannon*.

³ 102 U. S. 451; 26 L. Ed. 141.

⁴ *Moore v. City of Huntington*, 31 W. Va. 842; 8 S. E. 512.

to human sympathy and tended both to induce a verdict for the plaintiff and to aggravate damages. Where improper evidence is given it is presumed to work injury unless it very plainly appears not to have done so."⁵ So it has been decided that evidence is not admissible of plaintiff's poverty or of the number and ages of his children,⁶ or that he is poor and has no means to live upon except his earnings,⁷ that the plaintiff has no way of supporting himself, of the financial condition of his mother and brother,⁸ or that plaintiff had been committed to the almshouse.⁹ But where the nature and extent of the plaintiff's injuries were in dispute and the wife of the plaintiff had testified as to the manifestation of disease in her husband, it was held that for the purpose of explaining why no other member of the family had been called for the purpose of testifying in reference thereto, evidence was admissible that the plaintiff's family consisted of his wife and two children, aged seven and five years respectively.¹⁰ So, also, in the case of an action by a widow for personal injuries evidence that she had children dependent upon her for support was held not admissible.¹¹

§ 264. Same subject continued.—The financial condition of the parent should not be considered in an action to recover for an injury to a minor.¹² So the jury in assessing the damages should not consider the plaintiff's membership in any church or society.¹³ In a case in Iowa, it was held proper to permit plaintiff to prove "that he had no means or property to subsist upon and that he was entirely dependent upon his la-

⁵ Taylor v. Railroad Co., 36 W. Va. 39; 10 S. E. 29.

⁶ Penn. Co. v. Roy, 102 U. S. 451. But in an action by a husband to recover for the loss of his wife's services to himself and children as a result of a personal injury, evidence is admissible as to the number and ages of the plaintiff's children. Conway v. New Orleans & C. R. Co., 46 La. Ann. 1429; 16 So. 362.

⁷ Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 600; 46 S. W. 389.

⁸ Alabama G. S. R. Co. v. Carroll (C. C. App. 5th C.), 52 U. S. App. 442;

84 Fed. 772; 28 C. C. A. 207; 9 Am. & Eng. R. Cas. N. S. 759.

⁹ Schwanzen v. Brooklyn H. R. Co., 18 App. Div. (N. Y.) 205; 45 N. Y. Supp. 389.

¹⁰ Southern P. Co. v. Rauh (C. C. App. 9th C.), 49 Fed. 696; 7 U. S. App. 84.

¹¹ Shaw v. Boston, etc., R. R. Co., 8 Gray (Mass.), 45.

¹² Barnes v. Keene, 132 N. Y. 13; Vosburg v. Putney, 78 Wis. 84; 47 N. W. 99.

¹³ Denton v. Ordway, 108 Iowa, 487; 79 N. W. 276.

bor for support.¹⁴ This decision has been followed by later cases in that state, so that the rule now seems to be settled there that such evidence is admissible.¹⁵ In Illinois it has been decided that the husband's financial condition may be admissible in certain cases as tending to show the extent of the injury to the wife, since, owing to his pecuniary condition, preventing him from furnishing medical aid, remedies, apartments and nursing such as ample means would afford, the pain and suffering may be much greater.¹⁶ And on similar grounds such evidence was admitted in a case in Mississippi.¹⁷ And the extent of the plaintiff's accumulations as a result of his personal labor and work may be given in evidence as bearing upon his earning capacity.¹⁸ Although evidence of the financial condition of the plaintiff or that he is dependent upon his earnings is, as we have stated, generally inadmissible for the purpose of enhancing damages, yet where the object of such evidence was to show that the plaintiff had resorted to the best medical advice within his reach, it was held to be properly admitted.¹⁹ And evidence that the plaintiff was a widow is admissible as tending to show that whatever time was lost by reason of her disability was her own.²⁰ So again, in reply to evidence that the attorneys of the plaintiff were to share in any judgment recovered by her, evidence was admitted that the plaintiff was poor, for the purpose of showing that she was unable to employ counsel in any other way.²¹

§ 265. Evidence as to defendant's condition in life.—Evidence of the defendant's financial condition or of his ability to pay is as a general rule inadmissible in an action to recover for personal injuries.²² In this connection it is said in a late case in

¹⁴ *Hunt v. Chic., etc., R. R. Co.*, 26 Iowa, 363.

¹⁵ *Stafford v. Oskaloosa*, 64 Iowa, 251; *Moore v. Central R. R. Co.*, 47 Iowa, 688.

¹⁶ *Cochran v. Ammon*, 16 Ill. 316.

¹⁷ *Eltringham v. Earhart*, 67 Miss. 488.

¹⁸ *Shaber v. St. Paul, etc., R. R. Co.*, 28 Minn. 104.

¹⁹ *Alberti v. New York, L. E. & W. R. R. Co.*, 118 N. Y. 77; 27 N. Y. St.

R. 865; 23 N. E. 35, aff'g 43 Hun, 421.

²⁰ *Werner v. Chic. & N. W. Ry. Co. (Wis.)*, 81 N. W. 416. See *Corrigan v. Dry Dock R. R. Co.*, 6 N. Y. St. R. 243.

²¹ *Arndt v. Bourke (Mich.)*, 79 N. W. 190; 6 Det. L. N. 140.

²² *Toledo, Wabash & W. Ry. Co. v. Smith*, 57 Ill. 517; *Hunt v. Chic. etc., R. R. Co.*, 26 Iowa, 363; *Laidlaw v. Sage*, 158 N. Y. 73; 52 N. E.

New York: ³⁵ "It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases where position or wealth is necessarily involved in determining the damages sustained. As to this general proposition there can be no doubt and no authorities need be cited. Notwithstanding this well-established principle the plaintiff was permitted to show by the defendant upon his cross-examination substantially, or at least to a great extent, the amount of property possessed by him, its character, and his business. He was permitted to show the number of railroads the defendant operated, the banks in which he was a director, that he dealt in stocks, that he loaned money and other details of his affairs."³⁶ But where the person responsible for the injury was actuated by a bad motive and where other facts exist which would authorize the jury to award exemplary damages, evidence of the defendant's pecuniary circumstances may, it is held, be admitted.³⁷ In a case in Louisiana it is decided that in estimating the damages in an action for personal injuries, the jury may properly consider the defendant's circumstances to a reasonable extent.³⁸

§ 266. Evidence as to character of plaintiff—Chastity of female.—In actions to recover for personal injuries, the general rule seems to be that evidence either as to the good or bad character of the plaintiff is inadmissible on the question of damages unless it in some way contributed to the injury.³⁹ So evidence that the plaintiff who had been teaching school in another state

679; 44 L. R. A. 216, rev'g 2 App. Div. 374; 73 N. Y. St. R. 469; 37 N. Y. Supp. 770; *Moody v. Osgood*, 50 Barb. (N. Y.) 628; *Englert v. Kruse*, 8 N. Y. St. R. 375.

³⁵ *Laidlaw v. Sage*, 158 N. Y. 103; 52 N. E. 679; 44 L. R. A. 216.

³⁶ *Per Martin, J.*

³⁷ *Courvoisier v. Raymond*, 23 Colo. 114; 47 Pac. 284; *Hunt v. Chic.*, etc., R. R. Co., 26 Iowa, 363; *Eagle v.*

Kabrick, 66 Mo. App. 231; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6.

³⁸ *Loyacano v. Jurgeus*, 50 La. Ann. 441; 23 So. 717. See *Belknap v. Boston & Maine R. R. Co.*, 49 N. H. 358.

³⁹ *Indianapolis, etc., R. R. Co. v. Bush*, 101 Ind. 582; *Baltimore, etc., R. R. Co. v. Boteler*, 38 Md. 568; *Bruce v. Priest*, 5 Allen (Mass.), 100; *Littlehale v. Dix*, 11 Cush. (Mass.)

had been compelled to leave such state because of his immorality was held inadmissible.²⁹ Nor in an action for an assault is evidence for the purpose of impeaching plaintiff's character admissible.³⁰ And the fact that the plaintiff is a vagrant or a professional gambler should not affect the damages to be awarded him for his mental and physical pain and suffering.³⁰ Again, evidence that the plaintiff was a man of intemperate habits and that he was unable to transact business when intoxicated, has been held inadmissible on the question of damages.³¹ It is held, however, that evidence that the plaintiff was a sober and industrious man is admissible on such question.³² And in Wisconsin in an action by a passenger to recover for personal injuries, it was declared by the appellate court that a charge by the trial court that the amount of damages was not to be affected by the unchastity of the plaintiff, and that she was entitled to the same amount as a chaste woman, had a tendency to mislead the jury. The court declared that while an unchaste woman might suffer as much mental and physical pain as a chaste woman, yet the jury might not and perhaps ought not to give the same damages to an unchaste woman as they would to a virtuous, intelligent and industrious woman who could command good wages or take care of a family, and that the chastity of the plaintiff as well as other personal virtues and business qualifications might properly be considered in determining the amount of damages to be awarded.³³ There are certain actions in which the unchastity of a woman may properly be considered by the jury in determining what, if any, damages she is entitled to recover.³⁴ But to hold that in an action for physical injuries the fact of a woman being unchaste may be considered by the jury on the question of damages and that a chaste woman may recover more than an unchaste woman is a proposition of which it is hard to ap-

364; *Johnson v. Wells*, 6 Nev. 224; *Corning v. Corning*, 6 N. Y. 97; *McKenzie v. Allen*, 3 Strobh. (S. C.) 546. And see *Hardy v. Minneapolis, etc., Ry. Co.*, 36 Fed. 657.

²⁹ *Lord v. Mobile*, 118 Ala. 360; 21 So. 366.

³⁰ *Corning v. Corning*, 6 N. Y. 97.

³¹ *Boyle v. Case*, 18 Fed. 880.

³² *Baltimore, etc., R. R. Co. v. Boteler*, 38 Md. 568.

³³ *Metropolitan St. R. Co. v. Kennedy* (C. C. App. 2d C.), 51 U. S. App. 503; 82 Fed. 158.

³⁴ *Abbott v. Tolliver*, 71 Wis. 74; 36 N. W. 622.

³⁵ See chaps. XX, XXI, herein.

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prove. Unless a woman's chastity is directly involved by the character of the action, it would seem that evidence upon that point would be incompetent on the question of damages and such we believe is the proper rule.

§ 267. Evidence as to expectancy of life—Mortality tables.

—In actions to recover for personal injuries, evidence is admissible in certain cases as to the life expectancy of the person injured.³⁵ Such evidence is, however, only admissible in those cases where the plaintiff seeks to recover for a permanent injury and where there is some evidence tending to show that such an injury has been sustained, and where proof to this effect has been given, mortality tables such as the Northampton, Carlisle or other standard ones may be admitted for the purpose of showing the life expectancy of the person injured.³⁶

§ 268. Same subject continued.—As to the admissibility of mortality tables in evidence, it has been declared by the United States supreme court that courts may take judicial notice of the Carlisle tables, and may use them for the purpose of estimating the probable duration of life without regard to whether

³⁵ *Missouri, K. & T. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345; 51 S. W. 666; *Missouri, K. & T. R. Co. v. Simmons*, 12 Tex. Civ. App. 501; 33 S. W. 1096; *Waterman v. Chic. & A. R. Co. (Wis.)*, 52 N. W. 247.

³⁶ *Whelan v. N. Y. L. E. & W. R. Co.*, 38 Fed. 15; *Richmond & D. R. Co. v. Hissong (Ala.)*, 13 So. 209; *Arkansas M. R. Co. v. Griffith*, 63 Ark. 491; 39 S. W. 550; *Townsend v. Briggs (Cal.)*, 32 Pac. 307; *Collins Park & B. R. Co. v. Ware*, 112 Ga. 663; 37 S. E. 975; *Columbus v. Ogle-tree*, 102 Ga. 293; 29 S. E. 749; *Columbus v. Sims*, 94 Ga. 483; 20 S. E. 332; *Savannah, A. & M. R. Co. v. McLeod*, 94 Ga. 530; 20 S. E. 434; *Huntington v. Burke*, 21 Ind. App. 655; 52 N. E. 415; 1 Repr. 435; *Stomne v. Hanford Produce Co.*, 108 Iowa, 437; 78 N. W. 841; *Keyes v. Cedar Falls*, 107 Iowa, 509; 78 N. W. 227; *Allen v. Ames & C. R. Co.*, 106 Iowa, 602; 76 N. W. 848; *McDonald v. Chic., etc., R. R. Co.*, 26 Iowa, 124; *Greer v. Louisville & N. R. Co.*, 14 Ky. L. Rep. 876; 21 S. W. 649; *Foster v. Village of Bellaire (Mich. 1901)*, 86 N. W. 383; 8 Det. L. N. 203; *Leach v. Detroit Elec. Ry. Co. (Mich. 1900)*, 84 N. W. 316; 7 Det. L. N. 747; *Mott v. Detroit (Mich.)*, 15 Am. & Eng. R. Cas. N. S. 113; 79 N. W. 3; 6 Det. L. N. 87; *Deisen v. Chic., etc., R. R. Co.*, 43 Minn. 454; 45 N. W. 864; *Swift & Co. v. Holonbeck*, 55 Neb. 228; 75 N. W. 584; 4 Am. Neg. Rep. 509; *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646; 40 Atl. 634; 11 Am. & Eng. R. Cas. N. S. 600; *Campbell v. York*, 172 Pa. 205; 33 Atl. 879; *Kerrigan v. Penn. R. R. Co. (Pa. 1899)*, 44 Atl. 1069; *Steinbrunner v. Pitts-*

they have been introduced in evidence or not.³⁷ And in New York it is decided that the court may take judicial notice of the Northampton tables, though they are not put in evidence, since they are referred to and made a part of its rules.³⁸ The admissibility of such tables is held not to depend upon the condition of the health of the person whose expectancy of life is a subject of inquiry, but such condition may be considered as a qualification of the tables in evidence and in determining the probable duration of life. So the existence of a disease, and its tendency to shorten the life of the injured person, is to be considered in connection with such tables.³⁹ But where the jury were instructed that the plaintiff's expectation of life was "estimated by the Carlisle and other life tables at forty to forty-five years, and that they could take that as a means of estimation of what would compensate him for his loss," it was held that such instruction was erroneous since it allowed the jury to infer that plaintiff's expectancy was established by the tables, and that they were not to be given such weight in the absence of evidence showing that the plaintiff was clearly within the class of lives tabulated therein.⁴⁰ It was declared in this case that Carlisle tables are admissible only as some evidence for the consideration of the jury in determining the expectancy of life where that question becomes material, but they are by no means conclusive, and their value depends greatly on similarity of the life in question to the conditions and habits of those tabulated a century ago. While they are some evidence thereof they do not establish plaintiff's expectancy unless by precedent proof; the person whose life expectancy it is intended to show has brought himself clearly within the class of selected lives tabu-

burg, etc., R. R. Co., 146 Pa. St. 504; 23 Atl. 239; Missouri, K. & T. R. Co. v. Simmons, 12 Tex. Civ. App. 501; 33 S. W. 1096; Waterman v. Chic. & A. R. Co. (Wis.), 52 N. W. 247.

³⁷ Lincoln v. Power, 151 U. S. 436; 38 L. Ed. 224; 14 Sup. Ct. Rep. 387.

³⁸ Davis v. Standish, 26 Hun (N. Y.), 608. See as to admissibility of such tables in this state, Sauter v. N. Y. C. & H. R. R. Co., 66 N. Y. 50, aff'g 6 Hun, 446; Schell v. Plumb, 55

N. Y. 592, aff'g 46 How. 11; 16 Abb. N. S. 19.

³⁹ Greer v. Louisville & N. R. Co., 14 Ky. L. Rep. 876; 21 S. W. 649; Arkansas, M. R. Co. v. Griffith, 63 Ark. 491; 39 S. W. 550; Camden & A. R. Co. v. Williams, 61 N. J. L. 646; 40 Atl. 634; 11 Am. & Eng. R. Cas. N. S. 600.

⁴⁰ Kerrigan v. Penn. R. R. Co., 194 Pa. St. 98, 105, 106; 44 Atl. 1069.

lated. But mere proof of age and occupation without evidence of habits or health gives to such tables but little weight, and this is substantially true of tables made up by actuaries of reputable insurance companies.⁴¹ In Wisconsin it is held that the annuity tables given in certain statutes⁴² of that state form no mathematical basis for the estimation of damages for personal injuries not resulting in death.⁴³ And in Pennsylvania in an action for personal injury, annuity tables are not admissible. Such a table is based on the average anticipation of death, without taking account of capacity to work, indolence, vicious habits or tendency thereto, or diminution of ability to earn. The health, earning power or industry of the particular individual have no place in the calculation.⁴⁴

§ 269. Same subject continued—Cases.—Where it is alleged that the injuries are permanent, it is held that mortality tables are not properly admissible unless there be some evidence as to the value of plaintiff's services.⁴⁵ In another case an instruction to the jury which in substance authorized them to determine the yearly amount of the plaintiff's diminished earning capacity and then after multiplying this by the number of years of his expectancy of life to reduce the entire amount to its present value was

⁴¹ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. 98, 105, 106, per Dean, J., 44 Atl. 1069. This was a case of suit for damages for personal injury to a brakeman on defendant's railroad, who had his right arm crushed while coupling cars. The plaintiff offered in evidence 2 Scribner on Dower (ed. 1883), pp. 811, 812, 818, containing the Carlisle and other tables for the purpose of showing the expectancy of life of the plaintiff, and it was declared that the offer was general in its character and pointed to no particular life table as applicable to the special facts of this case. It was not suggested whose lives, or what class of persons, or what the perils of their daily employment or avocation. "The court without the

least aid from either counsel admitted the offer, we do not doubt inadvertently, and thus fell into error." Id. 105, per Dean, J. The cases cited in connection with the above text herein are *Steinbrunner v. R. Co.*, 146 Pa. 504; *Kraut v. Ry. Co.*, 160 Pa. 327, and *Campbell v. York*, 172 Pa. 222.

⁴² Wis. Rev. Stat. 1898, p. 2461.

⁴³ *Crouse v. Chic. & N. W. R. Co.*, 102 Wis. 196; 78 N. W. 446; 14 Am. & Eng. R. Cas. N. S. 780.

⁴⁴ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. 98, 106, 107; 44 Atl. 1069, per Dean, J.

⁴⁵ *Macon, D. & S. R. Co. v. Moore*, 99 Ga. 229; 5 Am. & Eng. R. Cas. N. S. 355; 25 S. E. 460.

held not erroneous.⁴⁶ In an earlier case in the same state it was decided that in using annuity tables as a basis of earnings and age in an action to recover for personal injuries by which the earning capacity of the plaintiff was diminished one half, there should be made a proportionate deduction for his continuing ability to labor, an allowance for probable decreased ability as a result of old age and for contributory negligence if the jury found that he had been guilty thereof.⁴⁷ But where there has been only a partial impairment of ability to earn money, it has been declared error to admit evidence of life expectancy.⁴⁸ In determining the expectancy of life by the use of mortality tables in the case of a minor, the expectancy must be based upon the actual age of the minor and not from the age of twenty-one, although in the absence of evidence of emancipation he cannot recover for loss of earnings prior to his majority.⁴⁹ Where a person is suing for a physical injury which has been inflicted upon him, the shortening of his expectancy of life is held not to be recoverable by the person injured.⁵⁰

§ 270. Presumption against seriousness of injury—Evidence to rebut.—Where it appears in evidence that the plaintiff resumed work shortly after receiving the injury, whatever, if any, presumption may arise against the seriousness of the injuries from such fact may be rebutted by evidence that circumstances compelled him to resume his work.⁵¹

§ 271. Admission in evidence of deposition charging attempt to make injuries appear worse, erroneous—Case.—Where a deposition which charges that the plaintiff is attempting to make his injuries appear worse than they really are is erroneously admitted, the admission thereof is reversible error.⁵²

⁴⁶ *Columbus v. Ogletree*, 102 Ga. 293; 29 S. E. 749. See Secs 242-249, herein.

⁴⁷ *Savannah, R. & M. R. Co. v. McLeod*, 94 Ga. 530; 20 S. E. 434.

⁴⁸ *Honey Grove v. Lamaster* (Tex. Civ. App.), 50 S. W. 1053.

⁴⁹ *Swift & Co. v. Holonbeck*, 55 Neb. 228; 79 N. W. 584; 4 Am. Neg. Rep. 509.

⁵⁰ *Richmond Gas Co. v. Baker*, 146 Ind. 600; 36 L. R. A. 683; 45 N. E. 1049.

⁵¹ *Burleson v. Reading*, 110 Misc. 512; 68 N. W. 294; 3 Det. L. N. 476; 29 Chic. Leg. News 27.

⁵² *Boise v. Atchison, T. & S. F. R. Co.*, 6 Okla. 243; 51 Pac. 662.

§§ 272-274 EVIDENCE IN PHYSICAL INJURY CASES.

§ 272. Action against city—Judgment roll conclusive in action on bond.—Where in an action against a city for personal injuries caused by an obstruction placed in the street by contractors for the construction of a sewer, such contractors together with the sureties on the bond had notice of the pendency of the suit and opportunity to defend the same, the judgment roll in such action is conclusive evidence, in an action by the city on a bond indemnifying it from all actions against it for damages for personal injuries, of the existence of the obstruction, of the freedom of the injured party from contributory negligence, and of the amount of the damages.³³

§ 273. Exemplary damages—Evidence in mitigation of.—Where a person has been injured by the negligence of another and the evidence in behalf of the plaintiff in an action to recover therefor tends to show that the negligence was of such a character as to authorize the award of vindictive damages, evidence in behalf of the defendant is admissible for the purpose of showing that the negligence was not of such a character, and to thus keep down exemplary damages. So where the complaint in an action by a person who had been injured by the bursting of a steamboat boiler alleged that the engineer was "unlicensed" and that the explosion was due to his negligence and unskillfulness, and evidence was given tending to show a flagrant violation of duty in employing him, it was held that it was proper for defendant to prove that he was a competent engineer for the purpose of rebutting such evidence and keeping down vindictive damages.³⁴

§ 274. Expert and opinion evidence—Future consequences of physical injuries.—Where medical men have attended and examined an injured person their opinions as to the future consequences and permanency of such injuries are admissible in evidence.³⁵ So the opinion of a physician who has attended an

³³ *New York v. Brady*, 151 N. Y. 611; 45 N. E. 1122.

³⁴ *Fay v. Davidson*, 13 Minn. 523.

³⁵ *Cunningham v. N. Y. C. & H. R. R. Co.* (C. C. S. D. N. Y.), 49 Fed. 439; *Healy v. Visalia & T. R.*

Co., 101 Cal. 535; 36 Pac. 125; *Denver Tramway Co. v. Reid* (Colo. App.), 35 Pac. 269; *Chattanooga R. & C. R. Co. v. Huggins*, 89 Ga. 494; 15 S. E. 848; 52 Am. & Eng. R. Cas. 473; *Springfield Consol. R.*

injured person, whether the fact that such person had not recovered from his injuries at the time of the trial would indicate that such injuries were permanent, is admissible,⁵⁶ as is also his opinion as to the permanency of the shortening of an injured person's leg as a result of an injury, from its known condition at the time of the trial.⁵⁷ And again, the opinion of a witness that the plaintiff could, since the injury, perform no duties requiring the slightest physical exercise, and that during his severe attacks he could do nothing and that at his best he cannot do anything but jobs of a light nature has been held properly admitted.⁵⁸ So, also, it is competent for a physician to

Co. v. Welsh, 155 Ill. 511; 40 N. E. 1084, aff'g 56 Ill. App. 196; Lake Erie & W. R. Co. v. Wills, 39 Ill. App. 649; Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544; 14 N. E. 572; 12 West. 303; Erickson v. Barber (Iowa), 49 N. W. 838; Holman v. Union St. R. Co., 114 Mich. 208; 72 N. W. 202; 9 Am. & Eng. R. Cas. N. S. 106; 4 Det. L. N. 518; Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77; 54 N. W. 638; Langworthy v. Green Twp., 88 Mich. 207; 50 N. W. 130; Brazil v. Pierson, 44 Minn. 212; 46 N. W. 331; Peterson v. Chicago, M. & St. P. R. Co., 38 Minn. 511; 39 N. W. 485; Barr v. Kansas City (Mo.), 25 S. W. 562; Chicago, R. I. & P. R. Co. v. Archer, 46 Neb. 907; 65 N. W. 1043; Knoll v. Third Ave. R. Co. (N. Y. 1901), 60 N. E. 1113, aff'g 46 App. Div. 527; 62 N. Y. Supp. 16; Ayres v. Del. I. & W. R. Co., 158 N. Y. 254; 53 N. E. 22; 5 Am. Neg. Rep. 683, aff'g 4 App. Div. 511; 40 N. Y. Supp. 11; Griswold v. N. Y. C. & H. R. R. Co., 115 N. Y. 61; 23 N. Y. St. R. 729; 21 N. E. 726; Clegg v. Metropolitan St. R. Co., 1 App. Div. (N. Y.) 207; 72 N. Y. St. R. 737; 37 N. Y. Supp. 130, aff'd 54 N. E. 1069; Stever v. N. Y. C. & H. R. R. Co., 7 App. Div. (N. Y.) 302; 39 N. Y. Supp. 941; appeal dis-

missed in 151 N. Y. 50; 45 N. E. 371; 64 Alb. L. J. 377; O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 74; 54 N. Y. Supp. 96; 58 Alb. L. J. 347; Barkley v. N. Y. C. & H. R. R. Co., 35 App. Div. (N. Y.) 228; 54 N. Y. Supp. 766; 5 Am. Neg. Rep. 218; Reynolds v. Niagara Falls, 81 Hun (N. Y.), 353; 63 N. Y. St. R. 118; 30 N. Y. Supp. 954; McCooey v. Forty-Second St. & G. St. Ferry R. Co., 79 Hun (N. Y.), 256; 61 N. Y. St. R. 34; 29 N. Y. Supp. 368; Saltzman v. Brooklyn City R. Co., 73 Hun (N. Y.), 567; 56 N. Y. St. R. 220; 26 N. Y. Supp. 311; Cannon v. Brooklyn City R. Co., 9 Misc. (N. Y.) 282; 61 N. Y. St. R. 147; 29 N. Y. Supp. 722; Coyne v. Manhattan R. Co., 42 N. Y. St. R. 617; 16 N. Y. Supp. 686; Cook v. N. Y. C. & H. R. R. Co., 1 N. Y. Supp. 711; Sabine & E. T. R. Co. v. Ewing (Tex. Civ. App.), 26 S. W. 638; Curran v. A. H. Stange Co., 98 Mis. 598; 74 N. W. 377; Lago v. Walsh, 98 Wis. 348; 74 N. W. 212.
⁵⁶ Erickson v. Barber (Iowa), 49 N. W. 838.

⁵⁷ Reynolds v. Niagara Falls, 81 Hun (N. Y.), 353; 63 N. Y. St. R. 118; 30 N. Y. Supp. 954.

⁵⁸ Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494; 15 S. E. 848; 52 Am. & Eng. R. Cas. 473.

testify that he knows to a reasonable certainty that the thickening of pleura which he has found will be permanent;⁵⁹ that as a result of an injury to a boy his ability to work when on his feet will be somewhat impaired and that he is a cripple, though the witness cannot state the extent of his disability;⁶⁰ and that a person's life will probably be shortened as a result of the injuries sustained.⁶¹

§ 275. *Same subject continued.*—It is proper to ask a physician as to the probability of an injured person's recovery.⁶² So it is declared in a late decision that "it is well settled by our decisions that in establishing the future physical and mental impairment of which damages may be recovered in such cases, by the testimony of duly qualified witnesses, they may be permitted to give their opinion as to the probability of such disability as a direct and natural effect of the injury in question. In *Railway Company v. Wood*,⁶³ it is said: 'The questions asked the medical witnesses were as to the probable results that would follow from an injury described by the witnesses, who testified on the trial. We understand it to be well settled that such questions are proper. . . . The cases cited by counsel are directly against them for they both concede that it is competent to ask an opinion as to probable results, although it is held that merely speculative opinions are not competent.'"⁶⁴ And expert evidence is admissible to show that a person is permanently injured under a complaint alleging incapacity to work for a certain length of time past, permanent injury, and that the plaintiff will continue to suffer pain and anguish for the rest of his life.⁶⁵ So, also, a physician, who has attended the injured person and has testified as to her condition and the probable cause thereof, may also testify as to what percentage of persons in her con-

⁵⁹ *Eifinger v. Brooklyn Heights R. Co.*, 13 Misc. (N. Y.) 389; 34 N. Y. Supp. 239; 68 N. Y. St. R. 118.

⁶⁰ *Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511; 40 N. E. 1034, aff'g 56 Ill. App. 196.

⁶¹ *Barr v. Kansas City (Mo.)*, 25 S. W. 562.

⁶² *Clegg v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 207; 37 N. Y. St. R. 130,

aff'd 54 N. E. 1089; *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn. 511; 39 N. W. 485.

⁶³ 113 Ind. 544, 558; 14 N. E. 572, 580.

⁶⁴ *Lake Lighting Co. v. Lewis* (Ind. App. 1902), 64 N. E. 35, per Black, J.

⁶⁵ *Taylor v. City of Ballard*, 24 Wash. 191; 64 Pac. 143.

dition recover their health, his statement being based upon his experience, practice and observation.⁶⁶ And where a medical expert in reply to a question as to the possible future consequences of an injury states that there are cases on record of such injuries producing death in future years, such testimony is not inadmissible as in effect permitting the introduction of medical books to the jury, since the reference to such cases is for the purpose of showing the basis of the opinion and information of the witness.⁶⁷ So the opinion of medical experts as to the nature and future consequences of personal injuries is admissible, though learning derived from the study of standard medical works is the basis of such opinion and not experience acquired from actual practice.⁶⁸ Again, the testimony of a physician is admissible as to the length of time that a person will live under certain conditions, although he states that he can only give the probability as to this based on the history of other cases.⁶⁹ But a physician cannot be asked his opinion as to the permanency of injuries from his examination of the plaintiff made a few days after the injury and the history of the case where no evidence touching such history had been given on the trial.⁷⁰

§ 276. Expert evidence not admissible as to speculative or possible future consequences. While expert evidence is admissible as to the future consequences of an injury, yet to authorize its admission the consequences must be such as are reasonably certain to ensue, and evidence is not admissible as to consequences which it is merely possible may ensue.⁷¹ So where a medical expert declined to say that the future results concern-

⁶⁶ *Cole v. Lake Shore & M. S. R. Co.*, 95 Mich. 77; 54 N. W. 638; *Budd v. Salt Lake City R. Co.* (Utah, 1901), 65 Pac. 486.

⁶⁷ *Healy v. Visalia & T. R. Co.*, 101 Cal. 585; 36 Pac. 125.

⁶⁸ *Fordyce v. Moore* (Tex. Civ. App.), 22 S. W. 235. See also *Jackson v. Boone*, 93 Ga. 662; 20 S. E. 46; 47 Am. & Eng. Corp. Cas. 54; *Mo. K. & T. R. Co. v. Rose*, 19 Tex. Civ. App. 470; 49 S. W. 133.

⁶⁹ *Alberti v. N. Y. L. E. & W. R. Co.*, 118 N. Y. 77; 6 L. R. A. 765; 2 N. Y. St. R. 865; 2 N. E. 35; 4 Am. & Eng. R. Cas. 201.

⁷⁰ *McCabe v. Third Ave. R. Co.*, 22 Misc. (N. Y.) 707; 50 N. Y. Supp. 34.

⁷¹ *Ganiard v. Rochester, C. & B. R. Co.*, 50 Hun (N. Y.), 22; 18 N. Y. St. R. 692; 2 N. Y. Supp. 470; 121 N. Y. 661; *Magee v. Troy*, 48 Hun (N. Y.), 383; 119 N. Y. 640; *Reichman v. Second Ave. Ry. Co.*, 15 N.

ing which he was testifying would ensue with reasonable certainty and confessed that there was a certain amount of uncertainty in reference thereto, it was held that the testimony was incompetent.⁷² So it is error to allow a physician to testify as to the merely possible outbreak of some new disease or suffering due to the original injury,⁷³ or that the pain and suffering resulting from the injury "might" be permanent.⁷⁴ And where the plaintiff was suffering from neuritis, it was held proper to exclude a question as to the effect if such disease extended upward so as to affect the spinal cord, since such consequences were too remote and speculative.⁷⁵ Again, it is incompetent for a physician to testify that in many cases of injuries similar to those from which plaintiff is suffering, certain consequences result, since such testimony is declared to be speculative and conjectural.⁷⁶ So also for the same reasons was it held improper to admit testimony of a physician that the injury from which plaintiff was suffering was liable to trouble him for several years, and that he knew of a case where an injury of that kind had troubled a man for about thirty years.⁷⁷

§ 277. Same subject continued.—A question to a medical expert as to what results are likely to follow from the injuries is improper.⁷⁸ But a physician may be asked whether he can state with reasonable certainty whether or not injuries are permanent in their nature.⁷⁹ And a question to a physician as to what in his opinion will in the "natural and ordinary course of events" be the result of plaintiff's injuries is not objectionable.⁸⁰

Y. St. R. 928; *Butler v. Manh. R. Co.*, 3 Misc. (N. Y.) 353; 52 N. Y. St. R. 498; 30 Abb. N. Cas. 78; 23 N. Y. Supp. 163. See also sec. 275 herein.

⁷² *De Soucey v. Manhattan R. Co.*, 39 N. Y. St. R. 79; 15 N. Y. Supp. 108.

⁷³ *O'Brien v. New York, N. H. & H. R. R. Co.*, 36 N. Y. St. R. 801; 13 N. Y. Supp. 305.

⁷⁴ *Elsas v. Second Ave. R. R. Co.*, 56 Hun (N. Y.), 161; 30 N. Y. St. R. 414; 9 N. Y. Supp. 210.

⁷⁵ *Yaeger v. Southern Cal. R. R. Co. (Cal.)*, 51 Pac. 190.

⁷⁶ *Jewell v. New York C. & H. R. R. Co.*, 27 App. Div. (N. Y.) 500; 50 N. Y. Supp. 848.

⁷⁷ *Miley v. Broadway & S. A. R. Co.*, 29 N. Y. St. R. 107; 8 N. Y. Supp. 455.

⁷⁸ *Atkins v. Man. R. Co.*, 57 Hun (N. Y.), 102; 32 N. Y. St. R. 214; 10 N. Y. Supp. 432.

⁷⁹ *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591; 47 N. Y. Supp. 356.

⁸⁰ *Loudoun v. Eighth Ave. R. Co.*, 16 App. Div. (N. Y.) 152; 44 N. Y. Supp. 742.

So, also, a physician may testify as to what would be the future result judging from the present condition of the plaintiff as indicated from her testimony and assuming it to be true.⁸¹ And where a medical expert in stating his opinion that the plaintiff would never recover, qualified it by adding "so far as to be capable of any persistent occupation," it was decided that such qualification was not a second speculative opinion based upon the first opinion and was not objectionable.⁸² Again, where a plaintiff was suffering from spinal irritation, it was held that the testimony of an expert that he was inclined to think that such irritation would prove permanent and that certain conditions and results were produced by permanent spinal irritation was not obnoxious to the objection that it was merely conjectural.⁸³ And it was similarly determined where a physician had testified that from the fact that a wound had once broken out it was liable to do so again and he was asked whether such result was probable and likely to occur.⁸⁴ So, also, where the plaintiff was suffering from a fracture of a leg, it was held that a medical witness might testify as to the probability of complete recovery therefrom and that such evidence was not objectionable as being too remote and speculative.⁸⁵ Again, it has been decided that a physician may be asked whether a "direct hernia" ever becomes dangerous to life or dangerous or painful in any way, where such question calls for no opinion as to some possible future complication, but rather as to some result which may ensue from existing conditions.⁸⁶

§ 278. Evidence of physician based on examination of injured person as to his condition.—Where a personal examination has been made by a physician of an injured person, the testimony of such physician as to the details of such examina-

⁸¹ *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560; 43 Pac. 528.

⁸² *Lehigh & H. R. R. Co. v. Merchant (C. C. App. 2d. C.)*, 84 Fed. 870; 55 U. S. App. 427; 28 C. C. A. 544.

⁸³ *Mahar v. New York C. & H. R. R. Co.*, 20 App. Div. (N. Y.) 161; 46 N. Y. Supp. 847.

⁸⁴ *Penny v. Rochester R. Co.*, 7

App. Div. (N. Y.) 596; 40 N. Y. Supp. 172; 74 N. Y. St. R. 732.

⁸⁵ *Rhines v. Royalton*, 40 N. Y. St. R. 662; 15 N. Y. Supp. 944.

⁸⁶ *Stever v. New York C. & H. R. R. Co.*, 7 App. Div. (N. Y.) 392; 39 N. Y. Supp. 944; appeal dismissed in 151 N. Y. 50; 45 N. E. 371; 54 Alb.

L. J. 377.

tion is admissible in evidence.⁸⁷ So the attending physician may testify as to the condition of a person when she reached her home and he first examined her,⁸⁸ and as to the plaintiff's subjective symptoms,⁸⁹ and as to any flinching or exclamations of the injured person when he pressed upon certain portions of the body.⁹⁰ And where a physician testified that he observed certain symptoms in his examination of the plaintiff from which the existence of a certain disease might be inferred, it was held that the fact that he did not have such disease in mind at the time of such examination or make a special examination in reference thereto, did not make such testimony inadmissible.⁹¹ Again, where an examination of the plaintiff by the physician was made two years after the injury, it was decided that his testimony as to the plaintiff's condition at that time was not rendered inadmissible by reason of the fact that he was unable to state the cause of such condition, where it appeared from other evidence that prior to the accident the plaintiff was sound and well, but subsequent thereto was unable to do hard work.⁹² Where, however, a physician examines an injured person merely for the purpose of becoming a witness in the plaintiff's behalf or for any purpose other than advice or treatment, it is held that he cannot testify as to statements or complaints made by the plaintiff at the time of such examination in reference to his symptoms, sufferings or condition.⁹³ But where statements have been made by the plaintiff to his attending physician in order to enable the latter to prescribe for him, the physician may testify in reference thereto.⁹⁴

⁸⁷ *Stone v. Moore* (Iowa), 49 N. W. 76; *Sherwood v. Chic. & W. M. R. R. Co.*, 88 Mich. 108; 50 N. W. 101; *Jones v. Chic. St. P. M. & O. R. Co.* (Minn.), 45 N. W. 444; *Eifinger v. Brooklyn H. R. Co.*, 18 Misc. (N. Y.) 389; 34 N. Y. Supp. 239; 68 N. Y. St. R. 118.

⁸⁸ *Griffith v. Utica & M. R. R. Co.*, 43 N. Y. St. R. 835; 17 N. Y. Supp. 692.

⁸⁹ *Gulf C. & S. F. R. R. Co. v. Brown*, 16 Tex. Civ. App. 93; 40 S. W. 608.

⁹⁰ *Zingrebe v. Union Ry. Co.*, 56

App. Div. (N. Y.) 555; 67 N. Y. Supp. 554.

⁹¹ *Chicago, St. L. & P. R. R. Co. v. Spilker* (Ind.), 32 Am. L. Reg. 763; 33 N. E. 280, reh'g denied 34 N. E. 218.

⁹² *Hall v. St. Joseph Water Co.*, 43 Mo. App. 356.

⁹³ *Lake Shore & M. S. R. R. Co. v. Yokes*, 12 Ohio C. C. 499; 1 Ohio C. D. 599. See *Abbot v. Heath*, 84 Wis. 314; 54 N. W. 574.

⁹⁴ *Gulf C. & S. F. R. R. Co. v. Brown*, 16 Tex. Civ. App. 93; 40 S. W. 608.

And an attending physician who has testified as to complaints as to pains made by the injured person may express his opinion as to the nature and extent of the injuries.⁸⁵ So in a case in Illinois it is declared that where, from a personal examination of the plaintiff, an expert witness has formed an opinion in reference to such injury, such opinion is admissible in evidence for whatever it may be worth.⁸⁶

§ 279. Expert evidence based on statements of injured person.—The testimony of an expert in an action for personal injuries may be based in part upon the statements of the injured person where such statements are made to the physician for the purpose of medical treatment.⁸⁷ And a physician may from knowledge gained by an examination and inquiries of the injured person state the conclusions at which he has arrived.⁸⁸ So the opinion of a physician based in part upon the statements of the person injured may be given as to the nature and extent of the injury,⁸⁹ and as to the probable duration of physical suffering and disability.⁹⁰ And where a medical expert on cross-examination testified that his opinion as to a person's physical condition was based on the facts stated by the patient, it was decided that the court properly refused to strike out such opinion, it not appearing any of the statements related to past events.¹ But the opinion of a physician that his patient's condition might readily have followed as a result of the injury complained of is inadmissible where no evidence is given showing the statements upon which it was based.² And where a deposition of the patient had been made relating to the injury, it was declared that

⁸⁵ *Austin & N. W. R. R. Co. v. McMurry* (Tex. Civ. App.), 38 S. W. 249.

⁸⁶ *Chataworth v. Rowe*, 166 Ill. 114; 46 N. E. 763, aff'd 66 Ill. App. 55.

⁸⁷ *Cunan v. A. H. Stange Co.*, 98 Wis. 598; 74 N. W. 377. See also *Jones v. Chicago St. P. M. & O. R. Co.* (Minn.), 45 N. W. 444; *Atchison, T. & S. F. R. Co. v. Click* (Tex. Civ. App.), 32 S. W. 226.

⁸⁸ *Chicago, St. L. & P. R. Co. v. Spilker* (Ind.), 33 N. E. 280; 32 Am. Leg. Rep. 763, reh'g denied 34 N. E. 218.

⁸⁹ *Louisville, N. A. & C. R. Co. v. Snider*, 117 Ind. 435; 3 L. R. A. 434; 20 N. E. 284; *Johnson v. Northern P. R. R. Co.*, 47 Minn. 430; 50 N. W. 473.

⁹⁰ *Consol. Tract. Co. v. Lamberson*, 59 N. J. L. 297; 36 Atl. 100, aff'd 38 Atl. 683.

¹ *Fulmore v. St. Paul City R. Co.*, 72 Minn. 448; 75 N. W. 589; 11 Am. & Eng. R. Cas. N. S. 636.

² *Van Winkle v. Chicago, M. & St. P. R. R. Co.* (Iowa), 61 N. W. 929.

it would not be assumed in the absence of any evidence as to the statements upon which the opinion of the physician was based, that it was based upon the same statements as those contained in the deposition.³ So the opinion of an expert as to a person's condition and the probable future result of his injuries is not admissible where founded only upon statements made by such person a year after the accident, not for the purpose of securing the physician's medical services and aid, but merely to qualify him as an expert.⁴ Nor is the opinion of a physician as to the plaintiff's condition admissible in evidence where founded in part upon the statements of third persons.⁵

§ 280. Expert and opinion evidence—Appearance and condition before and after injury.—A witness, whether he be an expert or not, who knew the person injured both prior and subsequent to the injury, may testify to his apparent physical condition at both periods, since this is a matter of ordinary observation.⁶ So witnesses who are not experts may testify that prior to the accident they had seen the plaintiff about her household work and that she was apparently healthy and had a rosy complexion, but not afterwards;⁷ or that before the accident plaintiff's complexion was strong and healthy looking, but that

³ *Van Winkle v. Chicago, M. & St. P. R. R. Co.* (Iowa), 61 N. W. 929.

⁴ *Delaware, L. & W. R. Co. v. Roalefs* (C. C. App. 3d C.), 70 Fed. 21; 28 U. S. App. 569; 16 C. C. A. 601.

⁵ *Chicago, R. I. & P. R. R. Co. v. Sheldon*, 6 Kan. App. 347; 51 Pac. 808.

⁶ *Healy v. Visalia & T. R. Co.*, 101 Cal. 585; 36 Pac. 125; *District of Col. v. Haller* (D. C. App.), 22 Wash. L. Rep. 761; *North Chic. St. R. Co. v. Gillow*, 166 Ill. 444; 46 N. E. 1082, aff'g 64 Ill. App. 516; *West Chic. St. R. Co. v. Kennedy*, 165 Ill. 496; 46 N. E. 368, aff'g 64 Ill. App. 539; 1 Chic. L. J. Wkly. 341; *Chicago City R. Co. v. Van Vleck*, 143 Ill. 480; 32 N. E. 262; *Chicago St. L. & P. R. Co. v. Spilker* (Ind.), 33 N. E. 280;

32 Am. L. Reg. 763, reh'g denied 34 N. E. 218; *Weber v. Creston*, 75 Iowa, 16; 39 N. W. 126; *Gardner v. Detroit St. R. Co.*, 99 Mich. 182; 58 N. W. 49; *Reardon v. Missouri P. R. Co.* (Mo.), 21 S. W. 731; *Hewitt v. Eisenbart*, 36 Neb. 794; 55 N. W. 252; *Quinn v. O'Keefe*, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116; *Cannon v. Brooklyn City R. Co.*, 9 Misc. (N. Y.) 282; 61 N. Y. St. R. 147; 29 N. Y. Supp. 722; *Galveston, H. & S. A. R. Co. (Tex. Civ. App.)*, 26 S. W. 1007; *Sanson v. Conaway*, 37 W. Va. 159; 18 L. R. A. 627; 16 S. E. 564; *Bridge v. Oshkosh*, 71 Wis. 363; 37 N. W. 409.

⁷ *Cannon v. Brooklyn City R. Co.*, 9 Misc. (N. Y.) 282; 29 N. Y. Supp. 722; 61 N. Y. St. R. 147.

since such injury she looked pale, delicate and unhealthy.⁸ So evidence is admissible as to the difference in plaintiff's weight before and after the accident.⁹ And where a witness testified that she had seen the plaintiff several times directly after the injury, and had then seen him again about a month after that, and she described the apparent condition of the plaintiff, it was held that the opinion of the witness that the plaintiff had grown worse in the interval was admissible.¹⁰ The plaintiff may also testify as to the condition of his health before and after an injury.¹¹ Photographs of a person taken prior to an injury sustained by him may be admissible for the purpose of showing his physical appearance at the time taken, provided there is no direct evidence in reference thereto, but where direct evidence may be easily obtained, it is no abuse of discretion to exclude a photograph.¹²

§ 281. Expert evidence as to cause of condition.—The opinion of a physician is admissible as to the cause of an injured person's condition.¹³ So upon an issue whether a fall upon a defective sidewalk or a disease of several years' standing was the cause of paralysis, it was held that a medical expert might, in answer to a hypothetical question, state his opinion as to the proximate cause of such paralysis.¹⁴ But the opinion of a physician based on the examination of a witness and the facts stated, and the testimony given during the trial, is not admissible as to the cause of such witness's condition,¹⁵ although in another case it was decided that where medical ex-

⁸ Cannon v. Brooklyn City R. Co., 9 Misc. (N. Y.) 282; 29 N. Y. Supp. 722; 61 N. Y. St. R. 147.

⁹ Quinn v. O'Keefe, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116.

¹⁰ Louisville, N. A. & C. R. Co. v. Wood (Ind.), 14 N. E. 572.

¹¹ West Chicago St. R. Co. v. Carr, 170 Ill. 478; 48 N. E. 992, aff'd 67 Ill. App. 530.

¹² Gilbert v. West End St. R. Co., 160 Mass. 403; 36 N. E. 60.

¹³ Flaherty v. Powers, 167 Mass. 61; 44 N. E. 1074; Tullis v. Rankin, 6 N. D. 44; 35 L. R. A. 449; 68 N. W.

187; St. Louis S. W. R. Co. v. Freedman, 18 Tex. Civ. App. 553; 46 S. W. 101.

¹⁴ Bowen v. Huntington, 35 W. Va. 682; 14 S. E. 217. See Crone v. Chic. & N. W. R. R. Co., 102 Wis. 196; 14 Am. & Eng. R. Cas. N. S. 780; 78 N. W. 446.

¹⁵ McGuire v. Brooklyn H. R. Co., 30 App. Div. (N. Y.) 227; 51 N. Y. Supp. 1075. See Page v. New York, 57 Hun (N. Y.), 123; 32 N. Y. St. R. 563; 10 N. Y. Supp. 826; Vosberg v. Putney, 78 Wis. 84; 47 N. W. 99.

perts had heard the plaintiff give part of her testimony, and had heard the balance read, they might express their opinion as to the cause of a miscarriage, assuming such testimony to be true.¹⁶ Again, where it was claimed that a miscarriage was the result of an injury, it was held that it was competent for the plaintiff's physician to testify that such miscarriage might be traced to the injury.¹⁷ And where a medical witness had testified to the existence of a bruise and fracture, and of a subsequent abscess and inflammation in the same place, it was declared that he might express his opinion whether the former were the cause of the latter.¹⁸ So in other cases it has been competent for a physician to testify as to what in his opinion produced the symptoms which he observed in plaintiff's case,¹⁹ and whether plaintiff's condition when he last called was due to the injuries as he discovered them on his first visit,²⁰ and whether the physical condition in which he found an injured person could have resulted from the injury;²¹ and again whether plaintiff's suffering could have resulted from the accident,²² or his physical condition and suffering at the time of the trial,²³ or the impairment of his nervous system.²⁴

§ 282. Same subject continued.—A physician who has attended the plaintiff may testify whether any other cause existed which might have produced his condition as testified to by him.²⁵ So, also, the opinion of a physician whether fright

¹⁶ *McKeon v. Chicago, M. & S. P. R. R. Co.*, 94 Wis. 477; 35 L. R. A. 252; 69 N. W. 175; 2 Chic. L. J. Wkly. 175. See also *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560; 43 Pac. 528.

¹⁷ *Gibbons v. Phoenix*, 39 N. Y. St. R. 658; 15 N. Y. Supp. 410. See *State v. Ginger*, 80 Iowa, 574; 46 N. W. 657.

¹⁸ *Stouter v. Manhattan R. Co.*, 38 N. Y. St. R. 162; 27 N. E. 805.

¹⁹ *Louisville, N. A. & C. R. Co. v. Wood (Ind.)*, 14 N. E. 572.

²⁰ *McDonald v. Illinois C. R. Co. (Iowa)*, 55 N. W. 102.

²¹ *Hunter v. Third Ave. R. Co.*, 21 Misc. (N. Y.) 1; 46 N. Y. Supp.

1010, aff'g 20 Misc. 432; 45 N. Y. Supp. 1041. But see *Chic. R. I. & P. R. Co. v. Sheldon*, 6 Kan. App. 347; 51 Pac. 808.

²² *Turner v. Newburgh*, 109 N. Y. 301; 16 N. E. 344; 12 Cent. 215.

²³ *McDonald v. New York C. & St. L. R. R. Co.*, 13 Misc. (N. Y.) 651; 34 N. Y. Supp. 921. But see *Chicago, R. I. & P. R. Co. v. Sheldon*, 6 Kan. App. 347; 51 Pac. 808.

²⁴ *Clegg v. Met. St. Ry. Co.*, 1 App. Div. (N. Y.) 207; 37 N. Y. St. R. 130, aff'd 54 N. E. 1089.

²⁵ *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun (N. Y.), 205; 51 N. Y. St. R. 391; 22 N. Y. Supp. 104.

would produce heart trouble is admissible.²⁶ And in a case where it was claimed that retroversion of the womb was caused by the injury, it was held proper to permit a medical expert to testify that a blow upon the stomach would produce such effect.²⁷ So, again, testimony that a person's condition could have been produced by contact with a heavily charged electric wire has been held admissible.²⁸ And where it was claimed by the defendant that the serious results complained of by the plaintiff as arising from a fall were, in fact, caused by a permanent ailment affecting plaintiff's whole system, it was decided that expert evidence that a breast trouble not alleged in the complaint might have been aggravated by the fall, was admissible for the purpose of rebutting such claim and to corroborate the testimony of the plaintiff that it broke out anew as a result thereof, though such evidence was not admissible in aggravation of damages.²⁹ In those cases where evidence has been given tending to show that the condition of the plaintiff is attributable to a cause for which the defendant is responsible, it is held that the witnesses giving such testimony may be cross-examined for the purpose of showing that such condition is in part attributable to other causes.³⁰

§ 283. Expert evidence—Ordinary results from injury of like character.—A medical expert who has properly qualified may be asked what symptoms or results ordinarily and necessarily accompany or follow an injury such as that which the plaintiff has sustained, the purpose of such evidence being to show that the plaintiff's condition is a result of the injury.³¹ So,

²⁶ *Illinois C. R. Co. v. Latimer*, 128 Ill. 163; 21 N. E. 7.

²⁷ *Cannon v. Brooklyn City R. Co.*, 9 Misc. (N. Y.) 282; 61 N. Y. St. R. 147; 29 N. Y. Supp. 722.

²⁸ *Block v. Milwaukee St. R. Co.*, 89 Wis. 371; 27 L. R. A. 365; 61 N. W. 1101.

²⁹ *Fuller v. Jackson*, 92 Mich. 197; 52 N. W. 1075; 21 Wash. L. Rep. 378; 12 Ry. & Corp. L. J. 173. See also *Niendorf v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46; 38 N. Y. Supp. 690.

³⁰ *West Chic. St. R. Co. v. Reddy*, 69 Ill. App. 53; 2 Chic. L. J. Wkly. 173.

³¹ *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59; 53 N. E. 670, aff'g 87 Hun (N. Y.), 584; 34 N. Y. Supp. 572. See also *Evansville & T. H. R. R. Co.*, 116 Ind. 446; 19 N. E. 310; L. R. A. 450; *Louisville, N. A. & C. R. Co. v. Wood* (Ind.), 14 N. E. 572; *Crites v. New Richmond*, 98 Wis. 55; 78 N. W. 322.

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where a medical expert testified that the injury which the plaintiff had sustained was a severe sprain, it was held proper for him to state what results usually accompany or follow such an injury.³² But it has been declared improper to ask a physician whether he can state with reasonable certainty that the consequences which have followed a certain injury are natural and usual.³³

§ 284. Expert and opinion evidence—Malpractice—Cases.

—In an action for malpractice where it was claimed that a wounded thumb had been negligently treated, it was decided that a physician might examine the thumb in the presence of the jury and exhibit and describe its condition to them.³⁴ But where in a like action it was claimed by the defendants that they were prevented by the parents of the injured child from redressing a broken arm on a certain night, it was held that it would be incompetent as calling upon the witness to pass on the testimony to ask a physician who had no personal knowledge of the case, whether he would trace any of the results he had heard stated in evidence to the failure to redress the arm on that night.³⁵ And where a witness was called upon to testify whether proper treatment had been given in a certain case, it was determined that he could not testify whether his opinion was "sustained amply by the authorities" since this would indirectly call for statements from medical books.³⁶ So also, where a defendant testified that he had treated twenty-five or thirty cases of a Colles fracture, it was held that he could not testify as to the results in such cases since specific acts were held not to be competent on the question of general reputation as to skill.³⁷

§ 285. Opinions as to amount of damages—Elements of damages.—The opinion of the plaintiff as to the amount of

³² *Crites v. New Richmond*, 98 Wis. 55; 78 N. W. 322.

³³ *Page v. New York*, 57 Hun (N. Y.), 123; 32 N. Y. St. R. 563; 10 N. Y. Supp. 826.

³⁴ *Freeman v. Hutchinson*, 15 Ind. App. 639; 43 N. E. 16.

³⁵ *Link v. Sheldon*, 18 N. Y. Supp. 815.

³⁶ *Link v. Sheldon*, 18 N. Y. Supp. 815.

³⁷ *Link v. Sheldon*, 18 N. Y. Supp. 815.

damages which he has suffered as a result of a personal injury, is not admissible.³⁸ Thus it was so held in an action for malpractice, it being declared that instead of the plaintiff's opinion, all the facts bearing on such question should be presented to the jury.³⁹ And again, in an action by a parent for an injury to his child, a question to the parent as to the amount of damage he thought he had sustained by reason of such injury, taking into consideration the value of the child's services until his twenty-first year, together with the trouble and expense caused, should, it was held, be excluded.⁴⁰ But it is held that the admission of evidence as to the amount of damages, though it may be incompetent, is not reversible error where a larger verdict would be justified from the uncontroverted competent evidence.⁴¹ So also, the opinions of witnesses are not admissible as to what plaintiff would be capable of earning in some employment or vocation in which he had never been engaged as bearing upon the question of loss of time.⁴² But the plaintiff may give his opinion as to the fair and reasonable pecuniary value of his services by the day during the period of his disability from work as a result of the injury.⁴³ So also, in actions of this nature, the plaintiff's attending physician may testify as to the value of the services rendered by him to the plaintiff in connection with the injury.⁴⁴ And a person who takes care of and nurses an injured person is competent to express an opinion as to the value of such services.⁴⁵ Opinions of experts, however, are not absolutely binding upon the jury as to the value of services rendered, but the jury are to exercise their own judgment after a consideration, not only of the expert evidence, but

³⁸ *Pierce v. Lutesville*, 25 Mo. App. 317. See also *Atchison T. & S. F. R. Co. v. Snedeger*, 5 Kan. App. 700; 49 Pac. 103.

³⁹ *Bain v. Cushman*, 60 Vt. 343; 15 Atl. 171; 6 N. Eng. 805.

⁴⁰ *Hurt v. St. Louis, I. M. & S. Ry. (Mo.)*, 7 S. W. 1.

⁴¹ *Keller v. Gilman*, 93 Wis. 9; 66 N. W. 800.

⁴² *Atchison, T. & S. F. R. R. Co. v. Chance*, 57 Kan. 40; 4 Am. & Eng. R. Cas. N. S. 328; 45 Pac. 60.

⁴³ *Chicago & E. I. R. Co. v. Bivans*, 142 Ill. 401; 32 N. E. 456, aff'g 42 Ill. App. 450.

⁴⁴ *Williams v. West Bay City*, 119 Mich. 395; 71 N. W. 328; 5 Det. L. N. 845.

⁴⁵ *Wahl v. Shoulder*, 14 Ind. App. 635; 43 N. E. 458. See *Keenan v. Getsinger*, 1 App. Div. (N. Y.) 172; 73 N. Y. St. R. 413; 37 N. Y. Supp. 826.

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also of the nature of the services, time required to render them, and all other circumstances in connection therewith.⁴⁸

§ 286. Evidence as to feigning—Personal injuries.—The question may arise in some cases of actions to recover for personal injuries whether a person is feigning his manner, movements, actions, pain and suffering to affect his recovery. In cases where such a question arises evidence of expert medical men is admissible in reference thereto.⁴⁹ So, where it was claimed that the plaintiff was feigning as to the power to use his arm being impaired, it was held that an expert medical witness who had testified as to the shrunk condition of the arm might give his opinion that the plaintiff was not simulating.⁴⁸ And where experiments had been made by an expert for the defendant in order to determine whether the plaintiff's symptoms were feigned or real, it was held that his opinion as to whether the symptoms were feigned was admissible although the defendant could not ask him if he would say plaintiff was a "malingerer."⁴⁹ Again, where a person claimed that his spine had been injured, it was decided that testimony by a physician was admissible that the manner, movements and actions of the plaintiff could not have been feigned.⁵⁰ But the opinion of a physician that he believes plaintiff's injuries to be real and not simulated cannot be based on the mere fact that he has known him for a long time.⁵¹

§ 287. Hypothetical questions.—Hypothetical questions should cover the entire field of inquiry. So, where the proof showed causes for the symptoms of suffering exhibited by the plaintiff in addition to those alleged in the complaint, it was

⁴⁸ *Baker v. Richmond City Mill Works*, 105 Ga. 225; 81 S. E. 416.

⁴⁹ *Hanold v. Winona & St. P. R. Co.*, 47 Minn. 17; 49 N. W. 389; *Brown v. Third Ave. R. Co.*, 19 Misc. (N. Y.) 504; 43 N. Y. Supp. 1094, aff'g 18 Misc. 584; 42 N. Y. Supp. 700; *Missouri, K. & T. R. Co. v. Wright*, 19 Tex. Civ. App. 47; 47 S. W. 56. But see *Cole v. Lake Shore & M. S. R. Co.*, 95 Mich. 77; 54 N. W. 638.

⁴⁸ *Hanold v. Winona & St. P. R. Co.*, 47 Minn. 17; 49 N. W. 389.

⁴⁹ *Brown v. Third Ave. R. Co.*, 19 Misc. (N. Y.) 504; 43 N. Y. Supp. 1094, aff'g 18 Misc. 584; 42 N. Y. Supp. 700.

⁵⁰ *Missouri, K. & T. R. Co. v. Wright*, 19 Tex. Civ. App. 47; 47 S. W. 56.

⁵¹ *Austin & N. W. R. Co. v. McElmurry* (Tex. Civ. App.), 33 S. W. 249.

held that a hypothetical question which asserted such additional causes was proper.⁵² But where in an action to recover for an injury to an arm, the evidence showed that there had been but very little improvement in the use of the arm since a specified time, it was decided that a hypothetical question should not be disallowed merely because it omitted to make any mention of an improvement in some of the functions of the arm.⁵³ In another case the question, "Suppose during the first three months of the confinement of the patient, the attending surgeon would remove the splint for the purpose of permitting the bones to rub against each other and would put the splint back again, and you found the condition you now find, would you say the present condition is the result of proper or improper treatment?" was held not sufficiently comprehensive and therefore not a proper hypothetical question.⁵⁴

§ 288. Expert and opinion evidence—Cases generally.—

Where in an action for personal injuries it was claimed that the plaintiff's arm had been injured, testimony of a medical expert was declared to be admissible to determine whether an injured condition could co-exist with the plaintiff's ability to use the arm in the manner witnessed by the jury;⁵⁵ and a physician who has examined a plaintiff may testify whether the existence of certain symptoms as shown to exist in plaintiff's case indicated a disordered condition of the spinal cord.⁵⁶ So also, a physician may be asked whether since the trial commenced he has seen sufficient of the plaintiff to be able to state whether or not an abnormal nervous condition exists in his case.⁵⁷ And a physician may testify that the plaintiff was examined while under the influence of chloroform and as to her condition at the time of such examination where the chloroform was given as part of the treatment and there was no evidence given to

⁵² *Illinois C. R. Co. v. Griffin* (C. C. App. 7th C.), 53 U. S. App. 22; 25 C. C. A. 413; 80 Fed. 278.

⁵³ *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591; 47 N. Y. Supp. 356.

⁵⁴ *Atchison v. Acheson*, 9 Kan. App. 33; 57 Pac. 248.

⁵⁵ *Graves v. Battle Creek*, 95 Mich. 266; 19 L. R. A. 641; 54 N. W. 757.

⁵⁶ *Quinn v. O'Keefe*, 9 App. Div. (N. Y.) 68; 41 N. Y. Supp. 116.

⁵⁷ *Illinois C. R. Co. v. Griffin* (C. C. App. 7th C.), 80 Fed. 278; 25 C. C. A. 413; 53 U. S. App. 22.

show that it was unnecessary to have administered it or that it was given for the purpose of the trial of the case.⁵⁸ So where plaintiff is suing to recover for injuries resulting in an abortion, it is proper to ask a medical expert, "How would these troubles affect the nervous system?"⁵⁹ And again, where plaintiff's eye had been injured, it is competent in an action to recover damages therefor for a physician to express the opinion that it was necessary to remove the eye in order to save the sight of the other which was endangered by sympathetic inflammation.⁶⁰ But a question to a physician as to the symptoms he treated the plaintiff for between the time of the injury and the trial, "due entirely to the injuries she received at the time of the accident," was held to be improper, since, if the witness were allowed to answer such question it would be permitting him to usurp the functions of the jury.⁶¹ And a medical expert in reply to a question as to the treatment and course of disease in plaintiff's case as a result of the injury will not be permitted to enter into a general discussion of the disease, the causes producing it and also the possible results thereof, in the absence of any opinion as to the course of such disease in the plaintiff's case.⁶² So the opinion of an expert whether a seaman who had been injured was competent to perform the duties of a quartermaster was held inadmissible.⁶³ Again, in an action to recover for an injury by which plaintiff's leg was broken and the character of the injury had been fully and minutely described by a physician, it was decided that he might also testify as to the position of the leg and the point from which the blow came.⁶⁴ And a physician may be asked whether an examination of an injured person was conducted in a superficial or in a careful and thorough manner, the answer to such question not

⁵⁸ *Holman v. Union St. R. Co.*, 114 Mich. 208; 72 N. W. 202; 9 Am. & Eng. R. Cas. N. S. 105; 4 Det. L. N. 518.

⁵⁹ *Powell v. Augusta & S. R. Co.*, 77 Ga. 192; 3 S. E. 757.

⁶⁰ *Reed v. Madison*, 85 Wis. 667; 56 N. W. 182.

⁶¹ *Atkins v. Manh. R. Co.*, 57 Hun (N. Y.), 102; 32 N. Y. St. R. 214; 10 N. Y. Supp. 432.

⁶² *Swenson v. Brooklyn H. R. Co.*, 15 Misc. (N. Y.) 69; 38 N. Y. Supp. 445; 71 N. Y. St. R. 496.

⁶³ *Eldridge v. Atlas Steamship Co.*, 58 Hun (N. Y.), 96; 33 N. Y. St. R. 1016; 10 N. Y. Supp. 468.

⁶⁴ *Johnson v. Steam Gauge & L. Co.*, 146 N. Y. 152; 66 N. Y. St. R. 276; 40 N. E. 773.

being considered as a substitution of the opinion of the witness for the judgment of the jury.⁶⁵

§ 289. **Same subject continued.** In the case of non-professional witnesses their opinions as to the physical condition or pain suffered by an injured person are admissible in evidence when based upon personal observations of the person while in attendance upon him,⁶⁶ although in a case in Pennsylvania it was decided that a daughter of the injured person, not an expert, was incompetent to testify that her mother suffered in her head and stomach.⁶⁷ And testimony by the plaintiff that his head would never be the same as it was,⁶⁸ or that he would never recover from his injuries or be able to do a good day's work, is not admissible.⁶⁹ Again, it has been held that the plaintiff is incompetent to express his opinion that his injuries are permanent.⁷⁰ Where a plaintiff has received a physical injury, and has exhibited such injury to the jury, it is determined that the defendant is not obliged to accept such experts as may be agreed upon by the parties and appointed by the court to examine such injury, but is entitled to select his own experts.⁷¹

§ 290. **Statements and complaints of injured person.**—Statements, exclamations, or complaints made by the injured person to an attending physician as to his pain and suffering and the symptoms, when they relate to the part of the body injured, are admissible in evidence.⁷² In this connection it is said

⁶⁵ *Northern P. R. Co. v. Urlin*, 158 U. S. 271; 15 Sup. Ct. Rep. 840; 39 L. Ed. 977.

⁶⁶ *Shelby v. Clagett*, 46 Ohio St. 549; 5 L. R. A. 606; 22 N. E. 407; 22 Ohio L. J. 294; *Heddles v. Chic. & N. W. R. Co.* (Wis.) 46 N. W. 115; *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69.

⁶⁷ *Lombard & S. St. Pass. R. Co. v. Christian*, 124 Pa. St. 114; 16 Atl. 628; 23 W. N. C. 273; 46 Phila. Leg. Intel. 210; 19 Pitts. L. J. N. S. 404.

⁶⁸ *Pfan v. Alteria*, 23 Misc. (N. Y.) 693; 52 N. Y. Supp. 88.

⁶⁹ *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462; 42 Atl. 699.

⁷⁰ *Atlanta St. R. Co. v. Walker*, 93 Ga. 462; 21 S. E. 48.

⁷¹ *Chicago, R. I. & T. R. Co. v. Langston*, 92 Tex. 709; 51 S. W. 331, modifying on reh'g, 50 S. W. 574, which affirms 47 S. W. 1027; 48 Cent. L. J. 35; 48 S. W. 610.

⁷² *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625; 45 N. E. 563; *Peirce v. Jones*, 22 Ind. App. 163; 53 N. E. 431; 1 Repr. 864; *Jackson Co. Commrs. v. Nichols* (Ind.), 47 Am. & Eng. Corp. Cas. 198; 38 N. E. 526;

in a late case: "Testimony of other witnesses was admissible of such complaints of pain by the plaintiff after the accident as might properly be regarded as expressive and elicited by existing feeling. 'An individual receives a wound and before his recovery complains of suffering from it. His complaint is evidence of his suffering and its degree because it is the natural language of the feelings which such a cause produces. . . .'"⁷² But unless the complaints are made to a physician with a view to medical treatment,⁷³ the proof should be limited upon proper objection to such complaints as are the natural and instinctive expressions of present suffering. Evidence is not admissible of complaints which are but narrations of past sufferings,⁷⁴ or which consist simply of answers to questions or are merely descriptive statements or assertions of the existence of present suffering,⁷⁵ or which though made to a physician are with a view of using him as a witness at the trial."⁷⁷

§ 291. Same subject continued.—Under the rule stated in the preceding section complaints of a child have been held admissible where made during an examination of the injured parts by the attending physician.⁷⁸ And complaints made by the injured person to his physician of pain in his chest, side and leg,

Smith v. Dawley (Iowa), 60 N. W. 625; Mott v. Detroit, G. H. & M. R. Co. (Mich.), 15 Am. & Eng. R. Cas. N. S. 113; 79 N. W. 3; 6 Det. L. N. 87; People v. Foglesong, 116 Mich. 556; 74 N. W. 730; 5 Det. L. N. 51; Brusch v. St. Paul City R. Co. (Minn.), 55 N. W. 57; Omaha St. R. Co. v. Emminger, 57 Neb. 240; 77 N. W. 675; 12 Am. & Eng. R. Cas. N. S. 188; Martin v. Wood, 23 N. Y. St. R. 457; 5 N. Y. Supp. 274, aff'g 18 N. Y. St. R. 274; 4 N. Y. Supp. 208; Geiler v. Manhattan R. Co., 11 Misc. (N. Y.) 413; 65 N. Y. St. R. 437; 32 N. Y. Supp. 254; Weiser v. Broadway & N. St. R. Co., 10 Ohio C. C. 14; 2 Ohio Dec. 463; Missouri, K. & T. R. Co. v. Saunders, 12 Tex. Civ. App. 5; 33 S. W. 245; Block v. Mil-

waukee St. R. Co., 89 Wis. 371; 27 L. R. A. 365; 61 N. W. 1101.

⁷² State v. Dart, 29 Conn. 153-155; 36 Am. Rep. 51.

⁷³ Wilson v. Town of Granby, 47 Conn. 59-76; 36 Am. Rep. 51.

⁷⁴ Rowland v. Railroad Co., 63 Conn. 415-419; 28 Atl. 102.

⁷⁵ Williams v. Ry. Co., 68 Minn. 55-59; 70 N. W. 860; 37 L. R. A. 199; Keller v. Town of Gilman, 93 Wis. 9; 66 N. W. 800.

⁷⁷ Martin v. Sherwood (Conn. 1902), 51 Atl. 526, per Hall, J., citing on this last point, Darrigan v. Railroad Co., 52 Conn. 285-309; 52 Am. Rep. 590.

⁷⁸ Martin v. Wood, 23 N. Y. St. R. 457; 5 N. Y. Supp. 274, aff'g 18 N. Y. St. R. 274; 4 N. Y. Supp. 208; 1 Sil. S. C. 212.

and that his wrist hurt him have been admitted.⁷⁹ So also, evidence by the attending physician of an injured person, that during his attendance of several weeks the plaintiff complained of pain, and indicated the locality of same, is admissible in connection with a description of the symptoms which he observed.⁸⁰ And where a physician made an examination solely for the purpose of ascertaining the extent of the person's alleged injuries, exclamations or complaints made by such person apparently in response to the manipulations by the physician of members of plaintiff's body were admitted.⁸¹ And though exclamations or complaints of an injured person may be made some time after an injury, yet if they are indicative of present existing pain or suffering at the time made, they are admissible.⁸² So such statements are not inadmissible because made while suit was pending if they were of such a character as to be admissible if made before suit was brought.⁸³

§ 292. **Same subject concluded.**—Persons other than a physician or nurse may testify to exclamations of pain made by an injured party.⁸⁴ So a witness to whose house an injured person was taken after an injury was permitted to testify as to complaints of pain and suffering made by such person on the morning after the accident.⁸⁵ And where a child of tender years was injured by stepping into a hole in a defective sidewalk, exclamations of pain made by such child in his own home under circumstances indicating that they were the natural and ordinary expressions caused by suffering are admissible.⁸⁶ But in another

⁷⁹ *Missouri, K. & T. R. Co. v. Saunders*, 12 Tex. Civ. App. 5; 33 S. W. 245.

⁸⁰ *East Tennessee, V. & G. R. Co. v. Smith*, 94 Ga. 580; 20 S. E. 127.

⁸¹ *Boyles v. Prisock*, 97 Ga. 643; 25 S. E. 389. See *Chicago, St. L. & P. R. Co. v. Spilker (Ind.)*, 32 Am. L. Reg. 763; 33 N. E. 280, reh'g denied 34 E. 218.

⁸² *Northern P. R. Co. v. Urlin*, 158 U. S. 271; 39 L. Ed. 977; 15 Sup. Ct. R. 840; *Island Coal Co. v. Risher (Ind. App.)*, 40 N. E. 158; *Crippen v. Des Moines (Iowa)*, 78 N. W. 688; *Beath*

v. Rapid R. Co., 119 Mich. 512; 78 N. W. 537; 15 Am. & Eng. R. Cas. N. S. 793; 5 Det. L. N. 905; *Girard v. Kalamazoo*, 92 Mich. 610; 52 N. W. 1021; *City R. Co. v. Wiggins (Tex. Civ. App.)*, 52 S. W. 577.

⁸³ *Kansas City, Ft. S. & M. R. Co. v. Stoner (C. C. App. 8th C.)*, 10 U. S. App. 209; 2 C. C. A. 437; 51 Fed. 649; 52 Am. & Eng. R. Cas. 462.

⁸⁴ *Brown v. Mt. Holly*, 69 Vt. 364; 38 Atl. 69.

⁸⁵ *De Long v. Delaware, Lack. & W. R. Co.*, 37 Hun (N. Y.), 282.

⁸⁶ *Strudgeon v. Sand Beach*, 107

case it has been decided that complaints as to suffering heard by a physician, but which were not shown to have been made for his professional guidance, should be excluded.⁸⁷ As it is permissible to introduce in evidence the exclamations or complaints of the injured person, so also it has been held proper to admit evidence of the fact that he had made no complaints among his neighbors.⁸⁸ Though statements of an injured person may be admissible in evidence, yet where they are not indicative of present pain but are rather in the nature of a narration of her bodily feelings they should not be admitted.⁸⁹ And a husband may not testify as to complaints made by his wife as to her pains and hurts resulting from an injury.⁹⁰ Declarations or statements, however, which relate to the cause of the injury should, it is held, be excluded.⁹¹ But in a case in the United States courts it is decided that declarations as to the cause of an accident made at the time of the injury are admissible in an action to recover upon an accident insurance policy against death.⁹² Although the statement of a plaintiff that defendant was responsible for the accident may be admissible, yet the latter is entitled to an instruction that he is not thereby rendered liable unless the entire evidence, including such statement, show that his negligence was the direct and proximate cause of the accident.⁹³

§ 293. Physical examination of injured person.—In an action for personal injuries the granting of a motion for the physical examination of the injured person is generally declared to be discretionary with the court in those jurisdictions where the power of the court to order such an examination is recognized.⁹⁴

Mich. 496; 65 N. W. 616; 2 Det. L. N. 749.

⁸⁷ *Hillesum v. New York*, 24 J. & S. (N. Y.) 596; 22 N. Y. St. R. 420; 4 N. Y. Supp. 806.

⁸⁸ *Barrelle v. Penn. R. R. Co.*, 4 N. Y. Supp. 127; 21 N. Y. St. R. 109; 121 N. Y. 897.

⁸⁹ *Keller v. Gilman*, 93 Wis. 9; 66 N. W. 800.

⁹⁰ *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255; 25 S. E. 622.

⁹¹ *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625; 45 N. E. 563; *Lake Shore & M. S. R. Co. v. Yokes*, 12 Ohio C. C. 499; 1 Ohio C. D. 599. But see *Bowles v. Kansas City*, 51 Mo. App. 416.

⁹² *North Amer. Acc. Asso. v. Woodson* (C. C. App. 7th C.), 64 Fed. 689; 12 C. C. A. 392.

⁹³ *Schwartz v. Shull*, 45 W. Va. 405; 31 S. E. 914; 5 Am. Neg. Rep. 496.

⁹⁴ *Alabama G. S. R. Co. v. Hill*, 90

So, where plaintiff's evidence had been closed and there had been no previous request for his medical examination and a proper one could not at the time be procured without too long a delay of the trial, it was decided that the motion therefor was properly refused in the discretion of the court.⁶⁵ In a case in Illinois it is held that if the court has power to order such an examination, such power is discretionary, and where the plaintiff does not pretend to suffer from any secret malady, it should not be exercised.⁶⁶ In another case in that state it was determined that the court had no power to order a medical examination of the injured person as to the measure and extent of his injuries for the purpose of learning whether he was in the condition he had testified to on the trial. It was also declared that if such power did exist the court should refuse to order an examination where no necessity therefor was shown, and the plaintiff had already submitted to one examination.⁶⁷ In a case in Wisconsin it was held that a refusal by the court to order a second examination of the plaintiff by the X-ray process was not an abuse of discretion where he had already submitted to one examination lasting about two hours and had been accidentally burned during

Ala. 71; 8 So. 90; 9 L. R. A. 442; 44 Am. & Eng. R. Cas. 441; 31 Cent. L. J. 376; Savannah, F. & W. R. Co. v. Wainwright, 99 Ga. 255; 25 S. E. 622; Chic. B. & Q. R. Co. v. Reith, 65 Ill. App. 461; Southern R. R. Co. v. Michaels, 57 Kan. 474; 46 Pac. 938; Belt Elec. Line Co. v. Allen, 19 Ky. L. Rep. 1656; 44 S. W. 89; Belle of Nelson Distilling Co. v. Riggs, 20 Ky. L. Rep. 499; 45 S. W. 99; Graves v. Battle Creek, 95 Mich. 266; 19 L. R. A. 641; 54 N. W. 757; Wanck v. City of Winona (Minn.), 80 N. W. 851; Hill v. Sedalia, 64 Mo. App. 494; 2 Mo. App. Rep. 1019; Norton v. St. Louis & H. R. Co., 40 Mo. App. 642; Lawrence v. Samuels, 20 Misc. (N. Y.) 15; 44 N. Y. Supp. 602; appeal dismissed in 20 Misc. 278; 45 N. Y. Supp. 743; Demenstein v. Richardson, 2 Penn. Dist. R. 825; 48 Alb. L. J. 452; 34 W. N. C. 295; Smith v.

Spokane, 16 Wash. 403; 47 Pac. 888. It is held that the court may in its discretion order an examination of an injured person to be made at the home of the plaintiff, though in another state, instead of in court. St. Louis S. W. R. Co. v. Dobbins, 60 Ark. 481; 30 S. W. 887, reh'g denied 60 Ark. 486; 31 S. W. 147.

⁶⁵ Savannah, F. & W. R. Co. v. Wainwright, 99 Ga. 255; 25 S. E. 622. See also Richmond & D. R. Co. v. Greenwood (Ala.), 14 So. 495; Southern K. R. Co. v. Michaels, 57 Kan. 474; 46 Pac. 938; Marler v. Springfield, 65 Mo. App. 301; Smith v. Spokane, 16 Wash. 403; 47 Pac. 888.

⁶⁶ Chicago, B. & Q. R. Co. v. Reith, 65 Ill. App. 461.

⁶⁷ Peoria, D. & E. R. Co. v. Rice, 144 Ill. 227; 33 N. E. 951. See also Joliet St. R. Co. v. Caul, 143 Ill. 177; 32 N. E. 389, aff'g 42 Ill. App. 41;

the continuance thereof.⁹⁸ And in another decision in that state where the plaintiff claimed that his bladder had been injured, it was declared that it would be an abuse of discretion on the part of the court to order an examination by instruments to determine the condition of the bladder where the plaintiff's physicians had testified that such examination would not be prudent, and the defendant's physician had stated that if the bladder was unhealthy it would be absolutely dangerous, but if healthy it would be safe.⁹⁹

§ 294. Same subject continued.—Where the plaintiff is willing to be examined by competent and disinterested men without an order by the court, an order should not be made requiring him to submit to an examination.¹⁰⁰ And in a case in Michigan it is declared that the plaintiff should not be required to submit to a physical examination by medical experts in open court where such examination would necessarily involve the use of anæsthetics.¹ In the United States courts it is held that the plaintiff cannot be required to submit to a compulsory examination upon the trial of an action for personal injuries;² and that the court has no legal power or right, on application of the defendant and in advance of the trial to order the plaintiff to submit to a medical or surgical examination for the purpose of determining the extent of the injury sued for, without the consent of such plaintiff.³ So in Indiana it is declared that unless such authority be conferred by statute, the court cannot issue an order requiring the plaintiff to submit to an examination by medical men appointed by the court for the purpose of furnishing evidence to be used on the trial.⁴ In New Jersey

St. Louis Bridge Co. v. Miller, 138 Ill. 465; 28 N. E. 1091, aff'g 39 Ill. App. 366.

⁹⁸ Boelter v. Ross Lumber Co., 103 Wis. 324; 79 N. W. 243.

⁹⁹ O'Brien v. La Crosse, 75 N. W. 81; 40 L. R. A. 831; 30 Chic. Leg. News, 342.

¹⁰⁰ Gulf C. & S. F. R. Co. v. Norfleet, 78 Tex. 321; 14 S. W. 703; 45 Am. & Eng. R. Cas. 207.

¹ Strudgeon v. Sand Beach, 107

Mich. 496; 65 N. W. 616; 2 Det. L. N. 749.

² Illinois C. R. Co. v. Griffin (C. C. App. 7th C.), 53 U. S. App. 22; 80 Fed. 278; 25 C. C. A. 413; Union P. R. Co. v. Botsford, 141 U. S. 250; 35 L. Ed. 734; 11 Sup. Ct. Rep. 1000.

³ Union P. R. Co. v. Botsford, 141 U. S. 250; 35 L. Ed. 734; 11 Sup. Ct. Rep. 1000.

⁴ Penn. Co. v. Newmeyer, 129 Ind. 401; 28 N. E. 860.

where the court is authorized by statute to issue an order requiring the plaintiff to submit to a physical examination by medical men who may testify at the trial as to the nature and extent of the plaintiff's injuries,⁵ it has been held that such a statute does not violate the express or implied restraints upon the legislative power in the federal or state constitutions.⁶ Though an order requiring a plaintiff to submit to such an examination may be erroneously granted by the court, yet if such order is acquiesced in by the plaintiff by his selection of a physician to act as one of the examiners, by his submission to the examination without objection and by his failure to question the judge's want of power, either at the time of the order or when the physicians give their testimony as to the result of the examination, a judgment will not be reversed because of the error in granting the order.⁷ Again, where a physical examination of the plaintiff is desired by the defendant, the latter is not entitled to have such examination made by physicians selected entirely by himself.⁸ Nor should the plaintiff be compelled to submit to an examination by physicians who have testified adversely to him,⁹ or by those who are unfriendly to him.¹⁰ But where persons are ordered to make a physical examination of the plaintiff, the fact that they were rude and uncivil in their conduct towards him is not to be considered on the question of damages.¹¹

§ 295. Physical examination of plaintiff—New York.—Courts have no authority either under the common law or by virtue of their inherent power to order a physical examination of the plaintiff in an action for personal injuries.¹² Such authority can only exist where expressly conferred by a statutory enactment.¹³ So in this state prior to the passage of the amend-

⁵ N. J. P. L. 1896, p. 344.

⁶ McGovern (N. J.), 42 Atl. 830.

⁷ Ellsworth v. Fairbury, 41 Neb. 831; 60 N. W. 336.

⁸ Smith v. Spokane, 16 Wash. 403; 47 Pac. 888.

⁹ Houston & T. C. R. Co. v. Berling, 14 Tex. Civ. App. 544; 37 S. W. 1083.

¹⁰ Stack v. New York, N. H. & H. R. Co., 177 Mass. 155; 52 L. R. A. 328; 58 N. E. 686.

¹¹ Goodhart v. Penn. R. Co., 177 Pa. St. 1; 35 Atl. 1; 5 Am. & Eng. R. Cas. N. S. 364; 38 Wkly. N. C. 545.

¹² Cole v. Fall Brook Coal Co., 87 Hun (N. Y.), 584; 34 N. Y. Supp. 572. See Roberts v. Ogdensburgh & Lake Champlain R. R. Co., 29 Hun (N. Y.), 154.

¹³ McQuigan v. Del. L. & W. R. Co., 129 N. Y. 50; 14 L. R. A. 466; 41 N. Y. St. R. 382; 29 N. E. 235;

ment to the code,¹⁴ there was no authority possessed by the court which authorized the issuance of an order requiring the plaintiff to submit to a physical examination, or, in case of his failure or refusal to comply with such order, the striking out by the court of the testimony of medical experts who had examined him and testified in his behalf.¹⁵ Under the amendment to the Code,¹⁶ providing for an order for a physical examination by surgeons of the injured person, such examination cannot be authorized as an independent proceeding, but must be in connection with or as a part of an order for the examination of the person before trial, and in conformity to the general provisions for such examinations.¹⁷ If the plaintiff has voluntarily submitted the injured part to the jury, he may be required to submit to a personal or professional examination of such part by the defendant in the presence of the jury.¹⁸ And where the defendant asks for an examination in good faith and makes a proper showing therefor, the plaintiff should be required under the New York Code¹⁹ to submit to such examination, unless there has been a stipulation by the plaintiff for use on the trial that he has entirely recovered from his injuries and this is true notwithstanding statements by him in his affidavit that he believes the examination is applied for for the purpose of harassing and annoying him.²⁰ Again, the defendant is entitled to such examination where he has no knowledge of the nature and extent of the injuries, and so far as he knows the plaintiff is the only one having any knowledge in reference to them.²¹ And where an order for an examination is

45 Alb. L. J. 68; 48 Am. & Eng. R. Cas. 490; 11 Ry. & Corp. L. J. 62.

¹⁴ N. Y. Code Civ. Proc. sec. 873, amended 1894.

¹⁵ *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59; 53 N. E. 670, aff'g 87 Hun 584; 34 N. Y. Supp. 572.

¹⁶ N. Y. Laws, 1893, chap. 721, amending N. Y. Code Civ. Proc. sec. 873.

¹⁷ *Lyon v. Manhattan R. Co.*, 142 N. Y. 298; 58 N. Y. St. R. 860; 31 Abb. N. Cas. 356; 37 N. E. 113, aff'g 7 Misc. 401; 58 N. Y. St. R. 50; 27 N. Y. Supp. 966.

¹⁸ *Winner v. Lathrop*, 67 Hun (N.

Y.), 511; 51 N. Y. St. R. 258; 22 N. Y. Supp. 516.

¹⁹ Code Civ. Proc. sec. 873.

²⁰ *Sewell v. Butler*, 16 App. Div. (N. Y.) 77; 44 N. Y. Supp. 1074.

²¹ *Bell v. Litt*, 12 App. Div. (N. Y.) 626; 42 N. Y. Supp. 112; *Green v. Middlesex R. Co.*, 10 Misc. (N. Y.) 473; 65 N. Y. St. R. 257; 24 Civ. Proc. 272; 32 N. Y. Supp. 177. Where it is held that he is entitled to such examination upon an affidavit showing such facts. *Moses v. Newburgh Elec. R. Co.*, 91 Hun 278; 36 N. Y. Supp. 149; 72 N. Y. St. R. 50.

granted upon an affidavit showing such facts, such oral questions may be asked the plaintiff by the physician as in the opinion of the latter are necessary to enable him to ascertain and report fully as to the nature and extent of plaintiff's injuries.²²

§ 296. Same subject continued.—Under the New York Code,²³ providing that the physical examination of a female plaintiff shall be "before" physicians or surgeons of her own sex, it is not intended that such examination shall be in the presence of the referee and counsel.²⁴ And where an order is issued under said Code²⁵ for such examination, plaintiff is entitled not as a matter of favor or privilege but as a matter of right, to have inserted therein a provision that the examination be made by a female physician.²⁶ In a former trial of this case, it was held that though a female plaintiff has the right to have a physical examination made by a female physician, yet if she makes no effort to have such a provision inserted in the order and seeks to have the order vacated merely on the ground that the papers upon which it is granted are insufficient, she thereby waives her right.²⁷ Where an order for a physical examination is granted, it should direct the time of service of a copy thereof,²⁸ and should be returnable within not less than five days unless special circumstances be shown in the affidavit and recited in the order.²⁹ The affidavit need not state that it is the purpose of the defendant to make use of such examination upon the trial.³⁰ And if the affidavit on which the order is granted makes out a case within the provisions of the Code it may not be vacated although the witness fees required by the Code³¹ have not been paid or tendered, since it is not obligatory to pay such fees be-

²² Wunsch v. Weber, 31 Abb. N. Cas. 365; 29 N. Y. Supp. 1100; 49 Alb. L. J. 176.

²³ Code Civ. Proc. sec. 873.

²⁴ Lawrence v. Samuels, 20 Misc. (N. Y.) 278; 45 N. Y. Supp. 743, dismissing appeal 20 Misc. 15; 44 N. Y. Supp. 602.

²⁵ Code Civ. Proc. sec. 872.

²⁶ Lawrence v. Samuels, 17 Misc. (N. Y.) 559; 40 N. Y. Supp. 686; 26 Civ. Proc. 10; 28 Chic. L. N. 420.

²⁷ Lawrence v. Samuels, 16 Misc. (N. Y.) 501; 38 N. Y. Supp. 976.

²⁸ Bowe v. Brunnbauer, 13 Misc. (N. Y.) 631; 34 N. Y. Supp. 919.

²⁹ Bowe v. Brunnbauer, 13 Misc. (N. Y.) 631; 34 N. Y. Supp. 919.

³⁰ Moses v. Newburgh Elec. R. Co., 91 Hun (N. Y.), 278; 72 N. Y. St. R. 50; 36 N. Y. Supp. 149.

³¹ N. Y. Code Civ. Proc. sec. 874.

fore the party submits to the jurisdiction of the court.³² Under the Code provision that the plaintiff may be required to appear before the judge or referee, it is held that he cannot be required to appear before the court at special term.³³ The fact that in the papers upon which an order is sought, the plaintiff's injuries are averred in the most general form will not render the papers insufficient where the formal part thereof complies with the statute and it is evident therefrom that the defendant is unable to inform himself as to the plaintiff's injuries except by such examination.³⁴

§ 297. Exhibiting injuries to jury.—In order to enable the jury to more accurately perceive the nature and extent of the plaintiff's injuries for which he seeks to recover damages, it is proper that he should in some cases exhibit his injuries to the jury.³⁵ So an exhibition of an injured limb is proper where made for the purpose of showing its condition at the time of the trial,³⁶ as that it is shriveled and withered.³⁷ And where part of a limb has been amputated it is not error to permit an exhibition to the jury of the remnant of such limb.³⁸ So the fact that an injury has not been properly treated is not ground for excluding an exhibition of the injury to the jury.³⁹ Again, the injury in such cases may be exhibited for the purpose of having the nature and extent thereof explained by a medical wit-

³² *Campbell v. Joseph H. Bauland* Co., 41 App. Div. 474; 58 N. Y. Supp. 984.

³³ *Bowe v. Brunnbauer*, 13 Misc. 681; 34 N. Y. Supp. 919.

³⁴ *Campbell v. Joseph H. Bauland* Co., 41 App. Div. 474; 58 N. Y. Supp. 984.

³⁵ *Swift v. Rutkowski*, 82 Ill. App. 108; *Citizens Street R. Co. v. Willooby*, 134 Ind. 563; 33 N. E. 627; *Edwards v. Three Rivers*, 96 Mich. 625; 55 N. W. 1003; *Langworthy v. Green Twp.*, 95 Mich. 93; 54 N. W. 697; *Plummer v. Milan*, 79 Mo. App. 439; 1 Mo. App. Rep. 600; *Omaha Street R. Co. v. Emminger*, 57 Neb.

240; 77 N. W. 675; 12 Am. & Eng. R. Cas. N. S. 188; *Carrico v. West Virginia, C. & P. R. Co.*, 39 W. Va. 86; 24 L. R. A. 50; 19 S. E. 571; *Sornberger v. Canadian Pac. R. Co.*, 24 Ont. App. 263. But see *Laughlin v. Harvey*, 24 Ont. App. 438.

³⁶ *Edwards v. Three Rivers*, 96 Mich. 625; 55 N. W. 1003.

³⁷ *Langworthy v. Green Twp.*, 95 Mich. 93; 54 N. W. 697.

³⁸ *Carrico v. West Virginia, C. & P. R. Co.*, 39 W. Va. 86; 24 L. R. A. 50; 19 S. E. 571.

³⁹ *Plummer v. Milan*, 79 Mo. App. 439; 1 Mo. App. Rep. 600.

ness.⁴⁰ And for the purpose of enabling the jury to determine the extent of the plaintiff's injury, the plaintiff may be placed in different attitudes by the physician.⁴¹

§ 298. Evidence admissible under pleadings—Cases.—In an action to recover for physical injuries it is not necessary to describe all the characteristics and consequences of a wound in order to render proof thereof admissible.⁴² So, under an allegation in a complaint in general terms evidence is admissible of all specific hurts and direct results therefrom.⁴³ A general averment in such cases is sufficient if the specific hurts or injuries are such as can be traced to the act complained of or are such as would naturally follow from it.⁴⁴ So where a complaint contained a general averment of severe personal injuries from which it was declared the plaintiff had not recovered and would not recover, and that as a result thereof he had been unable to follow his usual occupation or do any work whatever and had suffered great pain and agony, it was held that such allegations were sufficient to permit the admission of evidence as to all the effects of the injuries.⁴⁵ Again, a general allegation of damages caused by a personal injury is sufficient to permit the plaintiff to recover for loss of time, physical suffering and permanent disability, and in fact, all such damages as are the natural and necessary results of the injury.⁴⁶ And, under an averment that as a result of the injuries plaintiff was "made sick, sore and disabled," evidence of pleurisy is admissible.⁴⁷ And where a person sued to recover for injuries inflicted by a dog, proof of epilepsy as a result of the injury was admitted under allegations in the complaint that she was injured for life, that

⁴⁰ *Sornberger v. Canadian Pac. R. Co.*, 24 Ont. App. 263.

⁴¹ *Citizens Street R. Co. v. Willosby*, 134 Ind. 563; 33 N. E. 627.

⁴² *Joliet v. Johnson*, 177 Ill. 178; 52 N. E. 498, aff'g 71 Ill. App. 423.

⁴³ *Quirk v. Siegel-Cooper Co.*, 26 Misc. (N. Y.) 244; 56 N. Y. Supp. 49.

⁴⁴ *Missouri, K. & T. R. Co. v. Edling*, 18 Tex. Civ. App. 171; 45 S. W. 406; *Williams v. Oregon Short Line R. Co.*, 18 Utah, 210; 54 Pac. 991; 12

Am. & Eng. R. Cas. N. S. 61; *Parker v. Burgess* (Vt.), 24 Atl. 743.

⁴⁵ *Boite v. Third Ave. R. Co.*, 38 App. Div. (N. Y.) 234; 56 N. Y. Supp. 1038.

⁴⁶ *Abilene v. Wright*, 4 Kan. App. 708; 46 Pac. 715.

⁴⁷ *Hunter v. Third Ave. R. Co.*, 21 Misc. (N. Y.) 1; 46 N. Y. Supp. 1010, aff'g 20 Misc. 432; 45 N. Y. Supp. 1044.

her whole nervous system had been permanently injured and her mental faculties ruined, that she had suffered great bodily and mental pain and would continue so to suffer in the future, and that her blood had been poisoned and contaminated.⁴⁸ But where a person sought to recover for injuries due to an assault, it was decided that proof of epilepsy was not admissible unless alleged in the declaration.⁴⁹ In the application of the same rule that evidence is admissible of an injury which is an effect resulting from the injury alleged without a special allegation thereof in the complaint, it was held that where the complaint alleged an injury to the back, spine and brain of the plaintiff, and the evidence showed that such injuries were the natural and proximate cause of defective nutrition of the optic nerve which caused the eyesight to be impaired, damages therefor need not be specially pleaded and could be recovered under the allegation of the complaint.⁵⁰ And, again, under allegations of numerous injuries to the head, back and spine, and that "other serious injuries were done him," evidence is admissible of an impairment of plaintiff's eyesight and hearing.⁵¹ So, also, under an allegation of an injury to the left eye, evidence is admissible as to the effect of such injury on the right eye.⁵² And evidence of a disease of the sciatic nerve has been held admissible in an action for personal injuries though not alleged in the declaration.⁵³

§ 299. Same subject continued.—Evidence of a miscarriage, as a result of injuries received, is admissible under an averment that the plaintiff was greatly hurt and bruised and

⁴⁸ *Fye v. Chapin* (Mich. 1899), 80 N. W. 797.

⁴⁹ *Kuhn v. Freund*, 87 Mich. 545; 49 N. W. 867.

⁵⁰ *West Chicago St. R. Co. v. Levy*, 182 Ill. 525; 55 N. E. 554, aff'g 82 Ill. App. 202.

⁵¹ *Curran v. Stange Co.*, 98 Wis. 598; 74 N. W. 377.

⁵² *Maitland v. Gilbert Paper Co.*, 97 Wis. 476; 72 N. W. 1124. But in a case where the complaint alleged that the plaintiff's head was cut to

the skull for about an inch in length over the right eye, it was held that under such allegation evidence was inadmissible of an injury to one or both of the plaintiff's eyes and of pain suffered by reason thereof. *Gulf C. & S. F. R. Co. v. Warlick* (Ind. Terr.), 4 Am. & Eng. R. Cas. N. S. 32; 35 S. W. 235.

⁵³ *Beath v. Rapid R. Co.*, 119 Mich. 512; 78 N. W. 537; 15 Am. & Eng. R. Cas. N. S. 798; 5 Det. L. N. 905.

suffered great bodily injury.⁵⁴ And under an allegation of severe nervous shock, as a result of the injuries received, evidence is admissible to show that in consequence of the plaintiff's injuries she suffered from heart trouble, curvature of the spine, chronic meningitis and neurasthenia.⁵⁵ So, also, where the complaint contained an averment that the plaintiff intended to prove an injury to her leg as a result of a fall, evidence was admitted to show that varicose veins resulted from the injury, though there was no allegation in the complaint of enlargement of the leg or affection of the blood vessels thereof.⁵⁶ Again, where the complaint contained an allegation that the "plaintiff was greatly and permanently injured upon her foot, ankle, body and head, the bones of her ankle and foot were broken, the ligaments, tendons and flesh crushed, her head was lacerated and wounded, and her mind and memory were permanently injured, and the plaintiff otherwise injured upon her body," evidence was admitted that a tumor developed upon plaintiff's breast, as a result of the injuries, and was necessarily removed.⁵⁷ And where the complaint alleged that plaintiff was badly bruised, wounded, sprained and injured in and about her body, it was held proper to admit evidence of an injury to the back and spine of the plaintiff.⁵⁸ So again, under allegations of injuries to plaintiff's body by straining, laceration and discoloration and injuries of muscles, nerves and otherwise, evidence is admissible of injury to the knee and hip, and of inflammation of the sciatic nerve as a result of same.⁵⁹ And under a general averment of bodily injuries evidence of resulting uterine trouble is admissible.⁶⁰ So evidence as to the condition of the plaintiff's uterus and the nerves of her leg was held admissible where the complaint alleged nervous prostration and numbness and pain in the neck, arm, side and other portions of her body.⁶¹ And where the plain-

⁵⁴ *Tobin v. Fairport*, 12 N. Y. Supp. 224.

⁵⁵ *Kleiner v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 191; 65 N. Y. Supp. 394.

⁵⁶ *Joliet v. Johnson*, 71 Ill. App. 423.

⁵⁷ *Baltimore & O. S. R. Co. v. Slanker*, 180 Ill. 357; 54 N. E. 309, aff'g 77 Ill. App. 567.

⁵⁸ *Missouri, K. & T. R. Co. v. Walden* (Tex. Civ. App.), 46 S. W. 87.

⁵⁹ *Williams v. Cleveland, C. C. & St. L. R. Co.*, 102 Mich. 537; 61 N. W. 52.

⁶⁰ *Samuels v. California St. Cable R. Co.*, 124 Cal. 294; 56 Pac. 1115.

⁶¹ *Illinois C. R. Co. v. Griffin* (C. C. App. 7th C.), 25 C. C. A. 413; 80 Fed. 278; 53 U. S. App. 22. But

tiff seeks to recover for permanent disability, and so alleges in his complaint, the character of his occupation and the particulars of his earnings need not be alleged in order to authorize the admission of evidence in reference thereto.⁶³ Nor in an action against a street railway company is it necessary to allege the loss of a certain amount of earnings or the expenditure of a specified amount for medicine where such allegations are generally made.⁶⁴ And where a married woman sued to recover for personal injuries, alleging in her complaint that she was not only prevented from attending to her household duties but also from engaging in any other employment, it was held that such allegations were sufficient to permit her to recover for loss of salary which she had been accustomed to receive from her husband for services rendered by her to him.⁶⁵ And for the purpose of showing the seriousness of the plaintiff's injuries evidence that prior to the injury the plaintiff could read, was studying medicine and going to school, but subsequent thereto he was unable to read, admissible, though not specially pleaded.⁶⁶

in another case where the complaint alleged that the plaintiff was wounded, bruised and skinned, his nervous system seriously impaired, and that serious injuries, both external and internal had been sustained, it was held that proof was not admissible as to an impairment of his genital and urinary organs. *Missouri, K. & T. R. Co. v. Cook* (Tex. Civ. App.), 37 S. W. 769.

⁶³ *Flanagan v. Baltimore & O. R. R. Co.* (Iowa), 50 N. W. 60.

⁶⁴ *Cooney v. Southern Elec. R. Co.*, 80 Mo. App. 226; 2 Mo. App. Rep. 646. See also *Abilene v. Wright*, 4

Kan. App. 708; 46 Pac. 715. See *Sloane v. Southern Cal. R. Co.*, 111 Cal. 220; 32 L. R. A. 193; 44 Pac. 320.

⁶⁵ *Blacchinska v. Howard Mission & H. for L. W.*, 56 Hun (N. Y.), 322; 31 N. Y. St. R. 159; 9 N. Y. Supp. 679. See also as to evidence of loss of earnings in action by married woman, *Mellwitz v. Manhattan R. Co.*, 43 N. Y. St. R. 354; 17 N. Y. Supp. 112.

⁶⁶ *Bruce v. Heall*, 99 Tenn. 303; 41 S. W. 445; 9 Am. & Eng. R. Cas. N. S. 841; 2 Chic. L. J. Wkly. 464.

CHAPTER XIII

PARENT AND CHILD—PHYSICAL INJURY.

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| <p>§ 300. Recovery by parent—Loss of services of minor child.</p> <p>301. Judgment for parent in behalf of child not bar to action for loss of services.</p> <p>302. Action by widow for loss of services of minor child.</p> <p>303. Recovery by parent—Loss of services—Minor in employ of another.</p> <p>304. Statute as to employee not applicable to parent.</p> <p>305. Injury to child—Parent's recovery for expenses, nursing, etc.</p> <p>306. Injury to child—Parent's recovery for future expenses.</p> | <p>307. Evidence as to parent's condition in life.</p> <p>308. Child en ventre sa mere—Damages for injury to.</p> <p>309. Pain and suffering—Minors.</p> <p>310. Expenses—Recovery of by minor.</p> <p>311. Loss of time—Diminished earning capacity—Minor.</p> <p>312. Prospective loss—Permanent injury—Minor.</p> <p>313. No recovery by minor for injuries to mother.</p> <p>314. Recovery by minor for loss of wages in past.</p> <p>315. Negligence of parent.</p> |
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§ 300. Recovery by parent—Loss of services of minor child.—In case of an injury to a minor child which deprives a parent of his services, the parent may recover for such loss,¹ and

¹ St. Louis, etc., Ry. Co. v. Freeman, 36 Ark. 41; Morgan v. Southern Pac. Ry. Co., 95 Cal. 510; Durkee v. Central Pac. R. R. Co., 56 Cal. 388; 38 Am. Rep. 59; Karr v. Parks, 44 Cal. 46; East Tennessee, V. & G. R. Co. v. Hughes (Ga.), 17 S. E. 949; Bradley v. Sattler, 156 Ill. 603; 41 N. E. 171; aff'd 54 Ill. App. 504; Adams Hotel Co. v. Cobb (Ind. T. 1899), 53 S. W. 478; Penn. Co. v. Lilly, 73 Ind. 252; Burnett v. Chicago, etc., R. R. Co., 55 Iowa, 496; Meers v. McDowell, 23 Ky. Law Rep. 461; 53 L. R. A. 789; 62 S. W. 1013; Union News Co. v. Morrow, 20 Ky. L. Rep. 302; 46 S. W. 6; Bernard v. Merrill, 91 Me. 358; 40 Atl. 136; Horgan v. Pacific Mills, 158 Mass. 402; 33 N. E. 581; Bamka v. Chicago, St. P. M. & O. R. Co. (Minn.), 63 N. W. 1116; Meade v. Chicago, R. I. & P. R. Co., 72 Mo. App. 61; Buck v. Peoples St. R. E. L. & P. Co., 46 Mo. App. 555, aff'd 18 S. W. 1090; Barnes v. Keene, 132 N. Y. 13; Drew v. Sixth Ave. R. Co., 26 N. Y. 49; Dollard v. Roberts, 28 N. Y. St. R. 569; 8 N. Y. Supp. 432, aff'd 41 N. Y. St. R. 253; Cumming v. Brooklyn City R. Co., 21 Abb. N. C. 1; 109 N. Y. 95, rev'g

the recovery is not limited to the damages sustained up to the time of the trial, but may also include prospective loss during the child's minority.² But it is decided that for loss of future services there can be no recovery unless specially declared for.³ Although the parent may recover for loss of services of a minor child, past and prospective, yet there are some cases in which it has been held that a deduction must be made, from the probable gross earnings, of the cost of maintenance and support of the child.⁴ Again, in an action to recover for injuries to an adopted child, the complaint should allege the fact of the adoption, showing the child's emancipation by his parents in order to recover for loss of services. It is not sufficient to merely describe such child as an adopted child.⁵

§ 301. Judgment for parent in behalf of child not bar to action for loss of services.—The fact that a parent may have obtained a judgment in an action prosecuted by him in behalf of a minor child for injuries sustained by such child, will not operate as a bar to the father's maintaining an action for the loss of the services of the child resulting from the same injury

38 Hun (N. Y.), 362; *Gilligan v. New York & Harlem R. R. Co.*, 1 E. D. Sm. 453; *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320; *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Gavigan v. Atlantic Refining Co.*, 3 Super. Ct. (Pa.) 628; *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. 383; 1 Am. Neg. Rep. 708; *San Antonio St. R. Co. v. Muth* (Tex. C. A. 1895), 27 S. W. 752.

² *Gilligan v. New York & Harlem R. R. Co.*, 1 E. D. Sm. 453.

⁴ *Morgan v. Southern Pac. Ry. Co.*, 95 Cal. 510; *Penn. Co. v. Lilly*, 73 Ind. 252; *Benton v. Chic., etc., R. R. Co.*, 55 Iowa, 496; *Matthews v. Mo. Pac. Ry. Co.*, 26 Mo. App. 75.

⁵ *East Tennessee, V. & G. R. Co. v. Hughes* (Ga.), 17 S. E. 949; *Traver v. Eighth Ave. R. R. Co.*, 6 Abb. N. S. 46; 4 Abb. Ct. App. 42; *Cumming v. Brooklyn City R. R. Co.*, 21 Abb. N. C. 1; 109 N. Y. 95, rev'g 38 Hun (N. Y.), 362; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Dollard v. Roberts*, 28 N. Y. St. R. 569; 8 N. Y. Supp. 432, aff'd 41 N. Y. St. R. 253; *Texas & P. Ry. Co. v. Putnam* (Tex. Civ. App. 1901), 63 S. W. 910; *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. 383; 1 Am. Neg. Rep. 708; *San Antonio St. R. Co. v. Muth* (Tex. C. A. 1895), 27 S. W. 752.

³ *Gilligan v. New York & Harlem R. R. Co.*, 1 E. D. Sm. 453.

⁴ *Morgan v. Southern Pac. Ry. Co.*, 95 Cal. 510; *Penn. Co. v. Lilly*, 73 Ind. 252; *Benton v. Chic., etc., R. R. Co.*, 55 Iowa, 496; *Matthews v. Mo. Pac. Ry. Co.*, 26 Mo. App. 75.

⁵ *East Tennessee, V. & G. R. Co. v. Hughes* (Ga.), 17 S. E. 949; *Traver v. Eighth Ave. R. R. Co.*, 6 Abb. N. S. 46; 4 Abb. Ct. App. 42; *Cumming v. Brooklyn City R. R. Co.*, 21 Abb. N. C. 1; 109 N. Y. 95, rev'g 38 Hun (N. Y.), 362; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Dollard v. Roberts*, 28 N. Y. St. R. 569; 8 N. Y. Supp. 432, aff'd 41 N. Y. St. R. 253; *Texas & P. Ry. Co. v. Putnam* (Tex. Civ. App. 1901), 63 S. W. 910; *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. 383; 1 Am. Neg. Rep. 708; *San Antonio St. R. Co. v. Muth* (Tex. C. A. 1895), 27 S. W. 752.

for which the former action was brought.⁶ But where the judgment obtained by the father in behalf of his minor child includes damages for loss of earning capacity from the time of the injury, such judgment is a bar to an action by the father personally to recover for a loss of the services of the child during minority.⁷

§ 302. Action by widow for loss of services of minor child.

—While a widowed mother may recover for the loss of services of a minor child,⁸ yet where the injury was received during the life of the father, and the latter commenced no action to recover for such loss, there can be no recovery by the mother, since it is declared that the right of a parent to recover is based on the supposed relation of master and servant, and it was the father who was entitled to the services at the time of the injury and not the mother.⁹ And where a widow sues for her separate use and benefit to recover for injuries to a minor child, there can be no recovery by her in the absence of any allegation of loss of services of such child or that she has incurred some expense on her own account by reason of such injuries.¹⁰ But in an action by her as guardian of an infant son, there may be a recovery for impairment of his ability to earn money during his infancy, since it is said her bringing of the action and her testimony will be in effect a transfer to him of any cause of action she may have had by reason of the injury.¹¹

§ 303. Recovery by parent—Loss of services—Minor in employ of another.—If a person knowingly employs a minor to work in a dangerous employment against the known wishes of the

⁶ *Bernard v. Merrill*, 91 Me. 358; 40 Atl. 156; *Bamka v. Chicago*, St. P. M. & O. R. Co. (Minn.), 63 N. W. 1116. See *Texas & P. Ry. Co. v. Morin*, 56 Tex. 183. See *Bridger v. Asheville & S. R. Co.*, 27 S. C. 456; 3 S. E. 860; 13 Am. St. Rep. 653, where it is held that a judgment for personal injuries in favor of a minor child is inadmissible in an action by the father against the same defendant to recover damages for the same injury.

⁷ *Baker v. Flint & P. M. R. Co.*, 91 Mich. 298; 16 L. R. A. 154; 51 N. W. 697; 11 Ry. & Corp. L. J. 278.

⁸ *Horgan v. Pacific Mills*, 158 Mass. 402; 33 N. E. 581. See secs. 300, 308 herein, action by parent, etc.

⁹ *Geraghty v. New*, 7 Misc. (N. Y.) 30; 57 N. Y. St. R. 497; 27 N. Y. Supp. 403.

¹⁰ *Corsicana Cotton Oil Co. v. Valley*, 14 Tex. Civ. App. 250; 36 S. W. 999.

¹¹ *Chesapeake & O. R. Co. v. Davis*, 22 Ky. Law Rep. 748; 58 S. W. 698.

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father, and the minor sustains injuries while engaged in his work, the father may recover from the employer for the loss of the services of the minor, regardless of the question of negligence as to the injury.¹² But where a minor was injured by accident, through no negligence on the part of his employer, and the parent had not consented that the boy might work for himself, although the latter had stated at the time of his employment that his father had consented, it was decided that there could be no recovery by the parent for loss of services.¹³ In those cases, however, where a minor child is injured owing to his employer's negligence, the right of the father to recover is not precluded by the fact that he consented to such employment or agreed not to trouble the employer in case of injury.¹⁴

§ 304. Statute as to employee not applicable to parent.—Where a statute permits the recovery of damages for personal injuries by an employee from an employer in certain specified cases, it will not be construed as authorizing the recovery of such damages by a parent of a minor servant.¹⁵

§ 305. Injury to child—Parent's recovery for expenses, nursing, etc.—In an action by a parent to recover damages for an injury to a child, he may recover the expenses incurred for medical attendance, medicine, nursing, and in fact all expenses which have been sustained as a result of the injury.¹⁶ And in

¹² *Taylor v. Chesapeake & O. R. Co.*, 41 W. Va. 704; 24 S. E. 632; 4 Am. & Eng. R. Cas. N. S. 115. See *Union News Co. v. Morrow*, 20 Ky. L. Rep. 302; 46 S. W. 6.

¹³ *Williams v. Southern R. Co.*, 121 N. C. 512; 28 S. E. 367.

¹⁴ So held in *Texas & P. Ry. Co. v. Putnam* (Tex. Civ. App. 1901), 63 S. W. 910. Consent of parent to the employment is presumed in absence of evidence to the contrary. *Woodward Iron Co. v. Cook*, 124 Ala. 349; 27 So. 455.

¹⁵ *Woodward Iron Co. v. Cook*, 124 Ala. 349; 27 So. 455.

¹⁶ *Union P. R. Co. v. Jones* (Colo.),

40 Pac. 891; *East Tennessee, V. & G. R. Co. v. Hughes* (Ga.), 17 S. E. 949; *County Commrs. v. Hamilton*, 60 Md. 340; *Morgan v. Pacific Mills*, 158 Mass. 402; 33 N. E. 581; *Meade v. Chicago, R. I. & P. R. Co.*, 72 Mo. App. 61; *Buck v. Peoples St. R. E. L. & P. Co.*, 46 Mo. App. 555, aff'd 18 S. W. 1090; *Connell v. Putnam*, 58 N. H. 535; *Barnes v. Keene*, 132 N. Y. 13; 42 N. Y. St. R. 853, reh'g 32 N. Y. St. R. 1138; *Dollard v. Roberts*, 130 N. Y. 269; *Cumming v. Brooklyn City R. R. Co.*, 21 Abb. N. C. 1; 109 N. Y. 95, reh'g 38 Hun, 362; *Martin v. Wood*, 28 N. Y. St. R. 457; 5 N. Y. Supp. 274, aff'g 18 N. Y.

this connection the rule seems to be, that a father may recover compensation for his own, or his wife's services in nursing an injured child.¹⁷ So evidence of the value of the services of the plaintiff's wife in attending to an injured child is admissible.¹⁸ And a widowed mother, may recover for labor performed in caring for and attending to her child.¹⁹ Again, the father may recover the value of his own services in nursing his child, but where he gives up a lucrative business engagement for this purpose, he cannot recover in addition to the value of his services as nurse what he might have made if he had not given up such engagement.²⁰ In Pennsylvania, however, it is held that a father cannot recover for the services of the members of the family in caring for his child unless such care and attention deprived him of their services in his business.²¹ In this case it was said: "In an action by a parent to recover for loss occasioned by injury to his child, the measure of damages is the pecuniary loss to him. His action is for the injury done to him, not for the injury done his child or for the loss or inconvenience to other members of his family, whose cares and burdens have been increased. . . . The jury was allowed to consider as elements of damage the in-

St. R. 274; 4 N. Y. Supp. 208; 1 Sil. S. C. 312; *Kennedy v. N. Y. C. & H. R. R. Co.*, 35 Hun (N. Y.), 188; *Gilligan v. New York & Harlem R. R. Co.*, 1 E. D. Sm. 453; *Woekner v. Erie Elec. Motor Co.*, 187 Pa. St. 206; 43 W. N. C. 50; *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320; *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Gavigan v. Atlantic Refining Co.*, 3 Super. Ct. (Pa.) 628; *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.), 39 S. W. 383; 1 Am. Neg. Rep. 708; *Texas & P. R. Co. v. Cornelius* (Tex. Civ. App.), 30 S. W. 720; *Lutcher & M. Lumber Co. v. Dyson* (Tex. Civ. App.), 30 S. W. 61; *San Antonio St. R. Co. v. Muth* (Tex. Civ. App.), 27 S. W. 752; *Trow v. Thomas*, 70 Vt. 580; 41 Atl. 652. In this last case it is held that the father cannot recover the expenses of providing a suitable burial for a

child though he may recover for expenses incurred up to the time of death.

¹⁷ *County Commrs. v. Hamilton*, 60 Md. 340; *Morgan v. Pacific Mills*, 158 Mass. 402; 33 N. E. 581; *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380; *Connell v. Putnam*, 58 N. H. 535; *Barnes v. Keene*, 132 N. Y. 13; 42 N. Y. St. R. 853, rev'g 32 N. Y. St. R. 1138.

¹⁸ *Martin v. Wood*, 23 N. Y. St. R. 457; 5 N. Y. Supp. 274, aff'g 18 N. Y. St. R. 274; 4 N. Y. Supp. 208; 1 Sil. S. C. 312.

¹⁹ *Horgan v. Pacific Mills*, 158 Mass. 402; 33 N. E. 581.

²⁰ *Barnes v. Keene*, 132 N. Y. 13; 42 N. Y. St. R. 853, rev'g 32 N. Y. St. R. 1138.

²¹ *Woekner v. Erie Elec. Motor Co.*, 187 Pa. St. 206; 43 W. N. C. 50; 3 Am. Neg. Rep. 601.

creased inconvenience and troubles caused other members of the family. The duties performed by them in the care of the injured child cost the plaintiff nothing and caused him no pecuniary loss and they cannot be made the ground of a recovery by him. . . . If the increased attention required by the child had deprived the plaintiff of the services of other members of his family in his business and thus caused him direct pecuniary loss, his claim for compensation would rest on substantially the same ground as if he had been required to employ additional help; but for the mere inconvenience to others not affecting him pecuniarily, there can be no recovery."²²

§ 306. Injury to child—Parent's recovery for future expenses.—A parent's recovery for expenses, in an action for an injury to a minor child, is not in all cases limited to those which have been paid or incurred prior to the time of trial. In many cases there may be expenses which may be immediately and surely necessary subsequent to the trial, and which it is possible to definitely ascertain or determine. In such cases it has been decided that they may be recovered.²³ But where such expenses are merely contingent or possible in the remote future, they are not recoverable in an action by the parent.²⁴ So where in an action by a parent for an injury to a child, a surgeon was permitted to testify as to an operation which would become necessary at some remote period during the child's minority, and a recovery was allowed for the expenses of such operation, it was held to be error to allow the admission of such evidence and of a recovery for such expenses.²⁵ It is proper, however, to permit a recovery for the future increased expenses in maintaining and bringing up a child, which has been rendered necessary as a result of the injury.²⁶ And it has been decided that expenses for

²² Per Fell, J. See in this connection *Goodhart v. Penn. R. R. Co.*, 177 Pa. St. 10; 35 Atl. 192.

²³ *Dollard v. Roberts*, 130 N. Y. 269.

²⁴ *Cumming v. Brooklyn R. R. Co.*, 21 Abb. N. C. 1; 109 N. Y. 95, rev'g 38 Hun, 362, which holds that such expenses are only recoverable by the child. See also *Netherland Amer.*

Steam Co. v. Hollander, 59 Fed. 417; 8 C. C. A. 169.

²⁵ *Cumming v. Brooklyn R. R. Co.*, 21 Abb. N. C. 1; 109 N. Y. 95, rev'g 38 Hun 362.

²⁶ *Lang v. N. Y. L. E. & W. R. R. Co.*, 51 Hun (N. Y.), 603; 4 N. Y. Supp. 565; 22 N. Y. St. R. 110, aff'd 123 N. Y. 666; 33 N. Y. St. R. 1030; 25 N. E. 955; *San Antonio St.*

medical and surgical attention, nursing, and the like, may be recovered by the parent for a period extending beyond the maturity of the child.²⁷

§ 307. Evidence as to parent's condition in life.—In an action by a parent to recover for the loss of services of a minor child, evidence is inadmissible as to the size of plaintiff's family, his pecuniary condition, or his earnings.²⁸

§ 308. Child en ventre sa mere—Damages for injury to.—Where a child *en ventre sa mere* is injured by the negligence of another no action lies in his behalf after birth to recover for such injury since at the time of the injury he is regarded as a part of the mother and as having no separate entity.²⁹ And in a case in Massachusetts where by reason of a defective highway a woman was injured causing her to give premature birth to a child which died a few moments after it was born, it was held that such a child was not a "person" within the contemplation of the statute giving a right of action against the town in cases of death caused by a defective highway within the town's limits.³⁰ In this decision it was declared that the unborn child was a part of the mother at the time of the injury, and that any damage to the child which was not too remote to be recovered was recoverable by the mother. Upon the decisions in the foregoing cases the rule may be said to be that if a child *en ventre sa mere* is injured so that he is deformed or his health or physical condition impaired, there can be no recovery in behalf of the child for such injury, or if he is injured while in that state and death ensues immediately following his birth, he is not a "person" within the contemplation of a statute which gives an action for a loss of life caused by a negligent act. This particular phase of damages opens up a new field of inquiry, and

R. Co., v. Muth (Tex. Civ. App.), 27 S. W. 752. See Buck v. Peoples St. R. E. L. & P. Co., 46 Mo. App. 555, aff'd 18 S. W. 1090.

²⁷ Buck v. Peoples S. R. E. L. & P. Co., 46 Mo. App. 555, aff'd 18 S. W. 1090.

²⁸ Holdridge v. Mendenhall, 108 Wis. 1; 88 N. W. 1109.

²⁹ Allaire v. St. Luke's Hospital, 76 Ill. 441; 30 Chic. Leg. News, 333; Walker v. Great Northern R. Co., Ir. L. R. 28 C. L. 69. See discussion of this in 32 Cent. L. J. 197.

³⁰ Dietrich v. Northampton, 138 Mass. 14; 52 Am. Rep. 422.

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the few decided cases cannot be said to have definitely settled the rule. It may seem and is hard in some cases to say that though an injury to an unborn child may cause him to be deformed or otherwise permanently injured from the time of his birth, yet there can be no recovery thereof. The injury is not alone to the parent but is also in such a case as we have mentioned an injury to the child extending beyond his minority. For many purposes an unborn child is recognized by the law as being in esse. Should the rule be extended so as to consider a child in such cases as in esse and therefore entitled to recover for his personal damages? Certainly the damages which the parent recovers in no way compensate him for the injury he has sustained and will sustain independent of the parents. In one of the cases²¹ it was said by the court that it was not intended to declare that if a woman while pregnant was wilfully injured by another for the purpose of injuring the child, and such child as a result of such injuries became a cripple, there could be no recovery therefor in an action by the child; and if such an action would lie in case of wilful injuries, why not in case of negligence? Ignorance as to the condition of the mother should be no defense, since in cases of physical injuries where a person injured is afflicted with some disease of which the negligent party is not aware, evidence of the aggravation of such disease is admissible.

§ 309. Pain and suffering—Minors.—In an action by a minor for physical injuries sustained by him, there may be a recovery for the pain and suffering resulting therefrom.²² But the pain and suffering of a minor as a result of injuries he has sustained are not elements to be considered in an action by the father to recover damages therefor.²³

§ 310. Expenses—Recovery of by minor.—In an action by a minor child to recover for injuries sustained by him, the moneys paid or liabilities incurred by a parent for necessary medical

²¹ Walker v. Great Northern Ry. Co., Ir. L. R. 28 C. L. 69.

²² McMillan v. Union P. B. W., 6 Mo. App. 434; Penn. R. Co. v. Kelly, 31 Penn. St. 372; Texas & P. R. Co.

v. Malone, 15 Tex. Civ. App. 56; 38 S. W. 538.

²³ Balt. & O. S. W. Ry. Co. v. Keck, 89 Ill. App. 72; Texas & P. R. Co. v. Malone, 15 Tex. Civ. App. 56; 38 S.

or surgical treatment, or for medicines or other necessary purposes in effecting a cure, are not recoverable by the child.⁵⁴ But if a minor has no parent or guardian, it is held that he may recover the amount of such expenses.⁵⁵ And in another case it was decided that although the physician had charged the father for services rendered to a minor, yet the latter might recover the amount of such bill, where he was employed and promised payment by the minor after he became of age.⁵⁶

§ 311. Loss of time—Diminished earning capacity—Minor.

—The services and earnings of a minor child primarily belong to the parent, the right of the parent thereto being based upon the duty which he owes to his child to maintain and educate him during his minority. If, however, for any reason a minor becomes emancipated, he is then entitled to his own earnings, and for any injury which lessens his capacity to earn money, he may recover damages. So as a general rule where a minor has sustained an injury, there can be no recovery by him of damages for loss of time, during minority, as a result of such injury in the absence of evidence showing that his earnings during the period of minority would have belonged to himself.⁵⁷ But the

W. 538. See in this connection *Walker v. Second Ave. R. Co.*, 6 N. Y. Supp. 536; 24 N. Y. St. R. 961; 57 Supr. 14, *aff'd* 126 N. Y. 668; 37 N. Y. St. R. 968; 27 N. E. 854.

⁵⁴ *Peppercorn v. Black River Falls*, 80 Wis. 38; 61 N. W. 79. In this case it was also held that the same rule applied where a brother incurred liabilities or expended moneys under such circumstances. See *Newbury v. Getchell & M. Lumber & Mfg. Co.*, 100 Iowa, 441; 69 N. W. 743, where it is held that the cost of medical expenses are not recoverable by a minor, unless he has paid the bill for the same, as the parents are primarily responsible therefor.

⁵⁵ *Forbes v. Loftin*, 50 Ala. 396.

⁵⁶ *Judd v. Ballard*, 66 Vt. 668; 30 Atl. 96.

⁵⁷ *Atlanta & W. P. R. Co. v. Smith*

(Ga. 1895), 20 S. E. 763; *Western Un. Teleg. Co. v. Woods*, 88 Ill. App. 375; *Jordan v. Bowen*, 46 N. Y. Super. 355; *Gulf C. & S. F. R. Co. v. Johnson*, 91 Tex. 569; 11 Am. & Eng. R. Cas. N. S. 261; 44 S. W. 1067, *rev'g* 42 S. W. 584; 43 S. W. 583; *Railway Co. v. Whitten*, 74 Tex. 202; 11 S. W. 1091; *Texas & P. Ry. Co. v. Morin*, 66 Tex. 225; *Gulf C. & S. F. R. Co. v. Evansich*, 63 Tex. 54; *Peppercorn v. Black River Falls*, 89 Wis. 38; 61 N. W. 79; *Stewart v. Ripon*, 38 Wis. 584. See in this connection *Abeles v. Bransfield*, 18 Kan. 16. Where, however, the court failed to instruct the jury in an action by a minor to recover for personal injuries, that there could be no recovery by him for loss of time or impaired ability to labor during his minority, it was held that such failure was not re-

parent may waive his right to recover for loss of time of a minor child, and where this is done the minor may recover therefor.³⁸ Thus, it was held that a minor might recover for loss of time where, after the commencement of the suit by him, the father filed a release of any claim on his part.³⁹ And where a parent of an injured child dies without bringing suit to recover for such injury or making any claim or settlement whatever, if the parent dies during the minority of the child, the latter may recover for diminished ability to earn money during his minority, from the date of his parent's death, as well as for the time subsequent to his majority.⁴⁰

§ 312. Prospective loss—Permanent injury—Minor.—A minor who sues to recover for a physical injury as a result of which he has sustained a permanent injury impairing his capacity to pursue the ordinary avocations of life, and for which he seeks compensation, may recover only for the loss he will sustain as a result of such impaired capacity at and after his majority. For any loss of future earnings prior to his majority there can be no recovery by him in the absence of evidence of emancipation.⁴¹ Where tables of expectancy are introduced in evidence for the purpose of showing a minor's estimated duration of life as an aid in determining the measure of damages for impaired capacity to labor in the future, his expectancy should be shown not from the age of majority, but from the present age of the minor, since the tables are merely an aid in determining the probable duration of life, the damages, however, as we have stated above, are to be restricted in the absence of emancipation to those occurring after majority, there being no recovery allowed

versible error, where the attention of the court was not called to the subject. *McCoy v. Milwaukee St. R. Co.* (Wis.), 59 N. W. 453.

³⁸ *Abeles v. Bransfield*, 18 Kan. 16; *Judd v. Ballard*, 66 Vt. 668; 30 Atl. 96.

³⁹ *Judd v. Ballard*, 66 Vt. 668; 30 Atl. 96.

⁴⁰ *Missouri, K. & T. R. Co. v. Tona-hill*, 16 Tex. Civ. App. 625; 41 S. W. 875; 3 Am. Neg. Rep. 287.

⁴¹ *Western & A. R. Co. v. Young*, 81 Ga. 397; 7 S. E. 912; *Schmitz v. St. Louis, I. M. & S. R. Co.* (Mo.), 23 L. R. A. 250; *Swift & Co. v. Holon-beck*, 55 Neb. 228; 75 N. W. 484; 4 Am. Neg. Rep. 509; *Dublin Cotton Oil Co. v. Jarrard* (Tex. Civ. App.), 40 S. W. 531, aff'd 91 Tex. 289; 42 S. W. 959. But see *Penn. R. R. Co. v. Kelley*, 31 Pa. St. 373.

to him for those occurring prior thereto.⁴² In the case of a very young child it may be often difficult, if not impossible, to give direct proof of the extent to which such child's earning capacity has been impaired, and where such is the case the determination of the amount of damages to be awarded therefor must be left to the sound discretion of the jury according to the facts of the particular case.⁴³

§ 313. No recovery by minor for injuries to mother.—A child cannot recover for personal injuries sustained by a parent. So where an instruction was given which could be construed as authorizing a recovery by the child for injuries sustained by the mother in whose care he was at the time of the injury, it was held to be erroneous.⁴⁴

§ 314. Recovery by minor of loss of wages in past.—Where an unemancipated minor brings an action to recover for personal injuries which he has sustained, loss of wages in the past is not an element of damage to be considered by the jury in estimating the amount of his recovery.⁴⁵ But where a father consented to act as the guardian of the minor, appointed on a petition claiming loss of wages as an element of his damages, it was held that the father by so consenting acquiesced in the claim of the minor, and that the latter could recover such wages while the father by such act was precluded from recovery therefor.⁴⁶

§ 315. Negligence of parent.—Where in an action by a parent there is evidence tending to show negligence on his part which contributed to the injury to the child, it is proper to in-

⁴² *Swift & Co. v. Holonbeck*, 55 Neb. 228; 75 N. W. 584; 4 Am. Neg. Rep. 509.

⁴³ *Galveston, H. & S. A. Co. v. Clark*, 21 Tex. Civ. App. 167; 51 S. W. 276. See also *Rosenkranz v. Lindell Ry. Co. (Mo.)*, 18 S. W. 890.

⁴⁴ *Texas & P. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153; 32 S. W. 347.

⁴⁵ *Clark Mile-End Spool Co. v. Shaffery*, 58 N. J. L. 229; 33 Atl. 284.

⁴⁶ *Lieberman v. Third Ave. R. Co.*, 25 Misc. (N. Y.) 296; 54 N. Y. Supp. 574; 12 Am. & Eng. R. Cas. N. S. 858, mod'd 25 Misc. 704; 55 N. Y. Supp. 677.

struct the jury that damages for such injury are not recoverable by the parent if it could have been avoided or prevented by the exercise of ordinary diligence on his part.⁴⁷

⁴⁷Hooper v. Southern Ry. Co., 112 Ga. 96; 37 S. E. 165, wherein it was so held in an action by a parent for injuries received by his son in driving across a bridge of which one of the flooring planks was insecurely fastened.

CHAPTER XIV.

HUSBAND AND WIFE—PHYSICAL INJURIES.

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| <p>§ 316. Husband's recovery for loss of services and society of wife—Loss of earnings.</p> <p>317. Husband cannot recover for wife's suffering.</p> <p>318. Loss of time — Married woman.</p> <p>319. Same subject continued.</p> <p>320. Wife's right to recover not precluded by husband's right.</p> <p>321. Sale of laudanum to married woman—Recovery by</p> | <p>husband for loss of services—Case.</p> <p>322. Injury to wife—Expenses for medical treatment recoverable by husband.</p> <p>323. Recovery for services of husband in nursing injured wife.</p> <p>324. Recovery for services of daughter as nurse.</p> <p>325. Expenses—Recovery of by married woman.</p> <p>326. Pain and suffering—Married woman.</p> |
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§ 316. Husband's recovery for loss of services and society of wife—Loss of earnings.—In case of an injury to a married woman, her husband may recover damages for the loss of her services and society, both past and prospective, if the latter be reasonably certain.¹ And his right to recover damages for loss

¹ Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117; Union Pac. R. Co. v. Jones, 21 Colo. 340; 40 Pac. 891; Denver Consol. Tramway Co. v. Riley (Colo. App.), 59 Pac. 476; Washington & G. R. Co. v. Hickey, 12 App. D. C. 269; 26 Wash. L. R. 198; Metropolitan St. R. Co. v. Johnson (Ga.), 18 S. E. 816; Tuttle v. Chic., etc., R. R. Co., 42 Iowa, 518; McDewitt v. St. Paul, 66 Minn. 14; 33 L. R. A. 601; 68 N. W. 178; Cullar v. Mo. K. & T. Ry. Co., 84 Mo. App. 347; Smith v. City of St. Joseph, 55 Mo. 456; Furnish v. Mo. Pac. Ry. Co., 102 Mo. 669; Riley v. Lidtke, 49 Neb. 139; 68 N. W. 356; Hopkins v. Atlantic, etc., R. R. Co., 36 N. H. 9; Jones v. Utica & B. R. Co., 40 Hun (N. Y.), 349; Ainley v. Man. Ry. Co., 47 Hun (N. Y.), 206; 13 N. Y. St. R. 557; 28 Wkly. Dig. 244; London v. Cunningham, 1 Misc. (N. Y.) 408; 49 N. Y. St. R. 447; 20 N. Y. Supp. 882; Schukle v. Cunningham, 13 N. Y. St. R. 81; Meigs v. Buffalo, 23 Wkly. Dig. (N. Y.) 497; Kelly v. Mayberry Twp., 154 Pa. St. 440; 26 Atl. 595; Readdy v. Shamokin, 137 Pa. St. 98; Henry v. Klopfer, 1 Pa. Adv. R. 80; 23 Atl. 337; 29 W. N. C. 331; 22 Pitts. L. J. N. S. 385; Ft. Worth & D. C. R. Co. v. Kennedy, 12 Tex. Civ. App. 654; 35 S. W. 335;

of the wife's domestic services is not affected by a statute enlarging the property and contractual rights of married women.² The damages recoverable in such cases are based on the value of the wife's services rendered by reason of the marriage relation.³ And this includes the value of the services which a wife customarily renders in caring for and training their children.⁴ The services of a wife for the loss of which a husband may recover are not, however, merely limited to those which a servant might perform.⁵ And evidence of pecuniary loss due to the husband being deprived of the services of his wife is not necessary in order to authorize a recovery by him for such loss.⁶ Again, evidence of disturbed marital relations between the plaintiff and his wife at particular times is not admissible.⁷ Nor is the defendant entitled to an instruction that in estimating the amount of damages the necessary expenses of maintaining the wife should be deducted from the value of her services.⁸

Hawkins v. Front St. Cable Ry. Co., 3 Wash. 592; *Selleck v. City of Janesville*, 100 Wis. 157; 80 N. W. 944; *Hunt v. Town of Winfield*, 36 Wis. 154; 27 Am. Rep. 482; *Hodsoll v. Stallebrass*, 11 A. & E. 301. In a case in Connecticut, however, where a statute provided that if any person received any bodily injury by reason of a defective road or bridge, the town should pay to the person so hurt or wounded just damages and that if any property should receive any injury or damage, just damages should be paid by the town to the owner thereof, it was held that the substitution in a subsequent statute of the words "injured in person or property" for such provisions did not authorize a recovery by the husband of damages for the loss of his wife's services and society due to injuries received from a defective crosswalk. *Lounsbury v. Bridgeport*, 66 Conn. 360; 34 Atl. 93; Conn. Gen. Stat. sec. 2673. See *Starbird v.*

Frankfort, 35 Me. 89; *Harwood v. Lowell*, 4 Cush. (Mass.) 310.

²*Cullar v. Mo. K. & T. Ry. Co.*, 84 Mo. App. 847.

³*Redfield v. Oakland Consol. St. R. Co.*, 112 Cal. 220; 43 Pac. 1117; *Riley v. Lidtke*, 49 Neb. 139; 68 N. W. 356; *Henry v. Klopfer*, 1 Pa. Adv. R. 80; 23 Atl. 337; 29 W. N. C. 331; 22 Pitts. L. J. N. S. 385; *Selleck v. City of Janesville*, 100 Wis. 157; 80 N. W. 944.

⁴*Redfield v. Oakland Consol. St. R. Co.*, 112 Cal. 220; 43 Pac. 1117.

⁵*Selleck v. City of Janesville*, 100 Wis. 157; 80 N. W. 944. See also *Furnish v. Mo. P. R. Co.*, 102 Mo. 119.

⁶*Kelly v. Mayberry Twp.*, 154 Pa. St. 440; 26 Atl. 595; 32 W. N. C. 224.

⁷*Sullivan v. Lowell & D. St. R. Co.*, 162 Mass. 536; 39 N. E. 185.

⁸*San Antonio & A. P. Ry. Co. v. Belt* (Tex. Civ. App. 1900), 59 S. W. 607.

§ 317. **Husband cannot recover for wife's suffering.**—In an action by a husband for injuries sustained by his wife there can be no recovery by him for suffering which she has endured.⁹

§ 318. **Loss of time—Married woman.**—The rights of a married woman as defined under the common law have been so extended and broadened by statute that it is impossible to state any general rule applicable in all cases and in the different states as to her right to recover damages for loss of time. In the absence, however, of any statute making her earnings her separate estate and giving her the right to recover therefor, it may be stated that a husband is entitled to the services of his wife and to recover damages for any injury depriving him thereof, and if the wife sustains a physical injury she cannot recover for loss of time unless the presumptive right of the husband to recover therefor is rebutted.¹⁰ So where she is a mere housewife, her only occupation being that of keeping house for her husband and family, she cannot recover for loss of time as a result of a

⁹ Met. St. R. Co. v. Johnson, 90 Ga. 500; Cullar v. Mo. K. & T. Ry. Co., 84 Mo. App. 347; Howells v. North Amer. Transp. & Trad. Co., 24 Wash. 689; 64 Pac. 786.

¹⁰ Fuller v. Naugatuck R. Co., 21 Conn. 557; Ohio, etc., R. Co. v. Cosby, 107 Ind. 32; Nichols v. Dubuque, etc., R. Co., 68 Iowa, 732; Thomas v. Brooklyn, 58 Iowa, 438; Fleming v. Shenandoah, 67 Iowa, 508; Union St. R. Co. v. Stone, 54 Kan. 83; 37 Pac. 1012; 47 Am. & Eng. Corp. Cas. 90; Atchison, etc., R. R. Co. v. McGinnis, 46 Kan. 109; City of Holton v. Hicks (Kan. App. 1899), 58 Pac. 998; Baltimore, etc., R. R. Co. v. Kemp, 61 Md. 74; Jordan v. Middlesex R. R. Co., 138 Mass. 425; Plummer v. Milan, 70 Mo. App. 598; Klein v. Jewett, 26 N. J. Eq. 474; Blacchinska v. Howard Mission, 130 N. Y. 497; 15 L. R. A. 215; 42 N. Y. St. R. 378; 29 N. E. 755; 45 Alb. L. J. 255, rev'g 56 Hun, 322; 31 N. Y.

St. R. 159; 9 N. Y. Supp. 679; Uransky v. Dry Dock E. B. & B. R. R. Co., 118 N. Y. 304; 28 N. Y. St. R. 711; 23 N. E. 451, rev'g 44 Hun, 119; 7 N. Y. St. R. 395; Filer v. New York Central R. Co., 49 N. Y. 47; 10 Am. Rep. 327; Thuringer v. New York Cent. & H. R. R. Co., 71 Hun (N. Y.), 526; 55 N. Y. St. R. 87; 24 N. Y. Supp. 1087; Becker v. Janinski, 27 Abb. N. Cas. 45; 15 N. Y. Supp. 675; Minick v. Troy, 19 Hun (N. Y.), 253; Clark v. Dillon, 6 Daly (N. Y.), 526; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625; 29 S. E. 319; Richmond R. & E. Co. v. Bowles, 92 Va. 738; 24 S. E. 388; 2 Va. L. Reg. 14; Barnes v. Martin, 15 Wis. 240. But see Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; 16 S. E. 49, where it is held that the impairment of a married woman's capacity to labor is to be classified with pain and suffering and may be recovered by the wife herself.

physical injury.¹¹ And it is error to instruct the jury that she may recover damages for inability to perform the ordinary avocations of life, as the husband only can recover such damages.¹² And where a woman had lived apart from her husband for a period of twelve years, working out her own support and maintenance, it was held that there could be no recovery by her for loss of time applied to household duties, there being no proof of her husband's death, or that she had not received assistance from him or heard from him during such period, or any evidence showing a dissolution of the relation of husband and wife, or of any agreement by which she was entitled to her earnings separate and independent of any claim by him.¹³ Nor will her damages include anything for loss of earnings where such earnings consisted of compensation, received by her from her husband for work done by her for him under contract.¹⁴ But it is held in another case in New York to be otherwise where she labors for another,¹⁵ as is also the case where she is engaged in a separate business alone and apart from her husband.¹⁶ So under the Wisconsin statute,¹⁷ which provides that the earnings of a married woman shall be her separate property except where they are the result of labor performed for her husband, and which gives to her all the rights of an unmarried woman in regard to her separate property, where she conducts business in her own name separate from and independent of her husband's business, she may recover damages in her own name for loss of time.¹⁸

¹¹ *Fleming v. Shenandoah*, 67 Iowa, 508; *Union St. R. Co. v. Stone*, 54 Kan. 83; 37 Pac. 1012; 47 Am. & Eng. Corp. Cas. 90; *City of Holten v. Hicks* (Kan. App. 1899), 58 Pac. 998.

¹² *Wallis v. City of Westport*, 82 Mo. App. 522.

¹³ *Thuringer v. New York C. & H. R. Co.*, 71 Hun (N. Y.), 526; 55 N. Y. St. R. 87; 24 N. Y. Supp. 1067.

¹⁴ *Blaechinska v. Howard Mission*, 130 N. Y. 497; 15 L. R. A. 215; 42 N. Y. St. R. 378; 29 N. E. 755; 45 Alb. L. J. 255, rev'g 56 Hun, 322; 31 N. Y. St. R. 159; 9 N. Y. Supp. 679.

¹⁵ *Brooks v. Schwerin*, 54 N. Y. 343.

¹⁶ *Nichols v. Dubuque, etc., R. R. Co.*, 68 Iowa, 732; *Thomas v. Brooklyn*, 58 Iowa, 438; *Filer v. New York Central R. R. Co.*, 49 N. Y. 47; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625; 29 S. E. 319; *Fife v. Oshkosh*, 89 Wis. 540; 62 N. W. 541.

¹⁷ Wis. Rev. St. secs. 2343, 2345.

¹⁸ *Fife v. Oshkosh*, 89 Wis. 540; 62 N. W. 541. So under the Illinois statute which provides that a woman is entitled to her own earnings, it is held that she may recover for loss of time. *West Chicago St. R. Co. v. Carr*, 67 Ill. App. 530. And in Missouri under a similar statute a woman may recover for loss of wages. *Smith v.*

And in Massachusetts it has been held that where a married woman is authorized by statute to make contracts on her own account and is entitled to her own earnings, she may recover for impairment of her earning capacity.¹⁹ Since, presumptively, damages for the impairment of the earning capacity of a married woman belong to her husband, if she seeks to recover such damages, there must be alleged in her complaint some reason which entitles her to the fruits of her own labor,²⁰ and in the absence of such allegations evidence that she was carrying on a separate business and that the profits thereof belonged to her is inadmissible.²¹

§ 319. Same subject continued.—In many of the states statutes have been passed which provide that the earnings of a wife shall be her separate property.²² And where such statutes are in existence the husband's recovery for loss of services could not include damages for loss of earnings which she had sustained. So under a Nebraska statute²³ which so provided, it was decided that the husband could not recover for losses due to the wife's failure to perform laundry work and sewing for others, though she was accustomed to contribute such earnings to the support of the family.²⁴ But in New York²⁵ it is held that where the evidence did not show that the earnings of the wife were kept apart by her as her separate estate and she and her husband were living together, it would be presumed that her earnings were used as part of the family resources and a refusal to instruct that her husband had no absolute legal claim to such earnings was proper. In another case in the same state²⁶ where

Chic. & A. R. Co., 119 Mo. 246; 23 S. W. 784.

¹⁹ *Harmon v. Old Colony R. Co.*, 165 Mass. 100; 40 N. E. 506; 30 L. R. A. 658; 42 Cent. L. J. 247; 2 Va. Law Reg. 9.

²⁰ *Uransky v. Dry Dock E. B. & B. R. R. Co.*, 118 N. Y. 304; 28 N. Y. St. R. 711; 23 N. E. 451, rev'g 44 Hun, 119; 7 N. Y. St. R. 395; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625; 29 S. E. 319.

²¹ *Woolsey v. Ellenville*, 39 N. Y. St. 744.

²² See sec. 318 herein.

²³ *Neb. Comp. Stat. chap. 53, sec. 4.*

²⁴ *Riley v. Lidtke*, 49 Neb. 139; 68 N. W. 356.

²⁵ *Brown v. Third Ave. R. Co.*, 19 Misc. (N. Y.) 504; 43 N. Y. Supp. 1094, aff'g 18 Misc. 584; 42 N. Y. Supp. 700.

²⁶ *London v. Cunningham*, 1 Misc. (N. Y.) 406; 49 N. Y. St. R. 447; 20 N. Y. Supp. 882.

the husband was engaged in the restaurant business, it was decided that he could not recover for a loss of his wife's services in such business since a wife can herself recover for loss of earning power.²⁷ And where the husband has released to his wife all claim to her services as provided by a statute,²⁸ and such release has been filed, the wife may recover what the husband might have recovered in his own name for the loss of her services including her domestic services and also loss of earnings outside of her domestic services.²⁹ Though it may be stated as a general rule that the services of a married woman belong to her husband and that he alone can recover for the loss thereof, yet for such loss as is personal to herself she may recover.³⁰ And her right to recover for loss of capacity to labor or earn money will not be denied because there is no evidence showing such capacity at and just before the time of her being injured, where the evidence shows that she had been in business for a long time prior thereto, such business being discontinued at the time of the injury because of temporary illness.³¹ But a statute giving to a married woman the control of her time and actions does not take away from her husband the right of action for loss of consortium due to the negligence of another.³² And under an allegation of injury to the wife's spine whereby the husband has lost her services and society, it is held that evidence is admissible showing that as a result of such injury the husband is prevented from having intercourse with his wife where it is shown that this is the natural and proximate result of the injury.³³

§ 320. Wife's right to recover not precluded by husband's right.—Where the right is conferred by statute upon a married woman to recover damages for a personal injury, and she is also

²⁷ But see *Citizens St. R. Co. v. Tiviname*, 121 Ind. 375. See sec. herein as to wife's recovery for loss of earnings.

²⁸ Pa. Act, June 11, 1879.

²⁹ *Kelley v. Mayberry Twp.*, 154 Pa. St. 440; 26 Atl. 595; 32 W. N. C. 224.

³⁰ *Minick v. Troy*, 19 Hun (N. Y.), 253, aff'd 83 N. Y. 514.

³¹ *Texas & P. Ry. Co. v. Humble*, 181 U. S. 57; 45 L. Ed. 747; 21 S. Ct. 526, aff'g 97 Fed. 837; 38 C. C. A. 502.

³² *Kelley v. New York, N. H. & H. R. R. Co.*, 168 Mass. 308; 46 N. E. 1063; 38 L. R. A. 631; 2 Chic. L. J. Wkly. 326.

³³ *City of Dallas v. Jones* (Tex. Civ. App.), 54 S. W. 606.

entitled to recover under such a statute for any impairment of her capacity to labor, the fact that her husband may recover for loss of her services will not preclude her right to recover for loss of capacity to earn for herself.³⁴

§ 321. Sale of laudanum to married woman—Recovery by husband for loss of services—Case.—Where a person sells laudanum as a beverage to a married woman with knowledge of the fact that her mind and body are being destroyed thereby and that its use is causing a loss to her husband who has repeatedly warned such person and protested against the sale thereof, the latter will be responsible to the husband for such damages as he sustains by reason of the loss of her services.³⁵

§ 322. Injury to wife—Expenses for medical treatment recoverable by husband.—Moneys expended by a husband or for the expenditure of which liability has been incurred by him, where rendered necessary as a result of an injury to his wife for medical treatment or nursing, are recoverable by him in an action against the person responsible for the injury.³⁶ But it is held that such expenses cannot be recovered in an action by the husband and wife for injuries sustained by her since the right of action therefor is in the husband alone.³⁷ And where in an action by a wife she alleged in the complaint that she had been

³⁴ *Texas & P. Ry. Co. v. Heimble*, 181 U. S. 57; 45 L. Ed. 747; 21 S. Ct. 526, aff'g 97 Fed. 837; 38 C. C. A. 502 (under *Sand & H. Dig. Ark.* sec. 5641).

³⁵ *Holleman v. Harward*, 119 N. C. 150; 25 S. E. 972; 34 L. R. A. 803; 2 Chic. L. J. Wkly. 20.

³⁶ *Union Pac. R. Co. v. Jones*, 21 Colo. 340; 40 Pac. 891; *Denver Consol. Tramway Co. v. Riley* (Colo. App.), 59 Pac. 476; *Tompkins v. West*, 56 Conn. 478; *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 289; 26 Wash. L. Rep. 298; *Tuttle v. Chic. R. I. & P. R. R. Co.*, 42 Iowa, 518; *Eden v. Lexington, etc., R. R. Co.*, 13 B. Mon. (Ky.) 204; *Northern Cent. Ry. Co. v. Mills*, 61 Md. 355;

McDevitt v. St. Paul, 66 Minn. 14; 68 N. W. 178; 33 L. R. A. 601; *Blair v. Chic., etc., R. R. Co.*, 89 Mo. 334; *Hopkins v. Atlantic, etc., R. R. Co.*, 36 N. H. 9; *Robinson v. Met. St. Ry. Co.*, 34 Misc. R. (N. Y.) 795; 69 N. Y. Supp. 891; *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; *Henry v. Klopfer*, 147 Pa. St. 178; 23 Atl. 337; 29 W. N. C. 331; 22 Pitts. L. J. N. S. 385; *Lindsey v. Danville*, 46 Vt. 144; *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592; *Kavanaugh v. Janesville*, 24 Wis. 618.

³⁷ *South v. Thompson*, 1 Penn. (Del.) 149; 39 Atl. 1100; *Friedman v. McGowan*, 1 Penn. (Del.) 436; 42 Atl. 723.

§§ 323, 324 HUSBAND AND WIFE—PHYSICAL INJURIES.

permanently injured so as to be unable to labor and had expended large sums of money, not stating the amount, in attempting to effect a cure, it was decided that such statements were in aggravation for the purpose of showing the severity of the injuries and that the husband was not thereby precluded from recovering for loss of her services and society and for money expended by him in her care and treatment.³⁸

§ 323. Recovery for services of husband in nursing injured wife.—If a husband devotes his time to nursing and caring for his injured wife or in doing her work, he may recover for his services so rendered from the persons causing such injury.³⁹ The amount recoverable by him, however, is not the salary which he may have lost or the wages which he might have earned in working at his business or trade, but is determined by the value of his services in such capacities.⁴⁰ In other cases, however, it is held that the amount which a husband may recover for his services in nursing and attending an injured wife is limited to the sum for which he could have hired other reasonably competent persons in such capacity.⁴¹

§ 324. Recovery for services of daughter as nurse.—A husband suing to recover for injuries to his wife is entitled to an allowance for the services of a daughter as nurse to her, but he is not entitled to recover therefor the specific amount which she was earning in another capacity simply because her mother desired or required her services.⁴²

³⁸ *Denver Consol. Tramway Co. v. Riley* (Colo. App.), 59 Pac. 476.

³⁹ *Hazard Powder Co. v. Volger* (C. C. App. 8th A.), 7 C. C. A. 130; 58 Fed. 152; *Salida v. McKinna*, 16 Colo. 523; 27 Pac. 810; *Union P. R. Co. v. Jones*, 21 Colo. 340; 40 Pac. 891; *Smith v. City of St. Joseph*, 55 Mo. 456; *Fort Worth & D. C. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654; 35 S. W. 335; *Lindsey v. Danville*, 46 Vt. 144; *Selleck v. City of Janesville*, 104 Wis. 570; 80 N. W. 944; 47 L. R. A. 691.

⁴⁰ *Hazard Powder Co. v. Volger* (C. C. App. 8th A.), 7 C. C. A. 130; 58 Fed. 152; *Salida v. McKinna*, 16 Colo. 523; 27 Pac. 810. But see *Pullman Pal. Car Co. v. Smith*, 79 Tex. 478; 14 S. W. 993.

⁴¹ *Howells v. North Amer. Transp. & Trad. Co.*, 24 Wash. 689; 64 Pac. 786; *Selleck v. City of Janesville*, 104 Wis. 570; 80 N. W. 944; 47 L. R. A. 691.

⁴² *Dormer v. Alcatraz Pav. Co.*, 16 Pa. Super. Ct. 407.

§ 325. **Expenses—Recovery of by married woman.**—A wife is entitled to support from her husband, and it may be stated as a general rule that where living with her husband she cannot, in an action for personal injuries suffered by her, recover expenses for medical treatment or other expenses incurred as a result of the injury, since the husband being liable for her support and therefore for her expenses is entitled to recover therefor.⁴³ If, however, it appears that she has paid such bills out of her separate estate or become liable therefor, then she may recover the same.⁴⁴ Thus it is decided that a married woman may recover the expenses of her sickness as the result of an injury, though she had not paid the bill therefor, where it appeared that such expenses were incurred by and charged to her.⁴⁵ In a case in Virginia, however, it is held that a married woman cannot recover the expenses of her cure unless it is averred and proved that she paid such expenses out of her separate estate.⁴⁶ Where a married woman has not lived with her husband for several years, during which time she has supported herself, her medical expenses may be recovered.⁴⁷ So in Illinois it is held that a married woman may recover the expense of her cure, since un-

⁴³ *Tompkins v. West*, 56 Conn. 478; 16 Atl. 237; *Lewis v. Atlanta*, 77 Ga. 756; *Ohio & M. Ry. Co. v. Cosby*, 107 Ind. 32; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109; 26 Pac. 453; *Jordan v. Middlesex R. R. Co.*, 138 Mass. 425; *Rogers v. Orion*, 116 Mich. 324; 74 N. W. 463; 4 Det. L. N. 1086; *State v. Detroit*, 113 Mich. 643; 72 N. W. 8; 4 Det. L. N. 431; *Belyea v. Minneapolis, St. P. & S. S. M. R. Co.*, 61 Minn. 224; 63 N. W. 627; *Klein v. Jewett*, 26 N. J. Eq. 474; *Moody v. Osgood*, 50 Barb. (N. Y.) 628; *Burnham v. Webster*, 54 N. Y. Super. 30; *Met. Adams & E. R. R. Co. v. Wysong*, 8 Ohio C. C. 211; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 629; 29 S. E. 319; *Richmond R. & E. Co. v. Bowles*, 92 Va. 738; 24 S. E. 388; 2 Va. Law Reg. 14.

⁴⁴ *Lewis v. Atlanta*, 77 Ga. 756;

Ohio & M. Ry. Co. v. Cosby, 107 Ind. 32; *Shelby v. Castetter*, 7 Ind. App. 318; *Jordan v. Middlesex R. R. Co.*, 138 Mass. 425; *Lacas v. Detroit City R. Co. (Mich.)*, 52 N. W. 745; *McLean v. City of Kansas City*, 81 Mo. App. 72; *Klein v. Jewett*, 26 N. J. Eq. 474; *Moody v. Osgood*, 50 Barb. (N. Y.) 628; *Burnham v. Wester*, 54 N. Y. Super. 30; *Chacey v. Fargo*, 5 N. D. 173; 64 N. W. 932; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625; 29 S. E. 319.

⁴⁵ *Lacas v. Detroit City R. Co. (Mich.)*, 52 N. W. 745; *Chacey v. Fargo*, 5 N. D. 173; 64 N. W. 932.

⁴⁶ *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625; 29 S. E. 319.

⁴⁷ *Lammiman v. Detroit Citizens St. R. Co.*, 112 Mich. 602; 71 N. W. 153; 4 Det. L. N. 134.

der the statute of that state she is personally liable therefor.⁴⁸ And in Indiana a married woman may recover such expenses though her husband is liable for the same.⁴⁹ But expenses for domestic service during the disability of a married woman as a result of an injury cannot, it is held, be recovered by her.⁵⁰ Expenses for such service would, however, probably be controlled by the same principles as control in the case of the allowance of medical expenses.

§ 326. **Pain and suffering—Married woman.**—In an action by a married woman to recover damages for physical injuries sustained by her, recovery may be had for such pain and suffering as are the direct result of the injury.⁵¹ And in an action by the husband and wife jointly to recover for injuries sustained by her, the measure of damages is such sum as will compensate them for her injuries, and they may recover for her pain and suffering, past and prospective.⁵²

⁴⁸ West Chicago St. R. Co. v. Carr, 67 Ill. App. 530, aff'd 170 Ill. 478; 48 N. E. 992.

⁴⁹ Columbus v. Strassner, 138 Ind. 301; 34 N. E. 5.

⁵⁰ Frohs v. Dubuque (Iowa, 1899), 80 N. W. 341.

⁵¹ Green v. Penn. R. Co., 36 Fed. 66; Tompkins v. West, 56 Conn. 478; Friedman v. McGowan, 1 Penn.

(Del.) 436; 42 Atl. 723; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Ohio & C. R. R. Co. v. Cosby, 107 Ind. 32; Klein v. Jewett, 26 N. J. Eq. 474.

⁵² Friedman v. McGowan, 1 Penn. (Del.) 436; 42 Atl. 723, which was an action to recover for injuries sustained by the wife from a bite of a dog.

ACTIONS BY PASSENGERS.

CHAPTER XV.

ACTIONS BY PASSENGERS.

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| <p>§ 327. Actions by passengers may be in contract or tort.</p> <p>328. Physical injuries—Passengers—Generally.</p> <p>329. Permanent physical injuries—Passengers—Cases.</p> <p>330. Passenger injured alighting from car.</p> <p>331. Passenger injured—Lex loci contractus—Statutory limitation as to recovery.</p> <p>332. Exemplary damages.</p> <p>333. Exemplary damages—Assaults on passengers.</p> <p>334. Exemplary damages—Failure or refusal to transport passenger.</p> <p>335. Same subject continued.</p> <p>336. Penalty statute—Failure to transport and discharge passengers at destination—"Legal or just excuse."</p> <p>337. Wrongful ejection from train.</p> <p>338. Wrongful ejection from train—Continued.</p> <p>339. Wrongful ejection from train—Concluded.</p> <p>340. Exemplary damages—Ejection of passenger.</p> <p>341. Exemplary damages—Ejection of passenger—Unnecessary force or violence.</p> <p>342. Exemplary damages—Ejection of passenger—When not recoverable.</p> <p>343. Exemplary damages—Ejection of passenger—Cases.</p> <p>344. Passenger left at wrong station.</p> | <p>345. Duty to minimize damages—Ejection of passenger.</p> <p>346. Passenger carried beyond destination.</p> <p>347. Passenger carried beyond destination—Continued.</p> <p>348. Exemplary damages—Passenger carried beyond destination.</p> <p>349. Passenger—Illness due to exposure—Walking to destination.</p> <p>350. Same subject—Conclusion.</p> <p>351. Passenger—Injury to health by exposure.</p> <p>352. Fright in connection with physical injury—Expulsion of passenger.</p> <p>353. Mental suffering, etc.—Passenger carried beyond destination.</p> <p>354. Mental suffering—Injury to feelings, etc.—Ejection of passenger.</p> <p>355. Mental suffering—Passengers—Cases generally.</p> <p>356. Failure to give passenger proper accommodations.</p> <p>357. Injury or insult by third persons to passenger.</p> <p>358. Wrongful charge of fare—Taking up tickets, etc.</p> <p>359. Stipulations exempting carrier from liability.</p> <p>360. Statutory exemption from liability—Passengers riding on platforms of cars.</p> |
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§ 327. Actions by passengers may be in contract or tort.—The duties, obligations and responsibilities which a carrier owes to its passengers do not arise merely out of contract but are imposed also by law. While a carrier may by contract limit to a certain degree the extent of his obligation, yet the law will not permit him by contract to release himself from all obligations or to seriously impair or affect those which are imposed upon him. So while to a certain extent, it may be said that the relation between the carrier and passenger is a contract relation, yet the contract is one which the law imposes upon the carrier the duty to make, and it necessarily follows that where a carrier incurs any liability for a breach of any of its obligations towards its passengers, the action may either be in contract or for a tort.¹ So where a passenger is wrongfully ejected from a train he may recover damages as for a tort though the relation of the parties be in the nature of a contract.² Again, where a passenger owing to the fault of the station agent was induced to board a train which did not stop at the station where he wished to alight, it was held that his recovery for his ejection before he reached his destination was not merely for breach of the contract but for the tort.³ And in most of the cases the action is generally in tort in which form of action the damages are not limited as they would be were the action purely upon the contract. So where a passenger was wrongfully and violently expelled from a train, it was held that though the declaration allege a contract for carriage, the action was not for a breach of the contract but in the nature of a tort for breach of the duty the carrier owed to the passenger and that punitive damages were recoverable.⁴ But where the complaint alleged an agreement to carry plaintiff and others by a special train to a certain destination and back on a certain day and that the defendant wilfully, fraudulently and negligently failed and refused to carry them back from their destination, whereby plaintiff was injured in health and business and suffered pain and anxiety of mind, it was decided that the action was upon special

¹ Louisville & N. R. Co. v. Hine, 121 Ala. 284; 14 Am. & Eng. R. Cas. N. S. 382; 25 So. 857.

² Book v. Chic. B. & Q. R. Co., 75 Mo. App. 604; 1 Mo. App. Rep. 428.

³ Reynolds v. Railway Co., 13 Ohio C. C. 39.

⁴ Head v. Georgia Pac. Ry. Co., 79 Ga. 358; 7 S. E. 217.

contract and not in tort and that the plaintiff's recovery was limited to such damages as naturally resulted from the breach of the contract and that he could not recover for pain and anxiety of mind.⁵

§ 328. Physical injuries — Passengers — Generally.—The various elements which are to be considered in the estimation of the damages recoverable by a passenger in an action for physical injuries are similar to those which enter into the determination of the amount recoverable in other actions for physical injuries due to the negligence of another. So where a passenger is entitled to recover, the jury in estimating the damages may consider all the damages which he has sustained from the date of the injury up to the time of the trial and those which he will sustain in the future as a result of the injury, the various elements to be considered being physical and mental suffering,⁶ expenses actually paid or incurred,⁷ loss of time and earnings,⁸ diminution of ability to labor,⁹ and any permanent disability as a result of the injury.¹⁰ As a general rule only such damages can be recovered by a passenger in this class of cases as will compensate him for the injury which he has sustained.¹¹ Exemplary

⁵ *Walsh v. Chic., etc., Ry. Co.*, 42 Wis. 23; 24 Am. Rep. 376. See also *Denver Tramway Co. v. Cloud* (Colo. App.), 40 Pac. 779.

⁶ See secs. 215 *et seq.*, herein.

⁷ See secs. 250 *et seq.*, herein.

⁸ See secs. 226 *et seq.*, herein.

⁹ See secs. 226 *et seq.*, herein.

¹⁰ See secs. 242 *et seq.*, herein. These various elements as affecting the measure of damages have already been fully considered in the sections above referred to, but see also the following cases of actions by passengers where they have been considered: *Wade v. Leroy*, 20 How. (N. S.) 34; *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333; 30 S. E. 41; 4 Am. Neg. Rep. 128; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409; 1 West. 668; 2 West. 686; *Donaldson v. Mis-*

issippi, etc., R. R. Co., 18 Iowa, 280; *Chic. R. I. & P. R. Co. v. Posten*, 59 Kan. 449; 53 Pac. 465; 11 Am. & Eng. R. Cas. N. S. 138; *Black v. Carrolton R. Co.*, 10 La. Ann. 33; *Memphis, etc., R. R. Co. v. Whitfield*, 44 Miss. 466; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H. 541; *Orsor v. Metropolitan Crosstown R. Co.*, 78 Hun (N. Y.), 169; 60 N. Y. St. R. 193; 28 N. Y. Supp. 966; *Sevarthout v. New Jersey, etc., Co.*, 46 Barb. (N. Y.) 222; *Filer v. New York, O. R. R. Co.*, 46 N. Y. 42; *Lincoln v. Saratoga & Schenectady R. R. Co.*, 23 Wend. 425; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 260; *Galveston, H. & S. A. R. Co. v. Cooper* (Tex. Civ. App.), 20 S. W. 990.

¹¹ *Fremont E. & M. V. R. Co. v. French*, 48 Neb. 638; 67 N. W. 472;

damages will not be awarded in the absence of gross negligence or wanton recklessness.¹²

§ 329. Permanent physical injuries—Passengers—Cases.

—Where as a result of an injury to a passenger he was subsequently, though a considerable time after the injury, troubled with nervousness, his mental faculties became somewhat impaired, and this was followed by paralysis, though not until about seven months after the injury, the injury being the direct cause of the paralysis, the company was liable in damages therefor.¹³ And it was similarly decided where an injury resulted in a cancer.¹⁴ So also, where as a result of a collision of a vessel on which a woman was a passenger, she was thrown against a chair, but exhibited no signs of injury for several days, and did not call a physician for nine days, it was held that damages were recoverable for spinal irritability resulting from the collision.¹⁵ And in another case where in a railroad accident a passenger who had never been troubled with catarrh, was injured on the nose and catarrh subsequently developed, and evidence of medical experts was given showing that catarrh might result from such an injury under certain exceptional circumstances, it was determined that a refusal by the court to charge that there was not sufficient evidence to show that the catarrh resulted from the injury was proper.¹⁶

§ 330. Passenger injured alighting from car.—If a passenger while alighting from a street car or railroad train is injured owing to the negligent starting of such car or train, he may recover damages for such injuries as he has sustained, including physical pain and suffering, mental suffering, and for all other injuries both past and prospective.¹⁷ The measure of

4 Am. & Eng. R. Cas. N. S. 365; Kentucky, etc., R. R. Co. v. Dills, 4 Bush (Ky.), 593.

¹³ Kentucky & R. R. Co. v. Dills, 4 Bush (Ky.), 593.

¹⁴ Bishop v. St. Paul City Ry. Co., 48 Minn. 26; 50 N. W. 928.

¹⁶ Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134.

¹⁵ The Rosedale (D. C. S. D. N. Y.), 88 Fed. 324.

¹⁶ Quackenbush v. Chic. & N. W. Ry. Co., 73 Iowa, 458; 35 N. W. 523. See chaps. III-VI, herein.

¹⁷ Omaha St. R. Co. v. Emminger, 57 Neb. 240; 77 N. W. 675; 12 Am. & Eng. Corp. Cas. N. S. 188. As to duty of company when passenger

damages in such cases is the same as in all cases of personal injuries sustained as the result of the negligence of another. So it was held proper to instruct the jury in an action by a passenger for injuries received while alighting from a train, that in estimating the damages they might consider evidence showing mental and physical pain and suffering, expenses incurred, loss of time while disabled, and permanent diminution of ability to earn money.¹⁸ And where a female passenger was severely injured while alighting from a train, a verdict of \$3,000 was held not to be so excessive as to justify the appellate court in holding that it was the result of passion or prejudice.¹⁹ But where a passenger was injured by attempting to alight from a moving car which did not stop at the place he expected, it was decided that he could not recover in contract for such injuries because of the failure to stop, since such failure could not be considered as the proximate cause of the injuries.²⁰

§ 331. Passenger injured—Lex loci contractus—Statutory limitation as to recovery.—A passenger who procures a ticket between two stations within a state over a line of railroad which passes through another state, and who while passing over that portion of the road situate within such other state is injured by reason of the negligence of the carrier is not limited as to the amount of damages recoverable by the statutes of such state, since the contract of carriage is to be construed with reference to the laws of the state wherein he procured his ticket and from which his journey commenced, and within which it was to terminate. In such cases the *lex loci contractus* governs.²¹

§ 332. Exemplary damages.—The question as to the allowance of exemplary damages against corporations has been, as

alighting from electric car, and degree of care imposed on passengers, see *Joyce on Elec. Law*, secs. 562-569.

¹⁸ *Houston & T. C. R. Co. v. Rowell* (Tex. Civ. App.), 45 S. W. 763, *aff'd* 46 S. W. 630; 11 Am. & Eng. R. Cas. N. S. 597.

¹⁹ *Illinois C. R. Co. v. Baysa*, 17

Ky. L. Rep. 105; 30 S. W. 600. See *Weinberg v. Met. St. Ry. Co.*, 139 Mo. 286; 40 S. W. 882, where it was held that a verdict for nominal damages would not be disturbed.

²⁰ *White v. West End St. R. Co.*, 105 Mass. 522; 43 N. E. 298.

²¹ *Dyke v. Erie Ry. Co.*, 45 N. Y. 118.

we have hereinbefore stated, the subject of much discussion in the various courts where it has arisen, and the allowance is in many cases made dependent upon the fact whether there has been in any way a ratification by the corporation of the servant's wrongful act. As this question is discussed elsewhere in this work, we refer thereto²² for the general principles controlling the various decisions, and will only state generally that we believe the weight of authority sustains the allowance of exemplary damages against carriers for the wrongful act of a servant or agent towards a passenger, without regard to the question whether such act has been ratified by the carrier or not.²³

§ 333. Exemplary damages—Assaults on passengers.—The majority of the cases uphold the rule that a carrier is liable for an assault and battery committed by one of its servants upon a passenger, and that if the former without provocation wrongfully assault a passenger, the latter may recover exemplary damages. So where a brakeman attempted to eject a dog belonging to a passenger, and which had entered the car with him, but was prevented by the latter from so doing, and afterward the brakeman suddenly assaulted the passenger and seriously injured him, it was held, in an action against the company for such assault and injury, that it was proper to charge the jury that if the brakeman was acting in the performance of his duty as brakeman "he would be justified in using a reasonable degree of force, necessary and proper to accomplish the removal of the dog from the car, but if he used more violence than was necessary and inflicted on plaintiff blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages."²⁴ And in another case where a conductor rudely assaulted a passenger, used abusive and insulting language towards him, roughly seized and pulled him to the end of the car, acted

²² See secs. 135-141, herein, where the question of the allowance of exemplary damages against corporations is discussed.

²³ See secs. 139-141, herein, and also the various sections in this chapter on exemplary damages.

²⁴ *Hanson v. European & American Ry. Co.*, 62 Me. 84; 16 Am. Rep. 404. In this case a verdict of \$4,000 was given and was held not excessive. See also *Hinkley v. Chicago, etc., R. R. Co.*, 38 Wis. 194.

as if about to draw a pistol, threatened to kill him, and spit tobacco juice in his face, it was decided that the company was liable in punitive damages.²⁵ Again such damages were allowed to a passenger who upon demand had given his ticket to a brakeman authorized to receive it, but was shortly after approached by the same brakeman, who denied that he had been given the ticket and grossly insulted and assaulted him.²⁶ So also a sleeping car company has been held liable in punitive damages for an unprovoked assault by a porter upon one of its passengers.²⁷ In this case it was also held that, even if ratification by the company was necessary in order to render it liable in punitive damages for such assault, the company sufficiently ratified the act of the porter by attempting to prove upon the trial that his conduct was not improper or wrongful, and by making a violent and unwarrantable attack upon the conduct and character of the plaintiff with knowledge derived from the conductor's report of the facts of the case. In an earlier case in the same state, where a passenger was assaulted by fellow passengers, who were employees of defendant, but off duty, and the conductor made no particular effort to prevent the assault or protect plaintiff, and the company retained such servants in their employ, it was decided that punitive damages could be recovered.²⁸ While it is declared that exemplary damages may be recovered for an unprovoked and malicious assault by an employee of a railroad upon a passenger, yet provocation even does not necessarily defeat the recovery of exemplary damages, but the conduct of both parties may be considered by the jury.²⁹ In this class of actions, as also in actions to recover exemplary damages for the wrongful ejection of a passenger, the question of liability of the company is made to depend, in many

²⁵ *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23; 15 S. E. 778.

²⁶ *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; 2 Am. Rep. 39, Tapley, J., dissenting. In this case it also held that as the defendants had retained the brakeman in their employ after notice of the assault, a verdict for \$4,850 would not be set aside as excessive.

²⁷ *Pullman Palace Car Co. v. Law-*

rence, 74 Miss. 782; 22 So. 53; 15 Nat. Corp. Rep. 124; 8 Am. & Eng. R. Cas. N. S. 59; 2 Am. Neg. Rep. 586; 1 Miss. Dec. (No. 5.),

²⁸ *New Orleans, etc., R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689.

²⁹ *Baltimore & O. R. R. Co. v. Barger*, 80 Md. 23; 30 Atl. 220; 26 L. R. A. 220.

cases, upon the fact whether the company has by any act ratified the conduct of the employees.³⁰ In many states, however, statutes have been passed in reference to the allowance of exemplary damages in one or both class of cases, and where such statutes exist, their provisions in reference thereto will control.

§ 334. Exemplary damages—Failure or refusal to transport passenger.—A railroad company owes to the public the duty of stopping its trains at places and times designated by its schedule or time table, for the purpose of enabling intending passengers to board such trains, and it is the duty of the company to transport such passengers to the destination called for by the passenger in accordance with his ticket, or upon the payment of the proper fare to the conductor, provided the train is scheduled to stop at such point. And where a railroad company has advertised for passengers for a certain train at a certain station and has or could have had by reasonable diligence sufficient room to accommodate them, but in violation of its statutory duty fails to stop at such station for a passenger, punitive damages are recoverable.³¹ And where in pursuance of an unreasonable regulation of the company, its agents refuse to sell an intending passenger a ticket or check his baggage to a regular station of a passenger train, such regulation and refusal indicate such a wanton disregard of the rights of passengers as will warrant the recovery of exemplary damages.³² Again, where the employees of a carrier, acting within the scope of their authority, wilfully and wantonly refused to accept a round trip ticket which a passenger tendered for the return trip, and he was by such act obliged to borrow money in order to reach home, it was held that the passenger was entitled to recover exemplary damages against the company.³³

§ 335. Same subject continued.—It will be observed that in this class of cases as in all others, the recovery of exemplary

³⁰ See secs. 136-141, herein.

³¹ *Purcell v. Richmond & D. R. Co.*, 108 N. C. 414; 12 L. R. A. 113; 12 S. E. 954; 10 Ry. & Corp. L. J. 35.

³² *Pittsburgh, C. & St. L. R. Co. v.*

Lyon, 123 Pa. St. 140; 2 L. R. A. 489; 16 Atl. 607; 23 W. N. C. 69; 46 Phila. Leg. Intel. 311; 39 Pitts. L. J. N. S. 286.

³³ *Scott v. Chesapeake & O. R. Co.*, 43 W. Va. 484; 27 S. E. 211.

damages is allowed on the ground that the act of the company in failing or refusing to transport a passenger is a wilful, wanton or malicious one. The failure to transport may be due to mere negligence, and in such cases it is decided that exemplary damages are not recoverable, the damages being compensatory merely.³⁴ So where the failure to transport a passenger was due to the fact that the engine was broken down, and there was no personal injury, insult, indignity or intentional wrong done to him, punitive damages were refused.³⁵ And where an intending passenger, owing to the absence of the ticket agent from a flag station, was unable to procure a ticket, and the engineer of the train failed to see his signal to stop, it was held that he was entitled to recover the actual damages sustained and that to authorize the recovery of punitive damages for the failure of the engineer to stop at such station so that he might board the train, the engineer must have seen him, it not being sufficient that in the exercise of reasonable care he could have seen him.³⁶ And, again, it was held that such damages could not be recovered for delay in transporting a passenger, where such delay was due to a wreck, though the company failed to do all that it might have done to insure the continuance of the journey and though there was sufficient negligence to justify a recovery for loss of time.³⁷ And where, owing solely to the negligence of the company in calling out the name of a station before it was time for passengers to leave the car, a passenger was discharged from a train one and a half miles from the station, it was decided that he could not recover exemplary damages, and this though there was a refusal to stop the train after discovering that the passenger had left it.³⁸ And in another case it is held that the mere wrongful

³⁴ *Southern R. R. Co. v. Kendrick*, 40 Miss. 374, where it was held to be error to instruct the jury in an action to recover damages for failure to deliver a passenger at her destination, that not only damages compensatory for the private injury might be recovered, but also exemplary damages for disregard of public duty without qualifying that part of the instruction as to punitive damages by stating that such damages should

only be given where the circumstances of the case were found to justify or require them.

³⁵ *Hansley v. Jamesville & W. R. Co.*, 117 N. C. 585; 115 N. C. 602; 32 L. R. A. 543; 23 S. E. 443.

³⁶ *Thomas v. Southern R. Co.*, 122 N. C. 1005; 30 S. E. 843.

³⁷ *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652; 13 So. 472.

³⁸ *Gulf C. & S. F. R. Co. v. McFadden* (Tex. Civ. App.), 25 S. W. 451.

refusal of a carrier to permit a passenger to ride on a certain train is not sufficient to authorize the recovery of punitive damages even though the employees were informed by such person that he desired to reach the deathbed of a brother.³⁹ In an action by a person to recover exemplary damages against a carrier for the failure on the part of the conductor to hold the train for him, which he promised to do while the former, who was on his way to attend the funeral of his sister, procured his ticket, it was held that testimony by the plaintiff as to what he did after he had finally reached his home, was admissible though it tended to aggravate damages.⁴⁰

§ 336. Penalty statute—Failure to transport and discharge passengers at destination—"Legal or just excuse."—Where there is a statute imposing a penalty upon railroad corporations for failure to transport and discharge passengers who offer themselves for transportation, and further providing that the penalty shall be recoverable in an action for debt and that the only defense thereto shall be a "just or legal excuse,"⁴¹ in an action to recover such penalty by a passenger whom the company had failed to discharge at his destination, it is no defense within the wording of the statute that the train was not stopped at the passenger's destination, because in the opinion of the conductor it was unsafe to stop at such station on account of the number of persons who were waiting to take passage on the train which was already crowded.⁴²

§ 337. Wrongful ejection from train.—Where a passenger is wrongfully ejected from a train, he may recover either in an action upon the contract of carriage, or in an action of tort. Where his action is for a breach of the contract, he can only recover such damages as are the direct and proximate result of the breach.⁴³ In a case in Ohio, however, where a person, hav-

³⁹ *Barnett v. Chic. & A. R. Co.*, 75 Mo. App. 446; 1 Mo. App. Repr. 391.

⁴⁰ *Gillman v. Florida, C. & P. R. Co.*, 53 S. C. 210; 12 Am. & Eng. R. Cas. N. S. 125; 31 E. S. 224.

⁴¹ See How. Ann. Stat. Mich. sec. 3324, which imposes a penalty of \$100 in such cases.

⁴² *Hoyt v. Cleveland, Cincinnati & St. Louis Ry. Co.*, 112 Mich. 638; 71 N. W. 172; 9 Am. & Eng. R. Cas. N. S. 818; 29 Chic. L. N. 330; 4 Det. L. N. 142; 3 Am. Neg. Rep. 199.

⁴³ *Union P. R. Co. v. Shook*, 3 Kan. App. 710; 44 Pac. 785.

ing a ticket good only on trains stopping at a specified station, was induced to board a certain train by the statement of the station agent, that such train stopped at his station, but which in fact did not and he was ejected by the conductor before reaching such station, it was held that the measure of damages was the same whether the injury was considered as resulting from a tort or from a breach of contract.⁴⁴ As a general rule the measure of damages in such an action is such as may fairly be considered as arising naturally in the usual course of events from the breach of the contract, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they executed the contract as the probable results of a breach of the same.⁴⁵

§ 338. Wrongful ejection from train—Continued.—In an action of tort, a passenger may recover damages for all the injuries which he has sustained, either directly caused by or flowing from the wrongful act.⁴⁶ And it is declared that though a passenger in such a case may have suffered no pecuniary loss or actual injury to his person, his recovery will not be limited to merely nominal damages.⁴⁷ So where a passenger was ejected

⁴⁴ Pittsburg, C. O. & St. L. R. Co. v. Reynolds, 55 Ohio St. 370; 37 Ohio L. J. 41; 45 N. E. 712; 2 Chic. L. J. Wkly. 95.

⁴⁵ Chic. B. & Q. R. Co. v. Spirk, 51 Neb. 167; 70 N. W. 926; 7 Am. & Eng. R. Cas. N. S. 205; 2 Am. Neg. Rep. 201.

⁴⁶ Chic. B. & Q. R. Co. v. Spirk, 51 Neb. 167; 70 N. W. 926; 7 Am. & Eng. R. Cas. N. S. 205; 2 Am. Neg. Rep. 201. See Louisville & N. R. Co. v. Hine, 121 Ala. 234; 25 So. 857; 14 Am. & Eng. R. Cas. N. S. 382.

⁴⁷ Chic., etc., R. R. Co. v. Flagg, 43 Ill. 364. See cases following as to whether verdicts in certain cases were excessive in actions for ejection of passengers: In following cases held not excessive: Outlawing all certain class of tickets of which pas-

senger held one, considered as reckless disregard of passenger's rights—\$1,000. Winters v. Cowen (C. C. N. D. Ohio), 90 Fed. 99; 12 Am. & Eng. R. Cas. N. S. 40. \$800 though large not excessive. Charleston & S. R. Co. v. Varnadore, 94 Ga. 639; 21 S. E. 581. Wantonly and wilfully thrown from moving train—severe injuries external and internal—\$2,000. Illinois, C. R. Co. v. Davenport, 75 Ill. App. 579, aff'd 177 Ill. 110; 52 N. E. 266. Force and violence resulting in illness—\$2,000. Louisville, N. A. & C. R. Co. v. Goben, 15 Ind. App. 123; 42 N. E. 1116, reh'g denied 43 N. E. 890. Labor and inconvenience—physical and mental pain and suffering—humiliation—\$296.34. Atchison, T. & S. F. R. Co. v. Dickerson, 4 Kan. App. 345; 45 Pac. 975. Pas-

from a street car on the unfounded charge that he had not paid his fare, it was held that his recovery was not limited to the amount of the fare, where if the conductor had made an investigation which he refused to do, the fact as to the payment of the fare would have been disclosed, and the payment of another fare by the passenger would, in the eyes of the other passengers, have amounted to an admission that he had attempted to defraud the company.⁴⁵ But where it appeared that a passenger

senger afflicted with St. Vitus dance—forcible ejection in belief that he was intoxicated—\$400. *Requer v. Glens Falls, S. H. & F. E. St. R. Co.*, 74 Hun (N. Y.), 202; 56 N. Y. St. R. 300; 26 N. Y. Supp. 625. Publicly charging passenger with attempting to pass a fraudulent ticket, but which was good and proper and conductor failed to examine same—\$450. *Lake Shore & M. S. R. Co. v. Teed* (C. C.), 2 Ohio Dec. 662. Roughly spoken to by conductor in presence of other passengers—great mortification—compelled to walk seven miles to his home—\$200. *Fordyce v. Manuel*, 82 Tex. 527; 18 S. W. 657. Compelled to walk three and a half miles home—\$50. *Durfee v. Union P. R. Co.*, 9 Utah, 213; 33 Pac. 944. Large man—crippled—put off five miles from his destination—walked home because of anxiety on account of dangerous illness of his daughter. *Sheets v. Ohio River R. R. Co.*, 39 W. Va. 475; 20 S. E. 566. In following cases verdicts held excessive: Detained two days at expense of \$37—punitive damages not proper—\$1,700. *Zion v. Southern P. Co.* (C. C. D. Nev.), 67 Fed. 500. Obligated to walk about a mile causing recurrence of insomnia and nervous paroxysms—\$1,400. *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668; 32 L. R. A. 193; 44 Pac. 320. In belief that ticket was not good—no insulting language or improper

demonstrations—resumed journey on following day—no pecuniary loss outside of amount paid for fare—\$1,300. *Comer v. Foley*, 98 Ga. 678; 25 S. E. 671; 5 Am. & Eng. R. Cas. N. S. 250. No physical personal injury or pecuniary damages—\$500. *Louisville & N. R. Co. v. Breckinridge*, 17 Ky. L. R. 1303; 99 Ky. 1; 34 S. W. 702. Suspicious defects in ticket which in fact valid—no malicious or wanton disregard of passenger's rights—\$225. *Kleven v. Great Northern R. Co.*, 70 Minn. 79; 72 N. W. 828. Ejected by collar of person carried into steamboat ferry by a crowd after offer to pay fare or leave—\$1,500. *Doran v. Brooklyn & N. Y. Ferry Co.*, 46 N. Y. St. R. 310; 19 N. Y. Supp. 172. Respectable man of mature years—injuries to feeling and reputation—put off for alleged disorderly conduct—account thereof published in newspaper—pointed out as man put off—\$1,475—should be set aside unless \$1,000 remitted. *Cunningham v. Seattle Elec. R. & P. Co.*, 3 Wash. 471; 28 Pac. 745. No evidence as to loss of time—expenses—illness or unusual inconvenience—\$1,500, excessive though one half has been remitted. *Gillan v. Minneapolis, St. P. & S. S. M. R. Co.*, 91 Wis. 633; 65 N. W. 373; 2 Am. & Eng. R. Cas. N. S. 145.

⁴⁵ *Sprenger v. Tacoma Traction Co.*, 15 Wash. 660; 47 Pac. 17; 43 L. R. A. 706.

who had brought an action for his ejection from a railroad train had purchased a ticket consisting of four coupons, and that the second coupon was missing when he offered his ticket after having used his first coupon, and though having the money he refused to pay his fare, in consequence of which he was ejected, though he informed the conductor that such coupon had been taken up by the former conductor and he showed the return coupons, it was held that his recovery was properly limited to the amount of fare necessary to complete the journey.⁶⁰

§ 339. Wrongful ejection from train—Concluded.—For a wrongful ejection, of a passenger for a refusal to pay an excessive fare, he may recover for all the consequences of the wrong, and is not limited to the difference between the fare demanded and that tendered.⁶¹ If unnecessary or unreasonable force is not used in the ejection of a passenger, or the act is not accompanied by insult, it is held that the expulsion is not tortious and only compensatory damages are recoverable, where though the passenger was entitled by reason of his contract with the ticket agent to passage, yet his ticket upon its face did not so entitle him.⁶² And it has been decided that if a passenger is ejected in good faith, no unnecessary force being used, and the ejection is pursuant to rules and upon due notice to the passenger, he can only recover compensatory damages.⁶³ So if he is lawfully ejected but with more force than is necessary, his recovery is confined to such damages as were due to the excessive force used.⁶⁴ In another case where a passenger was wrongfully ejected in the erroneous belief that he was not the owner of a nontransferable ticket presented by him, it was held that the amount of his compensatory damages did not depend upon the good faith or intentions of the conductor.⁶⁵ Inconvenience suffered by a passenger in consequence of his wrongful ejection from a train is an element to be considered in estimating the dam-

⁶⁰ *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439; 56 N. W. 848.

⁶¹ *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1.

⁶² *Lexington & E. R. Co. v. Lyons*, 20 Ky. L. R. 516; 11 Am. & Eng. R. Cas. N. S. 212; 46 S. W. 209.

⁶³ *Pine v. St. Paul City R. Co.* (Minn.), 16 L. R. A. 347; 52 N. W. 392.

⁶⁴ *Guy v. C. C. & St. L. R. Co.* (C. P.), 6 Ohio N. P. 3.

⁶⁵ *Pittsburg, C. C. & St. L. R. Co. v. Russ* (C. C. App. 7th C.), 67 Fed. 662.

ages.⁵⁵ But where a passenger was ejected for nonpayment of fare it was decided that damages for unnecessary violence could not include compensation for inconvenience which he suffered in making his way back to a station or for his suffering or sickness from exposure.⁵⁶ Loss of time is also to be considered in determining the measure of damages for the wrongful ejection of a passenger,⁵⁷ but in the absence of some evidence as to the value of such time it cannot be included in the damages awarded.⁵⁸ Loss of a job of work, however, due to the expulsion of a passenger is not to be considered in the estimation of damages for such expulsion.⁵⁹ Nor are the remarks and comments of other passengers made at the time of such ejection to be considered.⁶⁰ In another case it was held that a charge to the jury that they were not confined to the same "amount of damages or the same rules as if the suit was between individuals, as the public have an interest in such cases which may be considered and looked to in assessing the damages" was erroneous.⁶¹ Where there is a statutory provision that in all actions against railroad companies the plaintiff may, if he recovers, be also allowed a reasonable attorney's fee to be taxed as part of the costs,⁶² it is decided that a plaintiff who has been successful in an action against a railroad company for his wrongful ejection from a train should be allowed to recover an attorney's fee.⁶³ But though a passenger has been wrongfully ejected, yet if no actual damages have been sustained, he is not entitled to recover counsel fees.⁶⁴ And in an action for the wrongful ejection of a passenger from

⁵⁵ *Central R. & B'k'g Co. v. Strickland*, 90 Ga. 562; 16 S. E. 352; 52 Am. & Eng. R. Cas. 216; *Laird v. Pittsburgh Traction Co.*, 166 Pa. St. 4; 31 Atl. 51; 25 Pitts. L. J. N. S. 291; 2 Det. L. N. 339; 36 W. N. C. 24; *Gulf C. & S. F. R. Co. v. Copeland*, 17 Tex. Civ. App. 55; 42 S. W. 239; *Boehm v. Duluth, S. S. & A. R. Co.*, 91 Wis. 592; 65 N. W. 506.

⁵⁶ *Texas & P. R. Co. v. James*, 82 Tex. 306; 15 L. R. A. 347; 18 S. W. 589.

⁵⁷ *Gulf C. & S. F. R. Co. v. Copeland*, 17 Tex. Civ. App. 55; 42 S. W.

239. See *sec. ante* herein, as recovery for loss of time.

⁵⁸ *Gulf C. & S. F. R. Co. v. Daniels* (Tex. Civ. App.), 29 S. W. 426.

⁵⁹ *Carston v. Northern P. R. Co.*, 44 Minn. 454.

⁶⁰ *Hoffman v. Northern P. R. Co.*, 45 Minn. 53.

⁶¹ *Illinois Cent. R. R. Co. v. Nelson*, 59 Ill. 110.

⁶² See *Sand. & H. (Ark.) Dig.* sec. 6218.

⁶³ *St. Louis & S. F. R. Co. v. Neal*, 66 Ark. 543; 51 S. W. 1060.

⁶⁴ *Dave v. Morgans L. & T. R. &*

a railroad train, interest upon unliquidated damages should not be allowed.⁶⁵

§ 340. Exemplary damages — Ejection of passenger.—

Where a passenger has been wrongfully ejected from a train, street car, or other public conveyance, the recovery is not in all cases limited to an amount which may be compensatory for the loss or damage sustained as a result thereof. The ejection in addition to being wrongful may be done in a malicious or wanton spirit, may be accompanied with vilification, insult or indignity, or with unusual and unnecessary force, or there may be other aggravating circumstances, which warrant the imposition of something more than compensatory damages, and in such cases the general doctrine seems to be that exemplary damages may be awarded.⁶⁶ In order, however, to authorize the allowance of exemplary damages, there must be evidence upon which to base the same. Thus it was held to be reversible error to instruct

S. S. Co., 47 La. Ann. 576; 17 So. 128.

⁶⁵ Nichols v. Union P. R. Co. (Utah), 27 Pac. 693.

⁶⁶ Cowen v. Winters, 96 Fed. 929; Gorman v. Southern Pac. Co., 97 Cal. 1; 31 Pac. 1112; Western & A. R. Co. v. Ledbetter, 99 Ga. 318; 25 S. E. 663; Atlanta Consol. St. R. Co. v. Hardage, 93 Ga. 457; 21 S. E. 100; Georgia R. Co. v. Olds, 77 Ga. 673; St. Louis, A. & T. H. R. Co. v. Reagan, 52 Ill. App. 488; Louisville, N. A. & C. R. Co. v. Goblen, 15 Ind. App. 123; 42 N. E. 1116, reh'g denied 43 N. E. 890; Callaway v. Mellett, 15 Ind. App. 366; 24 Wash. L. Rep. 614; 44 N. E. 198; 43 Cent. L. J. 77; 29 Chic. Leg. News, 43; Ellsworth v. Chicago, B. & Or. R. Co. (Iowa), 63 N. W. 584; Southern Kan. R. Co. v. Rice, 38 Kan. 398; 16 Pac. 817; Atchison, T. & S. F. R. Co. v. Long, 5 Kan. App. 644; 47 Pac. 993; Louisville & N. R. Co. v. Keller, 20 Ky. L. Rep. 967; 47 S. W. 1072; 5 Am. Neg. Rep. 348; 12 Am. & Eng. R. Cas. N. S.

589; Hanson v. European, etc., Ry. Co., 64 Me. 84; 16 Am. Rep. 404; Philadelphia, Wilmington & Balt. R. Co. v. Larkin, 47 Md. 155; Lucas v. Michigan C. R. Co., 98 Mich. 1; 56 N. W. 1039; Louisville & N. R. Co. v. Maybin, 66 Miss. 83; St. Clair v. Missouri P. R. Co., 29 Mo. App. 76; Wigton v. Met. St. R. Co., 38 App. Div. (N. Y.) 207; 56 N. Y. Supp. 647; Rose v. Wilmington & W. R. Co., 106 N. C. 168; 11 S. E. 526; Atlantic & Great Western Ry. Co. v. Dunn, 19 Ohio St. 162; Cincinnati, etc., R. R. Co. v. Cole, 29 Ohio St. 126; Pittsburgh, C. C. & St. L. R. Co. v. Ensign, 10 Ohio C. C. 21; Hall v. South Carolina Ry. Co., 28 S. C. 261; 5 S. E. 623; Palmer v. Railroad, 3 S. C. 580; International & G. N. R. Co. v. Miller, 9 Tex. Civ. App. 104; 28 S. W. 233; writ of error denied in 87 Tex. 430; 29 S. W. 235; Patsy v. Chic. St. P. M. & C. R. Co., 77 Wis. 218; 46 N. W. 56; Bass v. Chicago, etc., Ry. Co., 42 Wis. 654.

the jury that if in ejecting the plaintiff the agents of the defendant were rude and insulting in words, tone, or gesture, they might award punitive damages, there being no evidence upon which to base such a verdict.⁶⁷

§ 341. Exemplary damages—Ejection of passenger—Unnecessary force or violence.—If in the ejection of a passenger more force than is necessary is used, or unnecessary injury is inflicted upon him by the employees of the company, he may recover exemplary damages.⁶⁸ And though a passenger may make unnecessary resistance to the conductor who proposes to eject him, yet this will not excuse the conductor for inflicting wilful or malicious injuries upon him, and exemplary damages may be recovered.⁶⁹ So it was held proper to charge the jury that though a passenger, by reason of his disorderly conduct, rendered himself liable to expulsion therefor, yet if in ejecting him he was subjected to unnecessary and reckless violence and indignity, and the employees of the company acted in a wanton, high-handed and outrageous manner, exemplary damages might be awarded.⁷⁰ And where a conductor requested a passenger to assist him in the expulsion of a negress from a car set apart for whites and they used wilful and unnecessary violence, the company was held liable in exemplary damages therefor.⁷¹ Again, where a conductor, preparatory to ejecting a passenger, dragged him into the aisle of the car in the presence of a car full of ladies and gentlemen, the ejection being based on the unfounded pretense that he was not the owner of a mileage book presented by him, it was decided that the passenger might be awarded punitive damages.⁷² So,

⁶⁷ *Louisville & N. R. Co. v. Jackson*, 18 Ky. L. Rep. 296; 4 Am. & Eng. R. Cas. N. S. 437; 36 S. W. 173.

⁶⁸ *Hanson v. European, etc., Ry. Co.*, 64 Me. 84; *Philadelphia, Wilmington & Balt. R. R. Co.*, 47 Md. 155; 47 Fed. 155. If, however, a conductor starts to eject a passenger in a proper manner and the passenger makes unnecessary resistance to him, the use of force by the conductor will, it is held, be excused and the act of

the passenger may be considered in mitigation of damages. *Hall v. Memphis, etc., R. Co.*, 23 Fed. 637.

⁶⁹ *Chic., etc., R. Co. v. Griffin*, 68 Ill. 499.

⁷⁰ *Philadelphia, Wilmington & Balt. R. R. Co.*, 47 Md. 155.

⁷¹ *International & G. N. R. Co. v. Miller*, 9 Tex. Civ. App. 104; writ of error denied in 87 Tex. 430; 29 S. W. 235.

⁷² *Pittsburg, C. C. & St. L. R. Co. v. Ensign*, 10 Ohio C. C. 21.

also, such damages are held to be properly awarded where there is a disregard of the life and limbs of the passenger in his ejection,⁷³ as where a passenger was ejected while the train was in motion.⁷⁴

§ 342. Exemplary damages—Ejection of passenger—When not recoverable.—Where the ejection of a passenger is in good faith and without indignity, abuse, unnecessary force, violence, injury, or other aggravating circumstances, only compensatory damages will be allowed.⁷⁵ And where a passenger is ejected from a train by mistake, there can no recovery of punitive damages in the absence of any element of aggravation.⁷⁶ So where a conductor, owing to a mistake in reading a passenger's ticket, wrongfully ejected him from the train, but indulged in no abuse, rudeness, or violence, and upon being convinced of his mistake, used every effort to rectify it, there was held to be no basis for the recovery of exemplary damages.⁷⁷ And such damages cannot be recovered for his ejection, by the holder of a ticket which he believes will not be accepted by the conductor, where he enters the train not with the bona fide intention of making the trip called for by the ticket, but rather for the purpose of being ejected.⁷⁸ Again, where a person took passage for the purpose of testing the question of fares and with the expectation that he would be ejected and would make

⁷³ *St. Clair v. Missouri P. R. Co.*, 29 Mo. App. 76.

⁷⁴ *St. Louis, A. & T. H. R. R. Co. v. Reagan*, 52 Ill. App. 488.

⁷⁵ *Lemon v. Pullman Pal. Car Co.* (C. C. S. D. Miss.), 52 Fed. 262; *Turner v. North Beach, etc., R. R. Co.*, 34 Cal. 594; *Fitzgerald v. Chicago, R. I. & P. Ry. Co.*, 50 Iowa, 79; *Atchison, T. & S. F. R. Co. v. Brown* (Kan. 1893), 31 Pac. 79; *Atchison, T. & S. F. R. Co. v. Lamoreux*, 5 Kan. App. 813; 49 Pac. 152; *Smith v. Phila. W. & B. R. Co.*, 87 Ind. 48; 38 Atl. 1072; 10 Am. & Eng. R. Cas. N. S. 264; *Logan v. Hannibal & St. J. R. R. Co.*, 77 Mo. 663; *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, rev'g 35

N. Y. Supr. 118; *Muckle v. Rochester R. Co.*, 78 Hun (N. Y.), 32; 61 N. Y. St. R. 193; 29 N. Y. Supp. 732; *Louisville, Nashville & Great Southern R. R. Co. v. Guinan*, 11 Lea (Penn.), 98.

⁷⁶ *Phila. Traction Co. v. Orbann*, 119 Pa. St. 37; 12 Atl. 816; 21 W. N. C. 76; 11 Cent. 631. See also *Denver Tramway Co. v. Cloud* (Colo. App.), 40 Pac. 779.

⁷⁷ *Norfolk & W. R. Co. v. Neely*, 91 Va. 539; 22 S. E. 367.

⁷⁸ *Southern R. Co. v. Barlow*, 104 Ga. 213; 30 S. E. 732; 4 Am. Neg. Rep. 710. See *Murphy v. Western & A. R. Co.*, 23 Fed. 637; *Holmes v. Carolina C. R. Co.*, 94 N. C. 319.

money out of the transaction, and he tendered not the fare demanded but what he claimed to be the legal fare, and what was afterward held by the court to be the legal fare, it was held that he was not entitled to exemplary damages.⁷⁹ And the fact that in the wrongful ejection of a passenger a colored train hand was called to assist, is not an aggravating circumstance which will authorize the recovery of greater damages than if the train hand had been a white man.⁸⁰

§ 343. Exemplary damages—Ejection of passenger—Cases.—Where a person wishing to go to a certain destination is given by the ticket agent a ticket which is complicated and not easily understood, and which entitles him to ride only in the opposite direction, he may recover exemplary damages of the company when he is ejected from the train under aggravating circumstances, together with insult and vilification by the conductor.⁸¹ And, where a person applied for a ticket between certain points and accepted from the ticket agent an excursion ticket, the time limit for which had expired, and which he did not read but was assured by the ticket agent that it was all right, and that the conductor would accept it, it was held that he might recover exemplary damages for his ejection from the train by the conductor to whom such ticket was presented.⁸² Punitive damages were also awarded to a passenger who, after having paid his fare once, was asked by the conductor again for it about five minutes afterwards, and the conductor when informed of such fact told him he was lying, and forcibly ejected him from the train, such acts being held sufficient to justify the inference that the conductor acted in a spirit of malice or oppression.⁸³ So again, where it appeared that the plaintiff, after having paid his fare, was asked for another fare by the conductor

⁷⁹ Cincinnati, etc., R. R. Co. v. Cole, 29 Ohio St. 126.

⁸⁰ Central R. & B'k'g Co. v. Strickland, 90 Ga. 562; 16 S. E. 352; 52 Am. & Eng. R. Cas. 216.

⁸¹ Georgia R. Co. v. Olds, 77 Ga. 673.

⁸² Callaway v. Mellett, 15 Ind. App. 366; 44 N. E. 198; 24 Wash. L.

Rep. 614; 43 Cent. L. J. 77; 29 Chic. L. News, 43.

⁸³ Louisville, N. A. & C. R. Co. v. Goben, 15 Ind. App. 123; 42 N. E. 1116, reh'g denied 43 N. E. 890. See also Atchinson, T. & S. F. R. Co. v. Long, 5 Kan. App. 644; 47 Pac. 993.

in a violent manner, accompanied with profane and insulting language, and that upon his refusal so to pay, the conductor, without making any request for him to leave the car, jerked him from his seat with the assistance of others and threw him from the car with such violence as to dislocate his hip, it was decided that an instruction as to exemplary damages was proper.⁶⁴ And under the California Civil Code⁶⁵ providing that in case of a breach of any obligation not arising from contract, where there has been oppression, fraud or malice on the part of the defendant, exemplary damages may be awarded, it has been held that such damages may be recovered by a passenger who, after having paid his fare once, is again asked for it by the conductor, and upon his refusal to pay again is ejected by the conductor, his ejection being accompanied by undue violence or by insult or abuse.⁶⁶ Again, vindictive damages were allowed where a passenger, though he presented the proper ticket, was ejected from the train on the ground that the ticket had expired, where there was on the part of the conductor such reckless disregard of the rights of the passenger as amounted to wantonness.⁶⁷ And where a large number of mileage tickets which had been issued and sold by the authority of the general passenger agent were deliberately repudiated by him and in consequence of his orders a passenger who had purchased one of such tickets was ejected from a train of the company, it was held that the act of the passenger agent was of such a character and so far equivalent to an intentional violation of the company's duties and the passenger's rights as would warrant the awarding of exemplary damages.⁶⁸

§ 344. Passenger left at wrong station.—As a general rule a passenger who by the negligent conduct of the conductor is induced to alight at the wrong station is entitled to recover compensatory damages therefor, as where a conductor erroneously informed a passenger that his station had been reached,

⁶⁴ St. Louis, I. M. & S. R. Co. v. Davis, (Ark.) ; 19 S. W. 107.

⁶⁵ Sec. 3294.

⁶⁶ Gorman v. Southern P. Co., 97 Cal. 1; 31 Pac. 1112.

⁶⁷ Southern Kan. R. Co. v. Rice, 38 Kan. 398; 16 Pac. 817.

⁶⁸ Cowen v. Winters, 96 Fed. 929, aff'g 90 Fed. 99.

thus causing him to alight at a wrong station.⁸⁰ Compensation in such cases may include expenses incurred for a conveyance or lodging, extra fare if the passenger waits for another train, loss of time, and for any other injury directly resulting from the negligent act of the carrier.⁸⁰ But where the passenger was unable to procure a conveyance or lodging at the point at which he was left and he walked home, it was held that the action was one on the contract of carriage and that damages for exposure and fatigue, incident to such walk, were too remote and not recoverable.⁸¹ This element of damages we have, however, discussed elsewhere,⁸² and the weight of authority supports the conclusion that such damages are recoverable, especially in those cases where it appears that no lodging or conveyance can be obtained at the place at which the passenger is left.

§ 345. Duty to minimize damages—Ejection of passenger.—Where a passenger, in violation of his contract of carriage, is ejected from a train, there is no obligation imposed upon him to minimize his damages by paying an additional fare to avoid his removal though he may be able to do so.⁸³ But where a passenger who had been ejected from a train sought shelter and protection at a place further distant from the place of his ejection than a reasonably prudent person would have done under similar circumstances, it was held that for an excess of injuries caused by such want of prudence damages could not be recovered.⁸⁴

⁸⁰ *Cleveland, C. C. & St. L. R. Co. v. Quillen*, 22 Ind. App. 496; 53 N. E. 1024; 1 Rep. 1206. In this case \$150 was held excessive where the only expense incurred was \$5 for a conveyance and the only evidence of inconvenience or other damage was the fact of an evening ride across country.

⁸⁰ See in this connection *Paddock v. Atchison*, etc., R. R. Co., 37 Fed. 841; *Alabama*, etc., R. R. Co. v. *Sellers*, 93 Ala. 9; *Chic.*, etc., R. Co. v. *Brisbane*, 24 Ill. App. 463; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135; *Schunaker v. St. Paul & D. R.*

Co., 46 Minn. 39; 12 L. R. A. 257; 48 N. W. 559; *Dorrah v. Illinois C. R. Co.*, 65 Miss. 14; *Lake Shore*, etc., R. R. Co. v. *Rosenzweig*, 113 Pa. St. 519; *I. & G. N. R. Co. v. Terry*, 62 Tex. 380.

⁸¹ *Hobbs v. London & S. W. Ry. Co.*, L. R. 10 Q. B. 111.

⁸² See sec. 349 herein and preceding sections under this chapter.

⁸³ *Gulf C. & S. F. R. Co.*, 17 Tex. Civ. App. 55; 42 S. W. 239. See *Galveston, H. & S. A. R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848.

⁸⁴ *Galveston, H. & S. A. R. Co. v. Turner* (Tex. Civ. App.), 23 S. W. 83.

§ 346. **Passenger carried beyond destination.**—Where, owing to the negligence of the carrier, a passenger is carried beyond his destination, the latter may recover compensatory damages for the loss or injury proximately resulting therefrom.* In the absence of evidence showing a wilfulness or wantonness on the part of the carrier, or acts which show gross negligence, the damages are limited in such cases to an amount which is compensatory for the injury sustained. So where a conductor of a train became confused by an altercation with some of the passengers and neglected to stop his train at a station to which a passenger was bound and carried him eight miles beyond the same, for which neglect the conductor courteously apologized

* *Louisville & N. R. Co. v. Jackson*, 18 Ky. L. Rep. 296; 36 S. W. 173; 4 Am. & Eng. R. Cas. N. S. 437; *Judice v. Southern P. Co.*, 47 La. Ann. 255; 16 So. 816; *Cable v. Southern R. Co.*, 122 N. C. 892; 29 S. E. 377. See following cases as to different amounts which have been awarded in such cases: Carrying beyond destination and refusal to back up to station, accompanied by profane language by conductor in presence of ladies—\$1,000, held not excessive. *Fordyce v. Nix*, 58 Ark. 136; 23 S. W. 967. Arm broken in attempting to walk back to station—\$1,000, not excessive. *New York C. & St. L. R. Co. v. Doane*, 115 Ind. 435; 1 L. R. A. 157; 17 N. E. 913. Young and inexperienced girl carried past one station to point at which she could not safely alight and then half mile past next station, which conductor promised to stop at—\$400, not excessive. *Louisville, N. A. & C. R. Co. v. Rinicker*, 17 Ind. App. 619; 47 N. E. 239; 3 Am. Neg. Rep. 153. Woman in delicate condition compelled to leave train four hundred yards beyond station and walk back over a rough and rocky road—\$218, not excessive. *Louisville & N. R. Co. v. Guy*, 18

Ky. L. Rep. 750; 37 S. W. 1043. Verdict for \$4,500 considered very large, but as jury had power to give punitive damages, court refused to set it aside. *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660. Young lady carried to next station beyond—courteously treated—only annoyance was being obliged to wait three hours for return train—\$250, held excessive. *Southern R. Co. v. Bryant*, 105 Ga. 316; 31 S. E. 182; 12 Am. & Eng. R. Cas. N. S. 159. Young lady carried one and a half miles beyond station—daytime—told in loud tone to get off—necessary to walk back over track—\$2,000, excessive. *Chattanooga, R. & C. R. Co. v. Lyon*, 89 Ga. 16; 15 L. R. A. 857; 15 S. E. 24. Carried two miles beyond station—obliged to walk back—healthy, able-bodied man—no ill effects except slight fatigue—\$50, excessive. *Gulf C. & S. F. R. Co. v. Ryan* (Tex. Civ. App.), 18 S. W. 866. Carried one half mile beyond station—nighttime—obliged to walk and to crawl over two trestles on his knees, which were sore for several days—cold and cough from exposure—\$1,000, excessive. *Texas & P. R. Co. v. Mansell* (Tex. Civ. App.), 23 S. W. 549.

and gave him a free return ticket from that station, it was held to be only a case for the awarding of compensatory damages.⁹⁸

§ 347. Passenger carried beyond destination—Continued.

—Where a passenger is wrongfully carried past his destination, the jury may, in awarding damages therefor, properly consider the items, inconvenience, delay and expenses resulting from such negligent act.⁹⁹ And in such case evidence that the passenger was compelled to walk back over dusty roads, that it took her about three hours, that she was frightened by being chased by dogs and by other causes, that she got wet in crossing a creek, and that by reason of the sultry weather she was made sick, is competent.¹⁰⁰ But where a woman passenger with a sick child was carried past her station, it was held that the jury, in estimating the damages, were not to consider an arrangement which had been made with the father of such passenger to meet her and her child at the station and take them to her sister's home, where the child was to receive medical treatment, there being no evidence showing that the company knew of any such arrangement.¹⁰¹ And the fact that a tenant failed to pay a debt during the absence of a passenger from home under such circumstances, is held not to be a proper item to consider in the estimation of damages where there is no evidence showing what

⁹⁸ Chicago R. R. Co. v. Scurr, 59 Miss. 456; 42 Am. Rep. 373. There being no evidence in this of any inconvenience or injury except that the passenger suffered from a slight cold, it was held that a verdict of \$833.33 was excessive and should be set aside.

⁹⁹ Airey v. Pullman Pal. Car Co., 50 La. Ann. 648; 23 So. 512; 11 Am. & Eng. R. Cas. N. S. 836. But see St. Louis S. W. R. Co. v. McCullough (Tex. Civ. App.), 33 S. W. 285, where it is held that if the company used ordinary care not to inflict any unnecessary inconvenience in such a case, there can be no recovery for inconvenience in such an action.

¹⁰⁰ Cincinnati, Hamilton & Indian-

apolis R. R. Co. v. Eaton, 94 Ind. 474; 48 Am. Rep. 179. But see Gulf C. & S. F. R. Co. v. Cleveland (Tex. Civ. App.), 33 S. W. 687, where it was held that a passenger carried past his destination could only recover for cost of lodging or of a conveyance, and not for damages incident to his walking to his destination without inquiry as to lodgings or a conveyance. See also for a consideration of damages in such cases, sec. 349 herein.

¹⁰¹ Chic. R. I. & F. R. Co. v. Boyles, 11 Tex. Civ. App. 522; 33 S. W. 247. See Houston & T. C. R. Co. v. McKenzie (Tex. Civ. App.), 41 S. W. 831.

she might have done to compel its payment if she had been present.¹⁰⁰ The fact that a woman who had been carried past her station owing to the failure to call her as requested, did not leave the train at a point some distance beyond her station and accept a return fare and an opportunity to return by the next train, but chose to continue on the train and find shelter among her relatives, is not, it has been held, to be construed as a failure on her part to reduce her damages.¹ Again, an action to recover damages for carrying a passenger beyond his destination is, for the purpose of determining costs under the Indiana statute where the verdict is for less than \$50, to be treated as an action in tort, the contract of carriage in such a case being considered only as an incident in the creation of the relation from which the company's duty arose.²

§ 348. Exemplary damages—Passenger carried beyond destination.—It is the duty of a carrier to accept and transport a passenger, and also to permit him to alight at his destination and to allow him a reasonable time so to do. And where, owing to the gross negligence or wanton or intentional acts of the company, a passenger is carried beyond the place his ticket calls for, he may recover not only damages to compensate him for the injury, but also exemplary damages may be allowed.³ So such damages were held to be properly allowable where the employees of a railroad refused to put a passenger off at her station and to whom they were "insulting either in words, tone or manner."⁴ But exemplary damages cannot be recovered for failure to announce the station or to give a passenger a reasonable time to alight from a train, unless such failure is accompanied by wilfulness or other aggravating conduct.⁵ So where

¹⁰⁰ *Airey v. Pullman Pal. Car Co.*, 50 La. Ann. 648; 23 So. 512; 11 Am. & Eng. R. Cas. N. S. 836.

¹ *Airey v. Pullman Pal. Car Co.*, 50 La. Ann. 648; 23 So. 512; 11 Am. & Eng. R. Cas. N. S. 836.

² *Evansville & F. H. R. Co. v. Wilson*, 20 Ind. App. 5; 50 N. E. 90; 4 Am. Neg. Rep. 141.

³ *Memphis, etc., Packet Co. v. Nagel*, 16 Ky. L. Rep. 748; 29 S. W.

743; *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660.

⁴ *Louisville & N. R. Co. v. Ballard*, 10 Ky. L. Rep. 735; 2 L. R. A. 694; 10 S. W. 429. See also *Memphis, etc., Packet Co. v. Nagel*, 16 Ky. L. Rep. 748; 29 S. W. 743.

⁵ *Judice v. Southern P. Co.*, 47 La. Ann. 255; 15 So. 816; *Dorrah v. Illinois C. R. Co.*, 65 Miss. 14; 3 So. 36; *Norfolk & W. R. Co. v. Lips-*

a conductor negligently omitted to have his train stop at a flag station so that certain lady passengers might alight therefrom, and for such failure he expressed his regrets to them and stopped at the next station and endeavored to procure a conveyance to take them back to such flag station, it was held that his acts did not evince such a reckless disregard of the circumstances as to authorize the recovery of punitive damages.⁶ But where a carrier passed a station without giving a passenger opportunity to alight and refused to return him to such station, where the omission was discovered within a reasonable time and there was no controlling agency to prevent the return, aside from mere inconvenience, it was held that exemplary damages might be recovered.⁷ In the Georgia Code⁸ it is provided that "in every tort there may be aggravating circumstances either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." In a case where this provision was read to the jury, it was held that the mere negligent omission of a carrier to stop its train at a given point to which it has undertaken to transport a passenger is not a trespass within the meaning of the Code, and that the reading to the jury of the concluding clauses of that section, namely, as to the giving of additional damages either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff was error.⁹ In another case in the same state, which was an action to recover damages for carrying plaintiffs beyond their destination, where it appeared that they were carried to the next station beyond, where they had to wait for a few hours, when they were brought to the proper station by a train from the opposite direction, it was held that the provisions of the Code,¹⁰ that in some torts the injury was to the peace, happiness or feelings of the plaintiff and that the worldly circumstances of the parties, the amount of bad

comb, 90 Va. 137; 20 L. R. A. 817; 17 S. E. 809.

⁶ Kentucky C. R. Co. v. Biddle, 17 Ky. L. Rep. 1363; 34 S. W. 904.

⁷ Samuels v. Richmond & D. R. Co., 35 S. C. 493; 14 S. E. 943.

⁸ Sec. 3906, Civ. Code.

⁹ Southern Ry. Co. v. Hardin, 101 Ga. 263; 28 S. E. 847; 10 Am. & Eng. R. Cas. N. S. 250; 3 Am. Neg. Rep. 783.

¹⁰ Ga. Civ. Code, sec. 3907.

faith in the transaction, and all the attendant facts should be weighed, should not be read to the jury.¹¹

§ 349. Passenger—Illness due to exposure—Walking to destination.—In the estimation of the damages which may be allowed therefor, the jury may take into consideration the place of the ejection, the condition of the weather, and the sickness and suffering, if any, resulting from exposure thereto.¹² So where a passenger was put off at a station where there was no station house, except a box car, of which use as a station she was ignorant, and she walked back four miles to the station from which she came, it was held that she might recover for damages from exposure resulting from such walk, since it was the natural and reasonable thing to do.¹³ And in another case, where a passenger was wrongfully ejected at a place a long distance from his destination where his duties required him to be, to which place he was obliged to walk, damages were allowed for annoyances and exhaustion caused by exposure.¹⁴ Again, where passengers were put off a train in the night at a considerable distance from their destination and at a place where no houses could be seen and they were obliged to walk to their destination, and in consequence of the exposure caused by such walk the woman, plaintiff in this case, who was pregnant at the time, suffered a miscarriage and consequent illness, it was decided that the acts done by the plaintiff were proper, that the negligence of the company was the proximate, and not the remote, cause of the plaintiff's injury, that the plaintiff acted with ordinary care and prudence to get out of the difficulty in which she had been placed, and that such injury could be traced directly to the defendant's negligence as its cause.¹⁵ In an English case, however, which was an action upon the contract for carriage, a different conclusion was reached.¹⁶ In this case, it

¹¹ Southern R. Co. v. Bryant, 105 Ga. 316; 31 S. E. 182; 12 Am. & Eng. R. Cas. N. S. 159.

¹² Cross v. Kansas City, F. S. & M. R. Co., 56 Mo. App. 664.

¹³ Malone v. Pittsburg & L. E. R. Co., 152 Pa. St. 390; 25 Atl. 638; 31 W. N. C. 407; 23 Pitts. L. J. N. S. 467.

¹⁴ Lake Erie & W. R. Co. v. Cloes, 5 Ind. App. 444; 32 N. E. 588.

¹⁵ Brown v. Chic. M. & St. P. Ry. Co., 54 Wis. 342; 41 Am. Rep. 41.

¹⁶ Hobbs v. London & S. W. Ry. Co., L. R. 10 Q. B. 111.

appeared that a passenger with his wife and child were, owing to the negligence of the company, permitted to alight at the wrong station in the nighttime where they could neither get accommodations for the night nor a conveyance. They consequently were obliged to walk a distance of about five miles in the rain in order to reach their destination, and as a result of the exposure the wife caught cold and was taken ill. In an action to recover therefor, it was held that the action was based on the contract, and that damages for the illness resulting from the exposure were too remote to be recoverable, since it could not be said to be either the necessary or probable consequence of a person being put down at an improper place and having to walk home, that he should sustain either a personal injury or catch a cold, and such illness could not be considered as having been in the contemplation of the parties when they made the contract. In this case, however, it would seem that the plaintiff should have been permitted to recover. By the defendant's negligence the woman, accompanied by her husband and child, was left at a very small station, where no conveyances or accommodations for the night could be obtained. If it had occurred at a larger place where vehicles by reasonable effort could have been found or accommodations secured, which would have prevented any necessity for the long walk, the illness due to the exposure might then have properly been found to be due to the passenger's neglect or carelessness and not that of the company. But such was not the condition of affairs. Owing to the negligence of the company the passenger was obliged to walk home in order to extricate herself from the difficulty in which the company had negligently placed her. If she had remained at the place she was left at for the night, with no accommodations and had perhaps subjected herself to and in fact suffered a more severe illness, would the company not have contended that in the exercise of reasonable prudence she should have undertaken to walk to her home, and would not such a contention have been upheld as a reasonable one and have been considered as a defense to a recovery, or at least in mitigation of damages? Under the circumstances of this case it seems a very reasonable consequence that a passenger ejected or left at such a station might be compelled to walk home, and we fail to see how the consequent illness, due to the exposure occasioned

by such walking, could be considered as one not in the reasonable contemplation of the parties when the contract was made. It would also seem that such illness was not too remote even though the action be considered as in contract.¹⁷

§ 350. Same subject—Conclusion.—It might occur in some cases that a passenger would be ejected or left at a station where conveyances or lodging for the night could be obtained, and where the passenger would be under no necessity of walking to his destination. In such cases, if he elects to walk instead of procuring a conveyance or lodging, it would be only reasonable and proper that for any damages resulting from such walk the passenger should be held responsible and not the carrier. But if the carrier has left a passenger at a point where he can neither procure a conveyance or lodging, and where the only course left open to him to extricate himself from his difficulty is to walk, then a different rule should prevail. The carrier's obligation is to transport the passenger to a certain destination, and if he wrongfully ejects him or negligently puts him off at a point beyond or short of his destination where no conveyance or lodging may be had, and where if he would get out of his difficulty he must walk, then the carrier should be held responsible for any injuries necessarily resulting from such walk, including exposure to the weather and illness resulting from such exposure. Though it has in some instances been intimated that the fact of the action being one in tort or on the contract may be a determining factor in the consideration of this question, yet it seems to us that the true rule is, as we have just stated, that irrespective of the nature of the action, whether it be in contract or tort, if the passenger elects to walk on a dark or rainy night, exposing himself to risks of injury or consequent sickness when he might procure a conveyance or lodging and thus avoid such risk, the damages incident to his election must be borne by him. On the other hand, whether the action

¹⁷See *McMahon v. Field*, 7 Q. B. P. R. Co., 54 Wis. 342; 41 Am. Rep. Div. 591; *Cincinnati, H. & I. R. R. Co. v. Eaton*, 94 Ind. 474; *International & G. N. R. Co. v. Terry*, 62 Tex. 380; *Brown v. Chic. M. & St. P. R. Co.*, 54 Wis. 342; 41 Am. Rep. Div. 591; *Murdock v. Boston & Albany R. R. Co.*, 133 Mass. 16; *St. Louis & S. W. R. Co. v. Thomas* (Tex. Civ. App.), 27 S. W. 419.

be considered as on the contract or in tort, this should not affect the determination of the question of his recovery where the carrier has left him at a point where no choice is left to him, but his only way to extricate himself from his difficulty is to walk, since this is only the reasonable act of an ordinarily prudent man, an act which it is reasonable to suppose will follow the carrier's act, and exposure and illness therefrom are only natural results from such act directly traceable to the act of the carrier, and results which in such cases are reasonably to be contemplated.

§ 351. Passenger—Injury to health by exposure.—Where a passenger is subjected to exposure to the weather, either by wrongful ejection by the carrier or other negligent conduct on its part, damages for injury to health, caused by such exposure, may be recovered where such injury is the natural and proximate result of the wrongful or negligent act.¹⁸ And where a passenger is wrongfully ejected from a street car, and as a result of exposure to the cold illness ensues, he may recover damages therefor.¹⁹ But where a passenger was ejected from a train at a point about fifty miles from his destination, and he started to drive thereto, and instead of starting early in the morning he waited until the first part of the afternoon, it was held that damages were not recoverable for exposure and hardships caused by his losing his way upon the prairie during the night.²⁰ In another case where a passenger, after alighting from her train, was compelled to remain in a hail and rain storm because the way to the depot was obstructed by a freight train, it was decided that damages for such exposure were recoverable.²¹ So,

¹⁸ Alabama G. S. R. R. Co. v. Heddleston, 82 Ala. 218; Baltimore C. P. Ry. Co. v. Kemp, 61 Md. 74; Lerue v. Northern P. R. Co., 48 Minn. 78; 50 N. W. 1021; Heim v. McCaughan, 32 Miss. 17; Williams v. Vanderbilt, 28 N. Y. 217; Malone v. Pittsburgh R. R. Co., 152 Pa. St. 390; 25 Atl. 638; 31 W. N. C. 407; 23 Pitts. L. J. N. S. 467.

¹⁹ Toronto R. Co. v. Grinsted, 24 Can. S. C. 570; Grinsted v. Toronto R. Co., 24 Ont. Rep. 683.

²⁰ Chic. B. & Q. R. Co. v. Spirk, 51 Neb. 167; 70 N. W. 926; 7 Am. & Eng. R. Cas. N. S. 105.

²¹ Louisville & N. R. Co. v. Keller, 20 Ky. L. Rep. 957; 12 Am. & Eng. L. Cas. N. S. 89; 47 S. W. 1072; 5 Am. Neg. Rep. 348. In this case it also appeared that the plaintiff was subjected to the jeers of the railroad employees while so exposed. The court held that the defendant was guilty of gross negligence in obstructing the way to the depot, and

also, where owing to the negligence of a railroad company a collision ensues at the crossing of two roads, damages are recoverable from such company for exposure to the weather, where such exposure is the proximate result of the negligence.²² But in another case, where owing to the negligence of the defendant, its sleeping car caught fire and plaintiff was compelled to leave the car half clad and took cold which resulted in the suppression of her menses and a long illness, it was held that the defendant was not liable in damages therefor, since it appeared from the evidence that the plaintiff was menstruating at such time, and that such condition was the cause of her illness.²³ The court declared in this case that though the exposure was the direct result of the defendant's negligence, yet the illness was not the result of the exposure, but the result of the exposure in her then condition; that such condition was unknown to the carrier and the increased risk arising therefrom must rest upon the shoulders of the plaintiff. In its opinion the court cited the case of *Hobbs v. London & S. W. Ry. Co.*²⁴ But in the principal case²⁵ there certainly seems no just reason why recovery should have been denied to the plaintiff. If a carrier has negligently placed a passenger in a position where injury may ensue, it should be responsible for all the immediate and direct consequences of its negligence. Though in this particular case the woman's condition was the nearest cause of her illness, yet such condition is not unusual to every normal healthy woman under a certain age, and of this fact all persons have knowledge. If it were a rare and exceptional condition, there might be a basis for the conclusion reached in this case, but to hold that especially in such instances the company must have personal knowledge of this particular condition of its female passengers in order to be responsible for any illness or trouble possibly arising from such condition, even though directly traceable to the company's negligence would, it seems, be carrying a rule, that the company should have knowledge of its pas-

that punitive damages might properly be given. A verdict for \$260 was held not excessive.

²² *Missouri, K. & T. R. Co. v. Settle*, 19 Tex. Civ. App. 357; 47 S. W. 826.

²³ *Pullman Pal. Car Co. v. Barker*, 4 Colo. 344; 34 Am. Rep. 89.

²⁴ L. R. 10 Q. B. 111.

²⁵ *Pullman Pal. Car Co. v. Barker*, 4 Colo. 344; 34 Am. Rep. 89.

senger's infirmities in order to render it liable for certain results, to an absurdity.

§ 352. Fright in connection with physical injury—Expulsion of passenger.—Where a person is wrongfully expelled from a train, the expulsion may be at a place where the surroundings are such as to cause great fright, which of course, being a species of mental suffering, is an element of damages.²⁶ Thus, where a woman was compelled to leave a train at a point several hundred feet from a depot platform and was injured by falling into a culvert, it was held that recovery was not limited to damages for the physical injury, but that there might also be recovery for fright suffered by her in endeavoring to extricate herself from the culvert, while cars were approaching on the side track.²⁷ And where a child was in violation of the statute expelled from a train a few hundred feet from a depot and left on the track, it was held that derangement of the mind, resulting from fright at being left in such place, was an element of damage.²⁸ In a case in California where an action was brought to recover damages for the ejection of a passenger from a train, it was decided that paroxysms of the nervous system, resulting from the indignity and humiliation suffered by the passenger, constituted a bodily injury for which damages might be recovered.²⁹

§ 353. Mental suffering, etc.—Passenger carried beyond destination.—Where a passenger is carried beyond his destination no damages for mental suffering or fright unaccompanied by any physical injury are recoverable.³⁰ So where, by the negligence of a railway company, a passenger was carried beyond her destination, but suffered no insult or personal injury, it was

²⁶ See preceding section.

²⁷ *Stutz v. Chicago & N. W. R. Co.*, 73 Wis. 147; 40 N. W. 653.

²⁸ *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

²⁹ *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668; 44 Pac. 320; 32 L. R. A. 193. See secs. 219, 220, 352 herein, on Fright—Physical injury resulting from.

³⁰ *Judice v. Southern P. Co.*, 47 La. Ann. 255; 16 So. 816; *Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147; 41 Am. Rep. 305; *Strange v. Mo. P. R. Co.*, 1 Mo. App. Rep. 209; *Pullman Palace Car Co. v. Trimble* (Tex. C. A.) 28 S. W. 96. But see *Texas & P. R. Co. v. Gott*, 20 Tex. C. A. 335; 50 S. W. 193.

held that there could be no recovery for anxiety, effects on her health nor danger by reason of the train stopping an insufficient time for her to get off.³¹ And where by the negligence of a railroad company a passenger was afforded no opportunity to alight at her destination, recovery by her for mental anguish which she suffered on account of the fright and distress of a child from whom she was separated was denied.³² In a later decision in this same state it is determined, however, that there may be a recovery for fright, worry and mental anguish where a passenger is carried beyond her destination, though no physical injuries are sustained.³³ In another case, where a train which was signalled to stop at a flag station failed to do so, it was held that mental suffering, occasioned as a result of the the failure to stop, formed no part of the actual injury if the act was not wilfully done.³⁴

§ 354. Mental suffering—Injury to feelings, etc.—Ejection of passenger.—Where a passenger is wrongfully ejected from a train under such circumstances as to cause mental suffering, humiliation, shame, mortification, wounded pride, disgrace, indignity or insult, these elements, in substance the same, but thus variously designated by the courts, occurring in connection with such ejection may, in an action to recover damages therefor, be considered in determining the amount recoverable.³⁵ And

³¹ *Trigg v. St. Louis, Kansas City & N. Ry. Co.*, 74 Mo. 147; 41 Am. Rep. 305.

³² *Pullman Palace Car Co. v. Trimble* (Tex. C. A.), 28 S. W. 96.

³³ *Tex. & P. R. Co. v. Gott*, 20 Tex. C. A. 335; 50 S. W. 193.

³⁴ *Illinois C. R. Co. v. Siddons*, 53 Ill. App. 607.

³⁵ *Louisville & N. R. Co. v. Hine*, 121 Ala. 234; 14 Am. & Eng. R. Cas. N. S. 382; 25 So. 857, humiliation and indignity. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177; 45 S. W. 351, humiliation. *Cooper v. Mullins*, 30 Ga. 146, mental agony. *Pennsylvania Co. v. Connell*, 127 Ill. 419; 20 N. E. 89, indignity. *Chicago & C. R. R. Co. v. Flagg*, 43 Ill. 364; *Chicago*

& E. I. R. Co. v. Adams, 69 Ill. App. 571, wounded pride and humiliation. *Paleo v. Bray*, 125 Ind. 229; 25 N. E. 439, humiliation and indignity. *Louisville, N. A. & C. R. Co. v. Goben*, 15 Ind. App. 123; 42 N. E. 1116, shame and humiliation. *Shepard v. Chicago, R. I. & P. R. Co.*, 77 Iowa, 54; 41 N. W. 564, indignity, humiliation, wounded pride and mental suffering. *Curtis v. Sioux City & H. P. R. Co.* (Iowa), 54 N. W. 339; *Southern Kan. R. Co. v. Rice*, 38 Kan. 398; 16 Pac. 817, injury to feelings. *Southern Kan. R. Co. v. Hinsdale*, 38 Kan. 507; 16 Pac. 937; *Serne v. Northern P. R. Co.* (Minn.), 50 N. W. 1021, indignity. *Cherry v. Kansas City, F. D. S. & M. R. R. Co.*,

though the conductor of a train may not be personally at fault and may act with no ill-will or malice in the ejection of a passenger, yet if the ejection be wrongful, mental suffering caused by the shame and disgrace felt by such passenger will be an element of damages for which recovery may be had.⁸⁶ So where the conductor did not err personally, but the expulsion was due to the mistake of the ticket agent, recovery was allowed for the humiliation suffered.⁸⁷ And where a conductor in good faith ejected a passenger, owing to a misconception of her rights under a season ticket, and the conductor acted with no indication of ill-will or malice, but did only what was necessary to carry out his instructions and in as gentlemanly a manner as was consistent with a proper discharge of his duties, recovery was allowed for the mental suffering caused by the shame and disgrace.⁸⁸ So, also, where a young lady whose ticket was wrongfully taken up was ordered to vacate the car or pay fare, it was held that she might recover for the humiliation and mental suffering due to having the attention of other passengers attracted thereto and to being put under obligations to a stranger who advanced money to purchase such ticket.⁸⁹ Again, if a conductor in ejecting a passenger uses insulting and abusive language, there may be a recovery by the passenger on account of the words for injury to his feelings, but he cannot recover damages because the words tended to bring him into ignominy and disgrace.⁹⁰

1 Mo. App. Rep., injury to feelings including humiliation, insult and indignity. *Ray v. Cortland & H. Traction Co.*, 19 App. Div. (N. Y.) 530; 46 N. Y. Supp. 521, indignity. *Lake Shore & M. S. R. Co. v. Teed*, 2 Ohio Dec. 662, injury to feelings. *Texas & P. R. Co. v. James*, 82 Tex. 306; 18 S. W. 589; 15 L. R. A. 347, shame and mortification. *Gulf C. & S. F. R. Co. v. Copeland*, 17 Tex. Civ. App. 55; 42 S. W. 239, humiliation. *Willson v. Northern P. R. Co.*, 5 Wash. 621; 32 Pac. 468, humiliation and mental suffering. *Schmitt v. Milwaukee R. Co.*, 89 Wis. 195; 61 N. W. 834, humiliation.

⁸⁶ *Pittsburg, etc., R. Co. v. Russ*,

67 Fed. 662; 14 C. C. A. 612; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177; 45 S. W. 351; *Atchison, etc., R. Co. v. Dickerson*, 4 Kan. App. 345; 45 Pac. 975.

⁸⁷ *Hot Springs R. Co. v. Deloney*, 65 Ark. 177; 45 S. W. 351.

⁸⁸ *Curtis v. Sioux City & H. P. R. Co. (Iowa)*, 54 N. W. 339.

⁸⁹ *Willson v. Northern P. R. Co.*, 5 Wash. 621; 32 Pac. 468. But see *Missouri K. & T. R. Co. v. Armstrong* (Tex. C. A.), 38 S. W. 368.

⁹⁰ *Southern Kan. R. Co. v. Hinsdale*, 38 Kan. 507; 16 Pac. 937. See *Houston E. & W. T. R. Co. v. Perkins*, 21 Tex. Civ. App. 506; 52 S. W. 124.

For mental distress caused by apprehension as to discharge from employment, it is held that there can be no recovery by a passenger wrongfully ejected, unless the company at the time of the contract knew that in case of delay he was liable to suffer injury or loss.⁴¹ And mental anguish suffered by a passenger by reason of delay in reaching a sick brother is not recoverable though the situation was explained to the conductor who ejected him.⁴² Nor can recovery be had for disappointment, of a wrongfully ejected passenger, in regard to arrangements for his wedding or for ridicule to which he may have been subjected, where the conductor, after he had ejected him, stopped the train and invited him to board it again, but he refused to unless it was backed down to where he was, though he was only a short distance from the train.⁴³

§ 355. Mental suffering—Passengers—Cases generally.—

In an action by a husband against a railroad company, damages may be recovered by him for the mental anguish suffered by the wife from the delay and vexation consequent upon the negligence of an agent of the company in selling her a ticket to a wrong station.⁴⁴ But where, owing to the lock being out order, a woman passenger was confined in the water-closet of a car, it was held that the company was not liable for the mental suffering and mortification occasioned thereby to her, where it was not negligent either in furnishing a suitable lock or in keeping it in repair, and all reasonable and proper efforts were used to effect her release.⁴⁵ A passenger who, by the negligence of the company's employees, is injured while alighting from a street car may recover damages for mental suffering.⁴⁶ So, also, one injured in a railroad collision may recover damages for the shame

⁴¹ Pullman Palace Car Co. v. McDonald (Tex. C. A.), 21 S. W. 945.

⁴² Hot Springs R. Co. v. Deloney, 65 Ark. 177; 45 S. W. 351. See also Turner v. Great Northern R. Co., 15 Wash. 213; 46 Pac. 243; 5 Am. & Eng. R. Cas. N. S. 238.

⁴³ Louisville & N. R. Co. v. Hine, 121 Ala. 234; 25 So. 857; 14 Am. & Eng. R. Cas. N. S. 382.

⁴⁴ Texas & P. R. Co. v. Armstrong, 93 Tex. 31; 51 S. W. 835; 6 Am. Neg. Rep. 721; 14 Am. & Eng. R. Cas. N. S. 256.

⁴⁵ Gulf C. & S. F. R. Co. v. Smith (Tex. C. A.), 30 S. W. 361.

⁴⁶ Omaha Street R. Co. v. Emminger, 57 Neb. 240; 77 N. W. 675; 12 Am. & Eng. Corp. Cas. N. S. 188.

and mortification of being compelled to use crutches or a crutch and a cane.⁴⁷ In an action, however, against a carrier by a passenger to recover damages for injuries sustained by him, it is error to instruct the jury that they may consider, in estimating damages, pain of mind, aside and distinct from bodily suffering.⁴⁸

§ 356. Failure to give passenger proper accommodations.—

A carrier of passengers who fails to give to a passenger the proper and suitable accommodations called for by its contract of carriage, and which could have been furnished by the exercise of the degree of care required of such carriers is liable in damages therefor. So where, as the result of a leakage to which the attention of the proper officers was called and which could have been easily repaired, the berth of a passenger upon a steamship became wet and the passenger's health was thereby impaired, the company was held liable for such injury.⁴⁹ And where a sleeping car company agreed to furnish accommodations in one of its sleeping cars, to a woman in ill health and with a young baby, but failed to fulfill its contract and she was obliged, with her child, to ride in a common car with negroes, it was decided that the company was liable for the discomfort and illness caused thereby.⁵⁰ Again, where a passenger who had a first-class ticket was placed in a filthy car which was unsuitable for first-class passengers, and in which the occupants were smoking, drinking, singing indecent songs, and firing off pistols, it was held that the plaintiff was entitled to damages and that a verdict for \$500 was not excessive.⁵¹ But the damages recoverable for the breach of a contract of carriage or sleeping car accommodations are generally limited to those which directly and naturally flow from the breach and were in the contemplation of the parties, and there can be no recovery for mental suffering or anguish in the absence of evidence showing harsh

⁴⁷ *Beatti v. Rapid R. Co.*, 119 Mich. 512; 78 N. W. 537; 15 Am. & Eng. R. Cas. N. S. 793; 5 Det. L. N. 905.

⁴⁸ *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; 3 Am. Rep. 245.

⁴⁹ *Barker v. Cunard S. S. Co.*, 91 Hun (N. Y.), 495; 70 N. Y. St. R. 858; 36 N. Y. Supp. 256; 25 Civ. Proc. 108.

⁵⁰ *Pullman Pal. Car Co. v. Booth* (Tex. Civ. App.), 28 S. W. 719. A verdict for \$1,000 was held not excessive.

⁵¹ *Texas & P. R. Co. v. Sherbert* (Tex. Civ. App.), 42 S. W. 639.

or unkind treatment or some insult or injury inflicted by the company.⁵² And in an action by a negro for failure to furnish him accommodations on the train equal to those furnished white passengers, in violation of a statute, it was held that he could not even recover nominal damages in the absence of evidence showing that he had sustained some damage by such failure.⁵³

§ 357. Injury or insult by third persons to passenger.—

It is the duty of the carrier to exercise a high degree of care to protect its passengers from insult or injury at the hands of third persons, and where it negligently fails to exercise the degree of care required, it will be liable for all damages sustained from such a source.⁵⁴ So where a conductor, without any interference, permitted a passenger to insult or abuse a fellow passenger and to continue such conduct, it was held that the carrier was liable in damages therefor.⁵⁵ And where drunken passengers made a colored man dance and sing and subjected him to many other indignities while the conductor refused to interfere, it was decided that a verdict in favor of the colored man for \$1,000 was not excessive.⁵⁶

§ 358. Wrongful charge of fare—Taking up tickets, etc.—

If a passenger is wrongfully charged an excessive or exorbitant rate of fare or his ticket is wrongfully taken up by one conductor, and another conductor compels him to pay his fare a second time under penalty of expulsion, he may recover therefor his damages, not being limited in all cases to the excess of fare paid, but under certain circumstances he may recover exemplary damages.⁵⁷ But where a passenger who had been refused a

⁵² Pullman Pal. Car Co. v. Fowler, 6 Tex. Civ. App. 755; 27 S. W. 268. Minn. 7; 31 L. R. A. 551; 65 N. W. 944.

A verdict for \$1,500 was held excessive to amount of \$1,150.

⁵³ Norwood v. Galveston, H. & S. A. R. Co., 12 Tex. Civ. App. 561; 34 S. W. 180; 3 Am. & Eng. R. Cas. N. S. 395.

⁵⁴ Elliott on Railroads, sec. 1591; Hutchinson on Carrier, secs. 548-552a.

⁵⁵ Lucy v. Chic. G. W. R. Co., 64

⁵⁷ Richmond & D. R. Co. v. Jefferson, 89 Ga. 554; 17 L. R. A. 571; 16 S. E. 69; 52 Am. & Eng. R. Cas. 438.

⁵⁷ East Tennessee, V. & G. R. Co. v. King (Ga.), 14 S. E. 708, holding \$500 not excessive, though an extreme verdict for requiring a passenger whose ticket had been taken up by a former conductor to pay his

fare a second time under penalty of

ticket by the ticket agent because the train which he wished to board did not stop at the station to which he wished to be carried, boarded such train without a ticket and the conductor charged him fare in excess of the regular rate, it was held that his recovery was limited to the excess of fare which he had paid, where both the conductor and the ticket agent acted in good faith and in pursuance of what they believed to be the orders of their superior officers, though they were mistaken.⁸⁵ Damages are also recoverable for refusal of an agent of the company, whose duty it is to sign and stamp return tickets to so sign and stamp a ticket properly presented to him for such purpose. But where a person presented the return part of an excursion ticket to a station agent to be signed and stamped by him for a return passage, which he refused to do, a verdict for \$150 was held excessive, where the owner of such ticket suffered nothing in body or mind, and a friend who was with him, without any request from the latter, purchased a return ticket for a nominal sum.⁸⁶

§ 359. Stipulations exempting carrier from liability.—

As a general rule it may be stated that a carrier of passengers cannot stipulate for exemption from liability for injuries sustained by a passenger due to the negligence of the carrier.⁸⁷ So where a person who was transporting live stock was given a free pass on the back of which was a stipulation that "the person accepting this free ticket assumes all risks of accidents and expressly agrees that the company shall not be liable under any

expulsion. *Galveston, H. & S. A. R. Co. v. Patterson* (Tex. Civ. App.), 46 S. W. 848. In this case an extortionate charge of fifty cents had been made for carrying a passenger over a bridge, one mile long, forming part of the right of way. In addition such passenger was awakened while asleep at night and shaken by the shoulder. Five hundred dollars actual and \$1,500 exemplary damages was held excessive. Two hundred and fifty dollars actual and \$500 exemplary damages held sufficient.

⁸⁵ *Courts v. Louisville & N. R. Co.*,

99 Ky. 574; 18 Ky. L. Rep. 415; 36 S. W. 548; 5 Am. & Eng. R. Cas. N. S. 223.

⁸⁶ *New York, T. & M. R. Co. v. Leander* (Tex. Civ. App.), 46 S. W. 843.

⁸⁷ *Doyle v. Fitchburg R. Co.*, 166 Mass. 492; 44 N. E. 611; 33 L. R. A. 844; 5 Am. & Eng. R. Cas. N. S. 257; 24 Wash. L. Rep. 663; 3 Det. L. N. Mo. 26; 29 Chic. Leg. News, 41; *Williams v. Oregon Short Line R. Co.*, 18 Utah, 210; 12 Am. & Eng. R. Cas. N. S. 61; 54 Pac. 991; 4 Elliott on Railroads, secs. 1497, 1498.

circumstances, whether by the negligence of their agents or otherwise for any injury to the person or for any loss or injury to the personal property of the person using this ticket," it was held that such stipulation did not excuse the carrier for any injury occasioned by its own negligence.⁶¹

§ 360. Statutory exemption from liability — Passengers riding on platforms of cars.—Where by statute railroad companies are exempted from liability for injuries received by passengers while riding on the platforms of cars in violation of printed regulations posted in a conspicuous place in the car,⁶² it is held that the question of a railroad company's exemption from liability for personal injuries under such a statute cannot be raised for the first time on appeal, though there may be evidence bringing the case within the statute.⁶³

⁶¹ Penn. R. R. Co. v. Henderson, 51 Pa. St. 315. See also Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 171; Cleveland, etc., R. R. Co. v. Curran, 19 Ohio St. 1. But see Bissell v. N. Y. Cent. R. R. Co., 25 N. Y. 442; Gallin v. London, etc., Ry. Co., L. R. 10 Q. B.

212. See 4 Elliott on Railroad, secs. 1495 et seq. "

⁶² See N. Y. Laws, 1892, chap. 676, sec. 53.

⁶³ Schreiner v. New York C. & H. R. R. Co., 12 App. Div. (N. Y.) 551; 42 N. Y. Supp. 163.

CHAPTER XVI.

ASSAULT AND BATTERY.

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| <p>§ 361. Assault and battery—Generally.</p> <p>362. Elements of damages recoverable.</p> <p>363. Loss of time—Evidence.</p> <p>364. Mental suffering.</p> <p>365. Assault on pregnant woman.</p> <p>366. Action by married woman.</p> <p>367. Assault unintentionally committed.</p> <p>368. Matters in aggravation.</p> <p>369. Exemplary damages—When recoverable.</p> <p>370. Same subject continued.</p> <p>371. Exemplary damages—When not recoverable.</p> | <p>372. Exemplary damages—Effect of criminal prosecution on allowance of.</p> <p>373. Same subject continued.</p> <p>374. Evidence as to defendant's wealth.</p> <p>375. Mitigation of damages—Generally.</p> <p>376. Same subject continued.</p> <p>377. Words in mitigation.</p> <p>378. Pleading.</p> <p>379. Evidence generally.</p> <p>380. Whether verdicts excessive for various injuries.</p> |
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§ 361. Assault and battery—Generally.—In determining the measure of damages in an action for an assault and battery, the jury are not confined to any precise rule, but may allow in their discretion for such loss and damage as has been sustained, considering all the circumstances of the case. Although there is no precise rule for determining the amount of damages to be awarded, yet the recovery should only include damages for such loss or injury as is the natural consequence of the assault.¹ As a general rule such recovery should be a fair compensation for the actual loss or injury sustained, subject to certain exceptions which we shall hereafter consider.² And the measure of

¹ Slater v. Rink, 18 Ill. 527; Cox v. Vanderkleed, 21 Ind. 164; Studgeon v. Studgeon (Ind. App.), 30 N. E. 805; Wadsworth v. Treat, 43 Me. 163; Commonwealth v. Norfolk, 5 Mass. 435; Coffin v. Coffin, 4 Mass. 41; Avery v. Ray, 1 Mass. 12; Whitney v. Hitchcock, 4 Den. (N. Y.) 461; Birchard v. Booth, 4 Wis. 67; Huxley v. Berg, 1 Stark. 98; Gregory v. Cottersel, 5 El. & Bl. 571; Hodson v. Stallebrass, 11 Ad. & E. 301; Fetter v. Beale, 1 Ld. Raym. 339.

² Whitney v. Hitchcock, 4 Den.

damages is to be determined from a consideration of the results which actually ensued in consequence of the act of violence and not what the defendant might reasonably suppose to have contemplated as likely to result.³ So the plaintiff is not confined to nominal damages because of the fact that he alleges no special damages, but may recover such general damages as may be shown to have resulted from the injury.¹ And a verdict for nominal damages will be set aside on a finding by the jury that an unlawful assault was committed by defendant on the plaintiff and that as a result thereof, the latter has suffered much pain, and has expended a considerable amount in the treatment of his injury.⁵

§ 362. Elements of damages recoverable.—The jury, in determining the amount recoverable for an assault and battery, may allow for physical and mental pain and suffering,⁶ expenses incurred,⁷ loss of time,⁸ and for any permanent injury which results from the act of violence.⁹ So the actual expenses in-

(N. Y.) 461; *Harman v. Gross*, 5 Wash. 703; 32 Pac. 787; *Vosburg v. Putney*, 80 Wis. 523; 14 L. R. A. 226; 50 N. W. 403.

³ *Vosburg v. Putney*, 80 Wis. 523; 14 L. R. A. 226; 50 N. W. 403.

⁴ *Andrews v. Stone*, 10 Minn. 72.

⁵ *Dunbar v. Cowger*, 68 Ark. 444; 59 S. W. 951.

⁶ *Smith v. Overly*, 30 Ga. 241; *Courtenay v. Clinton*, 18 Ind. App. 620; 48 N. E. 799; *Nipp v. Wiseheart*, 7 Ind. App. 226; 34 N. E. 1006; *Caspar v. Prosadame*, 46 La. Ann. 36; 14 So. 317; *Wadsworth v. Treat*, 43 Me. 163; *Stockton v. Frey*, 4 Gill (Ind.), 406; *Smith v. Holcomb*, 99 Mass. 552; *Goucher v. Jamison* (Mich. 1900), 82 N. W. 663; *Stuppy v. Hof*, 82 Mo. App. 272; *Lyddon v. Dose*, 2 Mo. App. 668; *Cooper v. Hopkins* (N. H. 1900), 48 Atl. 100; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H. 541; *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. 415; *Klein v. Thompson*, 19 Ohio St. 569; *Penn. Canal Co. v.*

Graham, 63 Pa. St. 290; *Leach v. Leach*, 11 Tex. Civ. App. 699; 33 S. W. 703; *Beck v. Thompson*, 31 W. Va. 220; 7 S. E. 447; *Barnes v. Martin*, 15 Wis. 240. See secs. 364, 368 herein.

⁷ *Cox v. Vanderkleed*, 21 Ind. 164; *Golder v. Lund*, 50 Neb. 867; 70 N. W. 379; *Beck v. Thompson*, 31 W. Va. 220; 7 S. E. 447. The expenses of litigation have in such actions been held to be a proper element for the jury to consider in estimating the damages. *Noyes v. Ward*, 19 Conn. 250; *New Orleans, etc., R. R. Co. v. Allbritton*, 38 Miss. 242.

⁸ *Cox v. Vanderkleed*, 21 Ind. 164; *Wadsworth v. Treat*, 43 Me. 163; *Suffolk v. Woodward*, 5 N. J. Law J. 287; *Lagley v. Mason*, 69 Vt. 175; 37 Atl. 287; *Beck v. Thompson*, 31 W. Va. 220; 7 S. E. 447. See secs. 363 herein.

⁹ *Barr v. Post*, 56 Neb. 698; 77 N. W. 123.

curred by the plaintiff may be proven and it is not necessary to show that the physician rendering the services was licensed under the statute to practice in order to render such evidence competent.¹⁰ And a physician may testify as to the "probabilities" of the plaintiff's recovery.¹¹ So an instruction that the jury may in estimating the damages recoverable consider the plaintiff's "loss of time" and "diminished capacity for labor" is not objectionable as authorizing a double recovery.¹² In order, however, to justify a recovery for future consequences, they must be reasonably certain, and for those which are purely speculative there can be no recovery.¹³ And where the plaintiff sought to recover damages for a fractured skull and evidence as to the damages probably resulting therefrom was admitted, it was held to be error where the physician, who had examined plaintiff's skull, had given no testimony showing that it had been fractured.¹⁴ Again the plaintiff should not be allowed to show that as a result of the assault and battery, he has lost a position to which he was about to be appointed.¹⁵

§ 363. Loss of time—Evidence.—As a general rule in order to authorize a recovery for loss of time, there must be some evidence showing what the time was worth.¹⁶ So plaintiff may prove his earnings before and after the assault and his loss of time therefrom.¹⁷ And an estimate may be given by the plaintiff as to the value of his time, together with a statement of the facts and reasons upon which it is based.¹⁸ Again, under an allegation that plaintiff has suffered pain and has been prevented from the transaction of his necessary business as the result of an assault and battery, evidence is admissible that he is unable to work as he could before the assault, and that when he worked in

¹⁰ *Golder v. Lund*, 50 Neb. 867; 70 N. W. 379.

¹¹ *Nichols v. Brabazon*, 94 Wis. 549; 69 N. W. 342.

¹² *Knittel v. Schmidt*, 16 Tex. Civ. App. 7; 40 S. W. 507.

¹³ *Hooper v. Haskell*, 56 Me. 251; *Barnes v. Martin*, 15 Wis. 240. See secs. 369-373, 379 herein.

¹⁴ *Givens v. Berkly* (Ky.), 56 S. W. 158.

¹⁵ *Brown v. Cummings*, 7 Allen (Mass.), 507.

¹⁶ *Kane v. Manhattan Ry. Co.*, 3 N. Y. St. R. 145.

¹⁷ *Bagley v. Mason*, 69 Vt. 175; 37 Atl. 287.

¹⁸ *Jackson v. Wells*, 13 Tex. Civ. App. 275; 35 S. W. 528.

the sun he could not work as he could before, though the value of his time be not specially alleged.¹⁹

§ 364. Mental suffering.—In assessing the damages which are to be allowed for an assault, the mental suffering which necessarily and inevitably results therefrom is an element to be taken into consideration.²⁰ And damages therefor may be allowed, though no physical harm is done and there is no physical contact.²¹ Where a wrongful assault is accompanied with circumstance of insult or indignity, injury to the feelings, causing humiliation, may be considered in assessing the damages.²² And there may be a recovery for mental suffering caused by disfigurement resulting from an assault and battery.²³ But in an action by the father in behalf of a son to recover for an assault and battery committed upon him, it is held that the jury is not authorized to give damages for the injured feelings of the parents.²⁴

§ 365. Assault on pregnant woman.—For an assault on a pregnant woman which it is alleged has resulted in a miscarriage, in order to recover substantial damages therefor, it is not necessary, it has been decided, to show that and she has suffered more pain, or that her illness has been more severe, or her health impaired to a greater extent than would have been if the child had been delivered at the proper time and in the natural way.²⁵

¹⁹ *Knittel v. Schmidt*, 16 Tex. Civ. App. 7; 40 S. W. 507.

²⁰ *Southern Express Co. v. Platten* (C. C. App. 5th C.), 93 Fed. 936; 36 C. C. A. 46; 10 Am. & Eng. Corp. Cas. N. S. 521; *Maisenbacker v. Society Concordia*, 71 Conn. 369; 42 Atl. 67; *McKinley v. C. & N. W. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Morgan v. Curley*, 142 Mass. 107; *Stuppy v. Hof*, 82 Mo. App. 272; *Cooper v. Hopkins* (N. H. 1900), 48 Atl. 100; *Nichols v. Brabazon*, 94 Wis. 549; 69 N. W. 342; *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195; 61 N. W. 834.

²¹ *Goddard v. Grand Trunk Ry.*

Co., 57 Me. 202; *Handy v. Johnson*, 5 Md. 450; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Alexander v. Blodgett*, 44 Vt. 476; *Martin v. Shoppee*, 3 C. & P. 373. See *Papineau v. Taber*, Mont. L. R. 2 Q. B. 107.

²² *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195; 61 N. W. 834.

²³ *Nichols v. Brabazon*, 94 Wis. 549; 69 N. W. 342.

²⁴ *Cowden v. Wright*, 24 Wend. (N. Y.) 429.

²⁵ *Plonty v. Murphy* (Minn. 1901), 84 N. W. 1005, wherein it was held that three hundred dollars as damages was not excessive.

§ 366. Action by married woman.—In an action by a married woman to recover damages for injuries which she has sustained as the result of an assault, loss of time is not an element to be considered in estimating the amount recoverable, where she had no business or employment apart from her husband.²⁸ Nor can she recover moneys which her husband has expended for medical treatment and expenses in endeavoring to cure her.²⁹ And the right given by the Pennsylvania Married Woman's Property Act of 1887,³⁰ to recover for an assault and battery does not entitle her to recover for loss of ability to do household work.³¹ And in an action by a husband to recover for an assault committed upon his wife by defendant's agent, it is not proper to instruct the jury that an assault becomes aggravated when committed by an adult male upon a female, since though true, the jury might be misled thereby in the belief that they were justified in assessing more than actual damages.³² Again, there can be no recovery for the public odium incurred by exposure at the trial of the domestic quarrels of the husband and wife.³³

§ 367. Assault unintentionally committed.—Though an assault may be unintentional, yet if it is recklessly committed, the party guilty will be liable in damages therefor, and the injured party may recover such damages as are the natural and direct result of the act of violence, including mental and physical pain and suffering.³⁴ But one who in the exercise of his rights of self-defense inflicts an unintentional injury upon a third party is not responsible in damages therefor, as where when a person was assaulted by another he struck a third person, mistaking him for the assailant.³⁵

§ 368. Matters in aggravation.—The plaintiff may show that injuries which he had sustained prior to the assault have

²⁸ *Denton v. Ordway*, 108 Iowa, 487; 79 N. W. 271.

²⁹ *Burnham v. Webster*, 3 N. Y. St. R. 50; 25 Wkly. Dig. 556.

³⁰ Act of 1887, sec. 2.

³¹ *Walter v. Kensinger* (Pa. C. P.), 2 Pa. Dist. R. 728; 10 Lanc. L. Rev. 268.

³² *Texas Coal & Fuel Co. v. Arenstein*, 22 Tex. Civ. App. 441; 55 S. W. 127.

³³ *Barnes v. Martin*, 15 Wis. 240.

³⁴ *West v. Forrest*, 22 Mo. 344.

³⁵ *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615.

been aggravated thereby and also the extent to which they have been aggravated.³¹ In this case it appeared that the plaintiff was a man sixty years of age who had been injured by the explosion of a shell in the Civil War, for which injury he was receiving a pension. His counsel attempted to show as a part of his case the physical condition he was in just prior to the assault, arising from this injury and how and to what extent his condition had been affected by the acts of the defendant, but the court refused to admit such evidence and the question arose on appeal as to its admissibility, when it was said by the court: "The burden was upon the plaintiff to prove such of his injuries as were the direct and proximate result of defendant's acts, and in doing this it was proper to show in what respect and to what extent his present condition could be attributed to the assault and battery and what could more properly be established as the result of his army experience. The injury for which the plaintiff was receiving a pension affected his health and enfeebled him unquestionably, but that fact would not deprive him of the right to recover the direct consequence of the defendant's tort, to recover such damages as could be shown to be the direct result of that wrong. That the plaintiff was in ill health, no matter the cause, was no excuse for defendant's acts and would not relieve him from resulting consequences. The defendant could not be held to respond for injuries arising out of other causes, but as to those for which he was an efficient cause an action would lie. The rule is that a perpetrator of a tort is responsible for the direct and immediate consequences thereof whether they may be regarded as natural or probable, or whether they might have been contemplated, foreseen, or expected or not. It is not necessary to the liability of a wrongdoer that the result which actually follows should have been anticipated by him."³²

§ 369. Exemplary damages—When recoverable.—If it appear that the defendant's act in committing the assault and battery was intentional and without provocation, and was committed in a spirit of wantonness or maliciousness with no

³¹ *Watson v. Rheinderknecht* (Minn. 1901), 84 N. W. 798.

³² *Per Collins, J.*

legal excuse or justification, the plaintiff is not confined to damages which are merely compensatory, but may also recover exemplary or punitive damages.³⁵ So though no malice is charged in the complaint, it is proper to instruct the jury that if they find wilful and malicious conduct on defendant's part, they may award exemplary damages, where the complaint alleges that defendant violently assaulted plaintiff and against her will debauched and carnally knew her.³⁷ And punitive damages may be recovered by one who has been violently assaulted and wounded by another without any provocation.³⁸ Again, where a newsboy had dropped a paper upon the floor of a saloon and the proprietor of the saloon struck him a severe blow upon the head and forced him to go back into the saloon and place the paper upon the table, exemplary damages were allowed.³⁹ So also were they allowed against one who without any warning

³⁵ *Bundy v. Manginess*, 76 Cal. 532; 18 Pac. 668; *Wilson v. Middleton*, 2 Cal. 54; *Maisenbacker v. Society Concordia*, 71 Conn. 369; 42 Atl. 67; *Dalton v. Beers*, 38 Conn. 529; *Tatnall v. Courtney*, 6 Houst. (Del.) 434; *Watson v. Hastings*, 1 Penn. (Del.) 47; 39 Atl. 587; *Alcorn v. Mitchell*, 63 Ill. 553; *Farwell v. Warren*, 51 Ill. 467; *McNamara v. King*, 7 Ill. 432; *Reizenstein v. Clark*, 104 Iowa, 287; 73 N. W. 588; *Irwin v. Yeager*, 74 Iowa, 174; *Malone v. Murphy*, 2 Kan. 94; *Slater v. Sherman*, 5 Bush (Ky.), 206; *Gore v. Chadwick*, 6 Dana (Ky.), 477; *Webb v. Gilman*, 80 Me. 177; *Pike v. Dilling*, 48 Me. 539; *Thillman v. Neal*, 88 Md. 525; 42 Atl. 242; *Crosby v. Humphreys*, 59 Minn. 92; 60 N. W. 843; *Lochte v. Mitchell* (Miss. 1900), 28 So. 877; *Klingman v. Holmes*, 54 Mo. 304; *Lyddon v. Dore*, 81 Mo. App. 64; 2 Mo. App. Rep. 668; *Berryman v. Cox*, 73 Mo. App. 67; 1 Mo. App. Rep. 29; *Sloan v. Speaker*, 63 Mo. App. 321; 1 Mo. App. Rep. 767; *Connors v. Walsh*, 131 N. Y. 590; 42 N. Y. St. R. 868; 30 N. E. 859; *Clayton v. Keeler*, 18

Misc. (N. Y.) 488; 42 N. Y. Supp. 1051; *Lane v. Wilcox*, 55 Barb. (N. Y.) 615; *Causee v. Anders*, 4 Dev. & B. L. (N. C.) 246; *Hendricks v. Fowler*, 16 Ohio C. C. 597; 9 Ohio C. D. 209; *Rhodes v. Rodgers*, 151 Pa. St. 634; *Knittle v. Schmidt*, 16 Tex. Civ. App. 7; 40 S. W. 507; *Sargent v. Carnes*, 84 Tex. 156; 19 S. W. 378; *Borland v. Barrett*, 76 Va. 128; 44 Am. Rep. 152; *Roach v. Caldbeck*, 64 Vt. 598; *Goldsmith v. Joy*, 61 Vt. 488; 4 L. R. A. 500; *Edwards v. Lavitt*, 43 Vt. 126; *Beck v. Thomson*, 31 W. Va. 220; 7 S. E. 447; *Lamb v. Stone*, 95 Wis. 254; 70 N. W. 72; *Spear v. Sweeney*, 88 Wis. 545; 60 N. W. 1060; *Birchard v. Booth*, 4 Wis. 67. But see *Atkins v. Gladwish*, 25 Neb. 390; *Barr v. Barr*, 8 Neb. 68; 30 Am. Rep. 814; *Fay v. Parker*, 53 N. H. 342.

³⁷ *List v. Miner*, 74 Conn. 50; 49 Atl. 856.

³⁸ *Webb v. Rothchild*, 49 La. Ann. 244; 21 So. 258; *Webb v. Gilman*, 80 Me. 177; 18 Atl. 688.

³⁹ *Lyddon v. Dore*, 2 Mo. App. Rep. 668.

threw a brick at a boy who was running across his yard in company with other boys who fearing a policeman were endeavoring to reach another yard and the boy was struck in the eye by the brick and severely injured.⁴⁰

§ 370. Same subject continued.—Where the defendant endeavored to force an entrance into plaintiff's house during the absence of the husband, after the wife had refused him admission, and he struck at her several times and gave her a violent blow from which she suffered considerably, an instruction directing punitive damages was held proper.⁴¹ And consent to sexual intercourse when obtained by violence may constitute part of the assault and be a ground for the award of exemplary damages.⁴² Again, such damages were allowed against one who, in the presence of a large number of people in a court room after the adjournment of court, spit in a man's face.⁴³ So in another case where an action was brought to recover for an assault with a knife, it was held proper to charge the jury that if they thought the attack was wanton and unprovoked, and with a deadly weapon, exemplary damages might be given.⁴⁴ In actions to recover damages for an assault and battery, it is proper to consider the character and standing of the parties.⁴⁵ And evidence of the wealth of the defendant is held to be admissible as bearing upon the amount of damages recoverable,⁴⁶ and also of the pecuniary condition of both parties.⁴⁷ In actions of this kind it is held that exemplary damages may be given where the assault and battery is malicious, even though there has been a criminal prosecution and conviction.⁴⁸ Though the court should gene-

⁴⁰ *Connors v. Walsh*, 131 N. Y. 590; 43 N. Y. St. R. 868; 30 N. E. 59.

⁴¹ *Thillman v. Neal*, 88 Md. 525; 42 Atl. 242.

⁴² *Dickey v. McDonnell*, 41 Ill. 62.

⁴³ *Alcorn v. Mitchell*, 63 Ill. 553. In this case a verdict for \$1,000 was held not excessive.

⁴⁴ *Porter v. Seiler*, 23 Pa. St. 424.

⁴⁵ *Goldsmith v. Joy*, 61 Vt. 488; 17 Atl. 1010; 4 L. R. A. 500; 40 Alb. L. J. 48.

⁴⁶ *Pullman Pal. Car Co. v. Lawrence*, 74 Miss. 782; 22 So. 53 15 Nat. Corp. Rep. 124; 8 Am. & Eng. R. Cas. N. S. 59; 2 Am. Neg. Rep. 586; *Rowe v. Mores*, 9 Rich. L. (S. C.) 423; *Birchard v. Booth*, 4 Wis. 67. See sec. 374 herein.

⁴⁷ *Eltringham v. Earhart*, 67 Miss. 488; 7 So. 346.

⁴⁸ *Roberts v. Mason*, 10 Ohio St. 277. See sec. 372 herein as to exemplary damages where liable to criminal prosecution.

rally instruct as to the allowance of punitive damages, yet a refusal to instruct in regard to such damages does not constitute a reversible error where the verdict clearly shows that vindictive damages were not allowed.⁴⁹

§ 371. Exemplary damages—When not recoverable.—The defendant may in committing the assault have acted under the honest belief that he was in immediate danger of an assault by the plaintiff, and where such is shown to be the case, exemplary damages should not be allowed.⁵⁰ And where highly provoking language has been used by the plaintiff towards the defendant immediately prior to the assault, such malice will not be implied in law as will require an award of vindictive damages by way of punishment, unless the act of violence was carried to an excess, and beyond what a reasonable man would do under such circumstances, the question of the award of such damages being for the jury, and not for the court.⁵¹ Nor is it proper to instruct the jury that if an assault was committed in such a manner as to show that the defendant intended to injure, annoy, or vex plaintiff, exemplary damages might be awarded, since such intention is not equivalent to malice.⁵² So where a person in removing a trespasser from his premises uses excessive force, exemplary damages are not recoverable on the ground of wantonness and malice,⁵³ unless the trespasser was not previously requested to leave, and the assault was without qualification.⁵⁴ And one who has acquired peaceful possession of property is not liable to the owner of the same in exemplary damages, in the absence of excessive force or any motive of malice, where he resisted the effort of the owner to take possession of the property, and the latter for this purpose used a knife with which he threatened and intended bodily harm.⁵⁵ So a parent or master cannot recover punitive damages from one who has committed an assault

⁴⁹ *Cross v. Carter*, 100 Ga. 632; 28 S. E. 390.

⁵⁰ *Keyes v. Devlin*, 3 E. D. Sun. (N. Y.) 518.

⁵¹ *Donnelly v. Harris*, 41 Ill. 126.

⁵² *Badostain v. Grazide*, 115 Cal. 425; 47 Pac. 118.

⁵³ *Kiff v. Youmans*, 86 N. Y. 324;

13 W. D. 273, rev'g 20 Hun, 123; 9 W. D. 461.

⁵⁴ *Huston v. Gilbert*, 40 Hun (N. Y.), 638; 24 W. D. 54, aff'd 113 N. Y. 622; 22 N. Y. St. R. 992; 20 N. E. R. 876.

⁵⁵ *Barnes v. Martin*, 15 Wis. 240.

upon a child or servant, even though the assault be of an indecent character upon a female and under very aggravating circumstances, since such damages are recoverable in a suit by the child or servant herself.⁵⁶ And where plaintiff was shot by defendant while making a riotous disturbance around the latter's house at night, it was held that exemplary damages should not be allowed, but rather that the fact that he was one of a party creating such a disturbance should go to mitigate the damages.⁵⁷ Again, where a master whips a seaman, it is declared that exemplary damages are not recoverable by the latter unless it appear that the master acted wantonly, not with a view of punishment but rather for the purpose of disgrace and mortification.⁵⁸

§ 372. Exemplary damages—Effect of criminal prosecution on allowance of.—The defense has frequently been set up in actions for assault and battery that a criminal prosecution and fine is a bar to the recovery of exemplary damages in the civil action, on the ground that two punishments cannot be inflicted for the same offense. Such a defense has not, however, as a general rule, been sustained. The punishment inflicted by a criminal prosecution is in the nature of a penalty for the wrong which has been done to the public. Punitive damages, which are so called to distinguish them from the pecuniary damage or loss sustained, are inflicted as a punishment for the wrong done to the individual. The fact that the wrongdoer has been punished criminally and perhaps obliged to pay a fine to the public authorities, should not affect the individual's right to exemplary damages, where the facts of the case justify an award of such damages. The wrongdoer has in reality been guilty of two wrongs, though the act be one. He has done a wrong to society or the public at large, for which the law provides a punishment. He has also committed a wrong against the individual, for which the law says that if accompanied by malice or wantonness he shall be responsible to such individual in punitive damages, and the award of such

⁵⁶ *Whitney v. Hitchcock*, 4 Dem. (N. Y.) 461. The measure of damages in such an action is the actual loss of service sustained.

⁵⁷ *Robison v. Rupert*, 23 Pa. St. 523.

⁵⁸ *Gould v. Christianson, Blatchf. & H. Adm.* 507.

damages cannot in any just sense be considered as in violation of any constitutional provision or common-law inhibition against the infliction of two punishments for the same offense.⁵⁵

§ 373. Same subject continued.—Although the general rule is that stated under the preceding section, yet there are some cases which, while sustaining such rule, declare that a conviction and fine should be considered in mitigation of punitive damages.⁵⁶ Again, though a person may be liable to a criminal prosecution for an assault and battery committed by him upon another person, yet such fact of itself will not entitle the latter to recover exemplary damages.⁵⁷ Nor will the damages be increased in such an action by the fact that only a nominal fine has been imposed in a criminal action.⁵⁸

⁵⁵ Phillips v. Kelly, 29 Ala. 628; Bundy v. Maginess, 76 Cal. 532; 18 Pac. 668; Wilson v. Middleton, 2 Cal. 54; Jefferson v. Adams, 4 Harr. (Del.) 321; Smith v. Bagwell, 19 Fla. 117; 45 Am. Rep. 12; Butler v. Mercer, 14 Ind. 479; Hauser v. Griffith, 102 Iowa, 215; 71 N. W. 223; Reddin v. Gates, 52 Iowa, 210; Hendrickson v. Kingsbury, 21 Iowa, 379; Johnson v. Smith, 64 Me. 553; Elliott v. Van Buren, 33 Mich. 47; Boetcher v. Staples, 27 Minn. 308; 38 Am. Rep. 295; Corwin v. Walton, 18 Mo. 71; Cook v. Ellis, 6 Hill (N. Y.), 466; Sowers v. Sowers, 87 N. C. 303; Roberts v. Mason, 10 Ohio St. 277; Rhodes v. Rodgers, 151 Pa. St. 634; 24 Atl. 1044; 23 Pitts. L. J. N. S. 95; Barr v. Moore, 87 Pa. St. 385; Roach v. Caldbeck, 64 Vt. 593; 24 Atl. 989; Edwards v. Leavitt, 46 Vt. 126; Hoadley v. Watson, 45 Vt. 289; 12 Am. Rep. 197; Brown v. Swinford, 44 Wis. 282. But see Howlett v. Tuttle, 15 Colo. 454; 24 Pac. 921; Murphy v. Hobbs, 7 Colo. 541; Huber v. Teuber, 3 MacArthur (D. C.), 484; 336 Am. Rep. 110; Cheny v.

McCall, 23 Ga. 193; Farman v. Lauman, 73 Ind. 568; Humphreys v. Johnson, 20 Ind. 190; Butler v. Mercer, 14 Ind. 479; Austin v. Wilson, 4 Cush. (Mass.) 273; Fay v. Parker, 53 N. H. 342; 16 Am. Rep. 270.

⁵⁶ Coleman v. Hagerman, 5 City Hall Rec. (N. Y.) 63; Rhodes v. Rodgers, 151 Pa. St. 634; 24 Atl. 1044; 23 Pitts. L. J. N. S. 95; Flanagan v. Womack, 54 Tex. 45; Jackson v. Wells, 13 Tex. Civ. App. 275; 35 S. W. 528. But see Roach v. Caldbeck, 64 Vt. 593; 24 Atl. 989; Hoadley v. Watson, 45 Vt. 289; 12 Am. Rep. 197. In both of these last cases it is declared that a criminal prosecution and the payment of a fine is not to be considered in mitigation even of exemplary damages. See also Phillips v. Kelly, 29 Ala. 628; Wheatley v. Thorn, 23 Miss. 62; Cook v. Ellis, 6 Hill (N. Y.), 466; Brown v. Swinford, 44 Wis. 282.

⁵⁷ Badostain v. Graside, 115 Cal. 425; 47 Pac. 118.

⁵⁸ Honaker v. Howe, 19 Gratt. (Va.) 50.

§ 374. Evidence as to defendant's wealth.—Evidence of the wealth of the defendant is, as a general rule, inadmissible in these actions, except it be a case for the award of exemplary damages, when it is generally considered admissible.⁶⁵ So in an action to recover for a wrongful assault by an employee of the defendant, the wealth or pecuniary condition of the latter may be shown where the facts warrant the recovery of exemplary damages, for the purpose of enabling the jury to inflict proper damages by way of punishment.⁶⁶ But where no evidence has been given showing that the defendant in an action for an assault and battery is the owner of any property, it is not proper to instruct the jury that in assessing punitive damages they may consider the wealth of the defendant.⁶⁷

§ 375. Mitigation of damages—Generally.—The defendant may introduce all proper facts which tend to mitigate the damages for the assault and battery.⁶⁸ So where it is alleged by the plaintiff in his complaint that the act of the defendant was wilfully and wrongfully done, the latter may introduce evidence for the purpose of disproving any improper intent in mitigation of damages.⁶⁹ And evidence of provocation is admissible and it is not necessarily confined to the immediate time of the occurrence, but the provocation may be continuous, commencing some time prior to the date of the assault and continuing day by day.⁷⁰ But as a general rule antecedent

⁶⁵ *Brown v. Evans*, 8 Sawy. (U. S. C. C.) 488; 17 Fed. 912; *Jarvis v. Manlove*, 5 Har. (Del.) 452; *Tatnall v. Courtney*, 6 Houst. (Del.) 434; *Gore v. Chadwick*, 6 Dana (Ky.), 477; *Sloan v. Edwards*, 61 Md. 89; *Pullman Pal. Car Co. v. Lawrence*, 74 Miss. 782; 15 Nat. Corp. Rep. 124; 22 So. 53; 8 Am. & Eng. R. Cas. N. S. 59; *Morgan v. Durfee*, 69 Mo. 469; 33 Am. Rep. 508; *Berryman v. Cox*, 1 Mo. A. Rep. 29; 73 Mo. App. 67; *Moody v. Osgood*, 50 Barb. (N. Y.) 628; *Hendricks v. Fowler*, 10 Ohio C. C. 597; *Spear v. Sweeney*, 88 Wis. 545; 60 N. W. 1060; *Draper v. Baker*, 61 Wis. 450; 21 N. W. 527. But see

Givens v. Berkley (Ky. 1900), 56 S. W. 158. See in this connection sec. 370, herein.

⁶⁶ *Pullman Pal. Car Co. v. Lawrence*, 74 Miss. 782; 22 So. 53; 15 Nat. Corp. Rep. 124; 8 Am. & Eng. R. Cas. N. S. 59.

⁶⁷ *Lister v. McKee*, 79 Ill. App. 210.

⁶⁸ *Gilbert v. Rounds*, 14 How. Pr. (N. Y.) 46; *Saltus v. Kipp*, 5 Duer (N. Y.), 646; 2 Abb. Pr. 382; 12 How. Pr. 342.

⁶⁹ *Sherman v. Kortright*, 52 Barb. (N. Y.) 267.

⁷⁰ *Dolan v. Fagan*, 63 Barb. (N. Y.) 73. See *Linde v. Elias*, 4 Alb. L. J. 76.

acts which cannot be considered as part of the same transaction are not admissible in mitigation of damages though they may have been exceedingly irritating and provoking.⁶⁰ And though acts of the plaintiff in provocation of an assault may be admissible in mitigation of damages, yet they must be so connected with the assault as to raise a presumption that the act of the defendant was committed while his passions were aroused as the immediate result of the acts of the plaintiff.⁶¹ So it is declared that though there may be provocation, yet, if it does not amount to a justification, it cannot be considered in mitigation of actual or compensatory damages.⁶² Where a person acts in the belief that he has a right to so act, such fact may be considered in mitigation of damages, as where a person ejected an employer from his house under such a belief, and exemplary damages were claimed.⁶³ And the fact that the plaintiff immediately before the assault charged the defendant with a crime may be shown.⁶⁴ So evidence of previous threats made by the plaintiff has been held admissible.⁶⁵ And when a servant clearly neglects his duty and the master in a fit of passion assaults him, such facts may be considered.⁶⁶ So the action of the defendant in preventing a third party from joining in the assault and the declaration of such third person at the time that he was about to join in the fight, are facts which the jury may consider.⁶⁷ Again, evidence that the plaintiff advanced

⁶⁰ *Lee v. Woolsey*, 19 Johns. (N. Y.) 319; *Stetlar v. Nellis*, 60 Barb. (N. Y.) 524; 42 How. Pr. 163; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658. But see *Chicago & A. R. Co. v. Randolph*, 65 Ill. App. 208, where it was held that evidence of a prior assault was admissible.

⁶¹ *East Tenn. V. & G. R. Co. v. Fleetwood*, 90 Ga. 23; 15 S. E. 778; *Murphy v. McGrath*, 79 Ill. 594; *Groman v. Kukuck*, 59 Iowa, 18; *Turner v. Footman*, 71 Me. 218; *Gaither v. Blowers*, 11 Md. 536; *Tyson v. Booth*, 100 Mass. 258; *Heiser v. Loomis*, 47 Mich. 16; *Castner v. Sliker*, 33 N. J. L. 95; *Dolan v. Fagan*, 68 Barb. (N. Y.) 73; *Lee v. Woolsey*,

19 Johns. (N. Y.) 319; *Stetlar v. Nellis*, 60 Barb. (N. Y.) 524; 42 How. Pr. 163.

⁶² *Goldsmith v. Joy*, 61 Vt. 488; 4 L. R. A. 500; 17 Atl. 1010; 40 Alb. L. J. 148; *Birchard v. Booth*, 4 Wis. 67.

⁶³ *Redfield v. Redfield*, 75 Iowa, 435; 39 N. W. 688.

⁶⁴ *Bartram v. Stone*, 31 Conn. 159. See *Bauman v. Bean*, 57 Mich. 1.

⁶⁵ *McKenzie v. Allen*, 3 Strob. (S. C.) 546; *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 557; *Yeager v. Berry*, 82 Mo. App. 534; *Fairbanks v. Witter*, 18 Wis. 287.

⁶⁶ *Ward v. Blackwood*, 41 Ark. 236; 48 Am. Rep. 41.

⁶⁷ *Watkins v. Gaston*, 17 Ala. 664.

upon the defendant exhibiting a pistol and brass knuckles and in a threatening manner, whereupon the defendant struck him, is sufficient to justify a finding that the assault was justifiable.⁷⁷

§ 376. **Same subject continued.**—Where a woman brings an action to recover for an indecent assault, the defendant may show in mitigation of damages specific acts of lewdness on her part.⁷⁸ But evidence of defendant's general good character is declared to be inadmissible in such a case.⁷⁹ Nor is evidence admissible as to the general character of the plaintiff for the purpose of mitigating the damages.⁸⁰ Nor can the defendant show that the results of the assault and battery were more aggravated by reason of the intemperate habits of the plaintiff than they would have been if he had been a person of temperate habits.⁸¹ Nor is the fact that the defendant entered the plaintiff's house for the purpose of making an attachment admissible in mitigation.⁸² And in an action by the husband and wife to recover for injuries inflicted upon the wife by persons who were forcibly preventing her from entering her house, the fact that her husband had sometime since obtained possession of the house in a fraudulent manner from one of the defendants, is not admissible to reduce the damages.⁸³ Again, in an action by a passenger to recover damages for an assault committed upon him by a railroad conductor, the failure of the court to charge that sneers and contemptuous gestures of the former may be considered in mitigation is not sufficient ground for a new trial where it does not appear that any request for such charge was made.⁸⁴ If the defendant sets up a mere general denial to an action for an assault and battery, he cannot establish a justification under such plea.⁸⁵ So evidence in justifi-

⁷⁷ *Strickland v. Atlanta & W. P. R. Co.*, 99 Ga. 124; 24 S. E. 981.

⁷⁸ *Gulerette v. McKinley*, 27 Hun (N. Y.), 320; *Young v. Johnson*, 46 Hun (N. Y.), 164; 123 N. Y. 226; *Ford v. Jones*, 62 Barb. (N. Y.) 484.

⁷⁹ *Reddin v. Gates*, 52 Iowa, 210; *Sayen v. Ryan*, 9 Ohio C. C. 631.

⁸⁰ *Willis v. Forrest*, 2 Duer (N. Y.), 810; *Galbraith v. Fleming*, 60 Mich. 403; *Corning v. Corning*, 6 N. Y. 97.

⁸¹ *Littlehale v. Dix*, 11 Cush. (Mass.) 364.

⁸² *Sampson v. Henry*, 11 Pick. (Mass.) 379. But see *Paine v. Farr*, 118 Mass. 74.

⁸³ *Jacobs v. Hoover*, 9 Minn. 204.

⁸⁴ *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23.

⁸⁵ *Hathaway v. Hatchard*, 160 Mass. 296; 35 N. E. 857; *Barr v. Post*, 56 Neb. 698; 77 N. W. 123.

cation of an assault and battery, that the defendant was an officer armed with a process, and only used such force as was necessary to attach plaintiff's property under the writ, is not admissible unless such facts have been pleaded.⁸⁶

§ 377. **Words in mitigation.**—Although opprobrious, abusive or insulting language by the plaintiff, will not defeat an action for an assault and battery, yet it may be considered in mitigation. In this, however, as in other cases where provocation on the part of the plaintiff may tend to mitigate the damages, the words must not be wholly disconnected from the assault. Nor on the other hand must they necessarily be immediately connected with the act and confined to the time of its commission, but may consist of a series of provoking words extending back sometime from the assault, and in such cases prior words or language may be shown, and only in such cases.⁸⁷ So in an action against a railroad company for an assault by a conductor upon a passenger, the fact that the latter had made slanderous and indecent remarks about the sister-in-law of the former is not competent to reduce the damages in the absence of evidence showing that the remarks were so recently uttered as to indicate that the conductor acted under provocation immediately resulting therefrom.⁸⁸ And though it may appear that the plaintiff may have made remarks or declarations of a slanderous or provoking nature relative to the defendant, yet they are not admissible in evidence in mitigation

⁸⁶ *Smith v. Wilson*, 21 R. I. 327; 21 R. I. (part 2) 120; 43 Atl. 634.

⁸⁷ *Cushman v. Ryan*, 1 Story (U. S. C. C.), 91; *Bartram v. Stone*, 31 Conn. 159; *Burke v. Melvin*, 45 Conn. 243; *Matthews v. Teny*, 10 Conn. 455; *Donnelly v. Harris*, 41 Ill. 126; *Schlossen v. Fox*, 14 Ind. 365; *Thrall v. Knapp*, 17 Iowa, 468; *Caspar v. Prosdame*, 46 La. Ann. 36; 14 So. 317; *Prentiss v. Shaw*, 56 Me. 427; *Tyson v. Booth*, 100 Mass. 258; *Avery v. Ray*, 1 Mass. 12; *Stuppy v. Hof*, 2 Mo. App. Rep. 583; *Dolan v. Fagan*, 63 Barb. (N. Y.) 73; *Stetlar v. Nelson*, 60 Barb. (N. Y.) 524; 42 How.

(N. Y.) 163; *Maynard v. Berkeley*, 7 Wend. (N. Y.) 560; *Robinson v. Rupert*, 23 Pa. St. 523; *Hayes v. Lease*, 51 S. C. 534; 29 S. E. 259; *Goldsmith v. Joy*, 61 Vt. 488; 4. L. R. A. 500; 17 Atl. 1010; 40 Alb. L. J. 148; *Wilson v. Young*, 31 Wis. 574; *Frazer v. Berkeley*, 7 C. & P. 789; *Sinford v. Lake*, 3 H. & N. 275.

⁸⁸ *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23; 15 S. E. 778. See *Brooks v. Carter* (C. C. S. D. Ga.) 34 Fed. 505, where remarks made by plaintiff concerning the sister of the defendant were held not to justify an assault.

unless it also appear that they were communicated to the defendant immediately prior to the assault.⁹⁰ Again, in those cases where the defendant seeks to reduce damages by proof of abusive or provoking language on the part of the plaintiff, the question is whether the defendant has had time since the words were spoken to him or came to his knowledge to cool his blood, and not the number of hours they were spoken prior to the assault.⁹¹ In an action by a husband and wife to recover for an assault committed upon the latter, the fact that the husband had used provoking words to the defendant is not admissible in mitigation of damages, unless it also appear that the wife was privy to such language.⁹¹

§ 378. Pleading.—In an action to recover for an assault and battery, the complaint need not state separately the grounds for the recovery of actual and punitive damages.⁹² And the plaintiff may amend his complaint so as to ask for exemplary damages on grounds stated in the original.⁹³

§ 379. Evidence generally.—Evidence tending to show malice is admissible though not specially alleged in the complaint.⁹⁴ And evidence that the plaintiff is a laboring man has been admitted.⁹⁵ So it may be proper to admit evidence as to the financial condition of the plaintiff, the extent and dependency of his family upon him for support and of the family's source of support since the injury, for the purpose of showing the extent and amount of the damages received by him.⁹⁶ Again, statements made by the plaintiff to attending physicians as to pain suffered by him are admissible in evidence though made after he had decided to bring suit and for the purpose of using such physicians as witnesses.⁹⁷ So also, evidence as to exclamations tending to show pain, though made to one not a physician, are admissible.⁹⁸ And where an as-

⁹⁰ *Gaither v. Blowers*, 11 Md. 536;
Castner v. Sliker, 33 N. J. L. 95.

⁹¹ *Dolan v. Fagan*, 63 Barb. (N. Y.) 73.

⁹² *Everts v. Everts*, 3 Mich. 580.

⁹³ *Jackson v. Wells*, 13 Tex. Civ. App. 275; 35 S. W. 528.

⁹⁴ *Krenger v. Sylvester*, 100 Iowa, 647; 69 N. W. 1059.

⁹⁵ *Elfers v. Woolley*, 116 N. Y. 294.

⁹⁶ *Gaither v. Blowers*, 11 Md. 536.

⁹⁷ *Hencky v. Smith*, 10 Oregon, 349; 45 Am. Rep. 143.

⁹⁸ *Bagley v. Mason*, 69 Vt. 175; 37 Atl. 287.

⁹⁹ *Bagley v. Mason*, 69 Vt. 175; 37 Atl. 287.

sault is made upon a girl for the purpose of having illicit intercourse with her, in an action to recover therefor, evidence of complaints as to her treatment made to her parents in less than an hour after the assault, are admissible, since in the absence of such evidence there would be good reason for doubting her story.⁹⁹ And evidence of the plaintiff's condition on the morning following the assault is admissible.¹⁰⁰ And the defendant in an action for an assault may, for the purpose of giving a full version of the affair and of showing his belief in his danger, show that he was struck by others than the plaintiff, both before the alleged assault and during the affray.¹ But evidence that at the time of the assault the defendant charged the plaintiff with perjury is not admissible for the purpose of enhancing the damages.² And where only compensatory damages are claimed, evidence as to defendant's motive in visiting the plaintiff at the time of the alleged assault is not admissible.³ And in the absence of a demand in the petition for attorney's fees, evidence as to what the plaintiff agreed to pay his counsel is not admissible.⁴ In an action by a passenger against a carrier for an assault and battery committed by its conductor, if the carrier claims that the latter acted in self-defense and used only such force as appeared necessary to him as a reasonable man to repel the assault by the passenger, the burden of proof is upon the carrier to establish such facts.⁵

§ 380. Whether verdicts excessive for various injuries.—

As in other cases of personal injuries so in actions to recover for an assault and battery, if the verdict is so grossly excessive as to appear to have been the result of ignorance, prejudice or corruption, the verdict may be set aside.⁶ So where a very

⁹⁹ *Collins v. Wilson*, 18 Ky. L. Rep. 1049; 39 S. W. 33.

¹⁰⁰ *Hannan v. Cross*, 5 Wash. 703; 32 Pac. 787.

¹ *Hogan v. Ryan*, 5 N. Y. St. R. 110.

² *Pulver v. Harris*, 61 Barb. (N. Y.) 78.

³ *Berryman v. Cox*, 73 Mo. App. 67; 1 Mo. App. Rep. 29.

⁴ *Irlbeck v. Bierl*, 101 Iowa, 240; 67 N. W. 400, reh'g denied 70 N. W. 206.

⁵ *St. Louis S. W. R. Co. v. Berger*,

64 Ark. 613; 39 L. R. A. 784; 44 S. W. 809.

⁶ We cite a few cases as showing the various elements considered in determining whether verdicts were excessive: Person secretly approached and struck with heavy chain on head and rendered unconscious—\$2,365 not excessive. *Van Reeden v. Evans*, 52 Ill. App. 209. Kicked in face while down—jaw broken and teeth knocked out—

large verdict is awarded and the evidence is not sufficient to show that the injury resulted from the act of violence of the defendant, a new trial may be granted.⁷ And where there is a statutory provision which authorizes the granting of a new trial in those cases where the verdict is so excessive that it appears to have been the result of passion or prejudice,⁸ the court instead of ordering a remittitur should, it is held, order a new trial.⁹

\$1,000 not excessive. *Myers v. Moore*, 3 Ind. App. 226; 28 N. E. 724. Violent beating and wounding with axe—\$85 not excessive and a much larger, would, it was declared, be justified. *Gore v. Chadwick*, 6 Dana (Ky.), 477. Suffered pain for several weeks—confined in bed and had a miscarriage—assault apparently under influence of passion—\$2,000 not excessive. *Barr v. Post*, 56 Neb. 698; 77 N. W. 123. Serious personal injury—suffering and miscarriage, \$1,500 not excessive. *Pryor v. Chadwick*, 86 Hun (N. Y.), 75; 33 N. Y. Supp. 1133. Ejected from hotel—when outside assaulted by bartender under direction of defendant to “Go out and do that man up.” *Smith v. Flannery*, 69 Hun (N. Y.), 615; 53 N. Y. St. R. 159. Kicked in groin by gateman of elevated road—subsequent swelling and in hospital for six weeks, \$570 not excessive. *Niendorff v. Manhattan Ry. Co.*, 4 App. Div. (N. Y.) 46, appeal dismissed in N. Y. 276. Severe pain and suffering—deprived of use of arm for several months—\$750 not excessive. *Caldwell v. Central Park N. & E. R. R. Co.*, 7 Misc. (N. Y.) 67; 57 N. Y. St. R. 489; 27 N. Y. Supp. 397. Black eye only—\$100

not excessive. *Dunlap v. Ross*, 43 N. Y. St. R. 509. Malicious assault—delirious—in bed several months—intense pain resulting in insanity, \$3,250 not excessive. *Spear v. Sweeney*, 88 Wis. 545; 60 N. W. 1080. Female passenger kissed by conductor whom company discharged on learning of it—compensatory damages against company held recoverable—\$1,000 not excessive. *Croker v. Chic. & Northwestern Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504. Assault and battery with intent to produce an abortion—plaintiff consented—great pain—unable to perform domestic duties—injuries not permanent—no punitive damages recoverable—\$3,500 excessive. *Courtney v. Clinton*, 18 Ind. App. 620; 48 N. E. 799. Defendant intoxicated and provoked by plaintiff by latter’s language—verdict not warranted on account of actual damages—\$5,000 excessive. *Roades v. Larson*, 50 N. S. St. R. 551; 21 N. Y. Supp. 855; 66 Hun (N. Y.), 635.

⁷ *Wright v. Southern Exp. Co. (C. C. W. D. Tenn.)*, 80 Fed. 85.

⁸ S. D. Comp. Laws, sec. 5088, subd. 5.

⁹ *Murray v. Leonard*, 11 S. D. 22; 75 N. W. 272.

CHAPTER XVII.

LIBEL AND SLANDER.

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| <p>§ 381. Words actionable per se.</p> <p>382. Evidence showing malice.</p> <p>383. Privileged communications
—Whole communication not privileged because parts are, if one part alone actionable per se.</p> <p>384. Nominal damages.</p> <p>385. Measure of damages—Compensatory.</p> <p>386. Measure of damages generally
—In discretion of jury—Excessive verdicts.</p> <p>387. Injury to feelings—Mental suffering.</p> <p>388. Expenses—Counsel fees.</p> <p>389. Libelous article concerning member of legislature—Official investigation of charges—Expenses—Loss of time and labor—Case.</p> <p>390. Injury to reputation.</p> <p>391. Injury to business—Loss of employment—Special damages.</p> <p>392. Charge of incapacity in profession—Allegation of special damage not necessary.</p> <p>393. Special damages—Pleading.</p> <p>394. Special damages—Pleading—Continued.</p> <p>395. Special damages—Action by husband for slander of wife.</p> <p>396. Facts tending to enlarge the scope of a libel should be pleaded.</p> <p>397. Exemplary damages—Malice.</p> | <p>398. Exemplary damages may be awarded though actual damages nominal.</p> <p>399. Exemplary damages—Two defendants.</p> <p>400. Plea of truth as justification
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§ 381. Words actionable per se.—Where words are used by one person in reference to another which are actionable per se, the law will presume damage in an action for libel, and no special evidence showing malice or damage need be given in order to entitle a person to recover.¹ So statements are actionable per se which impute to a physician a general ignorance of medical science and want of professional skill, and incompetency to treat diseases, and it is not necessary for him to give proof of special damage in order to recover damages for such state-

¹Republican Pub. Co. v. Conroy, 5 Colo. App. 262; 38 Pac. 423; Delaware State F. & M. Ins. Co. v. Croasdale, 6 Houst. (Del.) 46; Nolte v. Herter, 65 Ill. App. 430; Tottleben v. Blankenship, 58 Ill. App. 47; Tracy v. Hacket, 19 Ind. App. 133; 49 N. E. 185; Haney Mfg. Co. v. Perkins, 78 Mich. 1; 43 N. W. 1073; Herzog v. Campbell, 47 Neb. 370; 66 N. W. 424; Cruikshank v. Gordon, 118 N. Y. 178; 28 N. Y. St. R. 784; 23 N. E. 457, aff'g 48 Hun (N. Y.), 308; 15 N. Y. St. R. 897; Sanderson v. Caldwell, 45 N. Y. 398; 6 Am. Rep. 106; Charwat v. Vopelak, 19 Misc. (N. Y.) 590; 44 N. Y. Supp. 26, aff'g 18 Misc. 601; Root v. King, 7 Cow. (N. Y.) 613; Littlejohn v. Greeley, 13 Abb. Pr. (N. Y.) 41; Fry v. Bennett, 5 Sand. (N. Y.) 54; Moore v. Leader Pub. Co., 8 Pa. Super. Ct. 152; 42 W. N. C. 570; O'Brien v. Times Pub. Co., 21 R. I. 256; 21 R. I. (part 2) 45; 43 Atl. 101; Mattson v. Albert, 97 Tenn. 232; 36 S. W. 1090; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574; 41 S. W. 381; Forke v. Homann, 14 Tex. Civ. App. 670; 39 S. W. 210; Clemmons v. Danforth, 67 Vt. 417; 48 Am. St. Rep. 836; 32 Atl. 626; Pellardis v. Journal Printing Co., 99 Wis. 156; 74 N. W. 99; Candrian v. Miller, 98 Wis. 164; 73 N. W. 1004.

ments.³ Actual malice is not in all cases necessary to a recovery of damages in an action for libel and slander. So where untrue statements which reflect upon the character of a candidate for office are published, he may recover from the one publishing such statements the actual damages, regardless of malice.⁴ The question of malice in such actions only affects the right to recover smart money.⁴

§ 382. Evidence showing malice.—Where words are slanderous or libelous per se, it is not necessary to give evidence of express malice in order to permit the plaintiff to recover his actual damages.⁵ But evidence of express malice is admissible in aggravation of damages whether the matter complained of is within the class of privileged communications or not.⁶ So the plaintiff was permitted to introduce in evidence a letter written to her by the defendant in which the latter stated that if the plaintiff kept on in the course he would “proceed to the bitter end,” and that she need look for no mercy from him after a specified date.⁷ And in an action for slander for charging the plaintiff with theft, the latter was permitted to show that the defendant had declared, twice after the occurrence of the alleged theft, that he would follow the thing up and have the plaintiff discharged if it cost him a hundred dollars.⁸ And again, in an action for libel against a newspaper, evidence is admissible of separate and independent libels, not declared on by the plaintiff, published by the same paper in reference to the plaintiff, as tending to show the degree of malice. Such independent libels, however, can only affect the damages by establishing the degree of malice and cannot be made the ground for the recovery of any damages the plaintiff may have sustained from their publi-

³ *Cruikshank v. Gordon*, 118 N. Y. 178; 28 N. Y. St. R. 784; 23 N. E. 457, aff'g 48 Hun (N. Y.), 308; 15 N. Y. St. R. 897.

⁴ *Austin v. Hyndman*, 119 Mich. 615; 78 N. W. 663; 6 Det. L. N. 8.

⁵ *Remsen v. Bryant*, 24 Misc. (N. Y.) 238; 52 N. Y. Supp. 515.

⁶ *Charwat v. Vopelak*, 19 Misc. (N. Y.) 500; 44 N. Y. Supp. 26, aff'g 18

Misc. 601; 42 N. Y. Supp. 235. See sec. 381, herein.

⁷ *Fry v. Bennett*, 28 N. Y. 324; 3 Bosw. (N. Y.) 200; *Krug v. Sassaman* (Tex. Civ. App.), 54 S. W. 304.

⁸ *Selp v. Deshler*, 170 Pa. St. 334; 32 Atl. 1032.

⁹ *Wright v. Gregory*, 9 App. Div. (N. Y.) 85; 41 N. Y. Supp. 139.

cation.⁹ So, also, where a libel is published by a newspaper charging a person with being connected with an illegal or criminal transaction, such as bribery, and challenges such person to explain his connection therewith, in an action to recover therefor the fact that such paper refused to publish, even as a paid advertisement, an explanation submitted by him which was fortified by an affidavit, is admissible as showing express malice.¹⁰ But it is held that the refusal of a newspaper to publish a retraction is not admissible in an action against such paper for libel, as tending to show malice and enhance the damages.¹¹

§ 383. Privileged communications.—Whole communication not privileged because parts are, if one part alone actionable per se.—Where a person having an interest in the matter published, or a duty, whether legal, social or moral, and there is a propriety in the publication, communicates such matter in good faith to another having a like interest or duty therein, or to whom a like propriety attaches to hear or read the utterances, such a communication is privileged and the burden is on the plaintiff to show lack of good faith and malice.¹² Of such a character is a publication concerning the general condition of municipal affairs. But if an article, the greater part of which is devoted to such a subject, is published which contains a charge against a village officer of incompetency in his professional capacity and criminality in office, the whole of such publication is not privileged by reason of the fact that the balance thereof is privileged, but the publisher of the same must, when brought into court, be prepared to prove the truth of his charge.¹³

§ 384. Nominal damages.—Where a person publishes words concerning another which are actionable per se, the plaintiff, in an action to recover therefor is not obliged to prove actual

⁹ *Van Derveer v. Sutphin*, 5 Ohio St. 293. See *Doyle v. Levy*, 89 Hun (N. Y.), 350; 35 N. Y. Supp. 434.

¹⁰ *Wallace v. Jameson*, 179 Pa. St. 98; 36 Atl. 142; 89 W. N. C. 387; 27 Pitts. L. J. N. S. 251.

¹¹ *Edsall v. Brooks*, 2 Robt. (N. Y.) 414.

¹² *Mattice v. Wilcox*, 147 N. Y. 636; 42 N. E. 270.

¹³ *Mattice v. Wilcox*, 147 N. Y. 636; 42 N. E. 270.

damage in order to recover more than nominal damages.¹⁴ So plaintiff was held to be entitled to more than nominal damages, though no special damages were shown, where it appeared that the defendant had written a letter to a creditor of the plaintiff stating that he was dishonest and intended to evade the payment of his debts.¹⁵ As a general rule, whether more than nominal damages should be awarded is a question for the jury to decide.¹⁶ But they will not be justified in restricting the plaintiff's damages to a nominal sum because he fails to take the stand and disprove the truth of the statements for the publication of which he seeks to recover, since the burden of proof is upon the defendant to prove the truth of the statements published by him.¹⁷ Nor again, will the fact that they find the character of the plaintiff to be bad, restrict them to an award of nominal damages unless they believe that the plaintiff will be compensated by an award of such damages, or that there is no ground for an award of exemplary damages.¹⁸ So, also, the fact that a libel or slander may not be believed is no ground for restricting the damages to a merely nominal sum.¹⁹ But where there is no evidence of express malice or of any actual loss or injury to the plaintiff, and it appears that at the time the libel was published, there was a common report or rumor in circulation, the jury should then award nominal damages.²⁰

§ 385. Measure of damages—Compensatory.—Damages in an action for libel or slander should, in the absence of any element which would justify an award of exemplary damage, be a compensation for the actual injury sustained as the natural or probable consequence of the slander or libel.²¹ And the plaintiff

¹⁴ *Nolte v. Herter*, 65 Ill. App. 430. See sec. 381, herein.

¹⁵ *Sanderson v. Hall*, 22 Tex. Civ. App. 282; 55 S. W. 594.

¹⁶ *Gray v. Times Pub. Co.*, 74 Minn. 452; 77 N. W. 204.

¹⁷ *Remsen v. Bryant*, 24 Misc. (N. Y.) 238; 52 N. Y. Supp. 515.

¹⁸ *Edwards v. San Jose Printing & P. Co.*, 99 Cal. 431; 34 Pac. 128.

¹⁹ *Bishop v. Journal Newspaper Co.*, 168 Mass. 327; 47 N. E. 119.

²⁰ *Delaware State F. & M. Ins. Co. v. Croasdale*, 6 Houst. (Del.) 181. See *Scougale v. Sweet* (Mich.), 82 N. W. 1061.

²¹ *Merchants Ins. Co. of Newark v. Buckner*, 98 Fed. 222; 39 C. C. A. 19; *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; *Enquirer Co. v. Johnston* (C. C. App. 7th C.), 72 Fed. 443; *Smith v. Sun Printing & P. Co.* (C.

may recover, in the absence of legal excuse, irrespective of the intent of the defendant in publishing the statement, or his belief in the truth thereof, or that he was actuated by an honest or even commendable motive.²² In estimating the damages the jury should consider the character of the language used, and the manner of the publication, and where the action is for a libel published in a newspaper, the extent of such paper's circulation, as showing the publicity given to the alleged libel.²³ The damages which a jury may award may include not only compensation for the past injury but also for such injury as may subsequently arise, since any subsequent injury accruing therefrom will not afford a new ground of action.²⁴ But the damages awarded should not include any allowance for remote or speculative matters, whether past or prospective.²⁵ In assessing the damages the jury may consider the defendant's conduct in connection with the libel or slander from the time the same was published down to the day of the verdict.²⁶ So acts and declarations of his subsequent to the time when the libel or slander was published may be considered as showing the degree of malice which actuated him.²⁷ But though there may have been no express malice, and the defendant may have acted from a good or laudable motive, yet if the publication is not justified,

C. App. 2d C.), 55 Fed. 240; *Hearne v. De Young*, 132 Cal. 357; 64 Pac. 576; *Edwards v. Kansas City Times Co.*, 32 Fed. 813; *Croasdale v. Tantom*, 6 Hous. (Del.) 60; *Washington Gas Light Co. v. Lansden* (D. C. App.), 24 Wash. L. Rep. 807; *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314; *Evening News Assoc. v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450; *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105; *Ullrich v. New York Press Co.*, 23 Misc. (N. Y.) 168; 50 N. Y. Supp. 788; *Miller v. Donovan*, 16 Misc. (N. Y.) 453; 39 N. Y. Supp. 820; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574; 41 S. W. 381; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532; 35 L. R. A. 611; 45 Pac. 1097.

²² *Holmes v. Jones*, 147 N. Y. 67; 69 N. Y. St. R. 310; 41 N. E. 409, per *Andrews*, Ch. J.

²³ *Arnold v. Sayings Co.*, 76 Mo. App. 159. See *Edwards v. Kansas City Times Co.*, 32 Fed. 813; *Washington Gas Light Co. v. Lansden* (D. C. App.), 24 Wash. L. Rep. 807. ²⁴ *Norfolk & W. S. B. Co. v. Davis*, 12 App. D. C. 306; 26 Wash. L. Rep. 261; 57 Alb. L. J. 359; *Clark v. Bohms* (Tex. Civ. App.), 37 S. W. 347. See *Weston v. Barnicoat* (Mass.), 56 N. E. 619.

²⁵ *Cortulla v. Kerr*, 74 Tex. 89; 11 S. W. 1058.

²⁶ *Praed v. Graham*, L. R. 24 Q. B. D. 53.

²⁷ *Stitzell v. Reynolds*, 67 Pa. St. 54; 5 Am. Rep. 396.

such fact will not prevent the recovery by the plaintiff of the actual damage sustained.²⁸

§ 386. Measure of damages generally—In discretion of jury—Excessive verdicts.—In determining the amount of damages which may be awarded in an action for slander or libel, the jury may consider the character of the language used, the various circumstances in connection with its use as showing malice, or in provocation, or in mitigation generally, the publicity given to it, as in the case of a newspaper, the extent of the paper's circulation, any subsequent facts aggravating the damages as repetition or mitigating them as retraction, that due care and caution was used by the defendant to determine the truth of the charge, and any attempt at justification not made in good faith. Evidence bearing upon all these points is admissible to enable the jury to determine the monetary loss sustained by the plaintiff, and also in arriving at the amount which they may award as exemplary damages, where such damages are claimed and may be justified.²⁹ The amount of damages which may be awarded in an action for slander or libel are peculiarly within the discretion of the jury.³⁰ "The jury

²⁸ *Ullrich v. New York Press Co.*, 2 Misc. (N. Y.) 168; 50 N. Y. Supp. 788.

²⁹ *Smith v. Sun Pub. Co.* (C. C. S. D. N. Y.), 50 Fed. 399; *Rutherford v. Morning Journal Assoc.* (C. C. S. D. N. Y.), 47 Fed. 487, *aff'd* 51 Fed. 513; 16 L. R. A. 803; 1 U. S. App. 296; 2 C. C. A. 354; *Jones v. Greeley*, 25 Fla. 629; 6 So. 448; *Storey v. Early*, 86 Ill. 461; *Smith v. Chicago Herald* (Ill. C. C.), 50 Alb. L. J. 23; *Nally v. Burleigh*, 91 Me. 22; 39 Atl. 285; *John Brenner Brew. Co. v. McGill*, 23 Ky. Law R. 212; 62 S. W. 722; *Frederickson v. Johnson* (Minn.), 62 N. W. 388; *Arnold v. Sayings Co.*, 76 Mo. App. 159; *Fry v. Bennett*, 28 N. Y. 324; *Wright v. Gregory*, 9 App. Div. (N. Y.) 85; 41 N. Y. Supp. 139; *Neber v. Butler*, 81 Hun (N. Y.), 244; 62 N. Y. St. R.

669; 30 N. Y. Supp. 713; *Tobin v. Sykes*, 71 Hun (N. Y.), 469; 54 N. Y. St. R. 399; 24 N. Y. Supp. 943; *Cummings v. Line*, 45 N. Y. St. R. 56; 18 N. Y. Supp. 469; *Rich v. Mayer*, 26 N. Y. St. R. 107; 7 N. Y. Supp. 69; *Hilbraut v. Simmons*, 18 Ohio C. C. 123; 9 Ohio C. D. 566; *Kerr v. Atticks*, 20 Pa. Co. Ct. 233; *Luft v. Lingane*, 17 R. I.—; 22 Atl. 942; *Pelardis v. Journal Printing Co.*, 99 Wis. 156; 74 N. W. 99. These various points are fully considered in the various sections of this chapter.

³⁰ *Croasdale v. Bright*, 6 Houst. (Del.) 52; *Manget v. O'Neill*, 51 Mo. App. 35; *Jacquelin v. Morning Journal Assoc.*, 39 App. Div. (N. Y.) 515; 57 N. Y. Supp. 299; *Morrison v. Press Pub. Co.*, 14 N. Y. Supp. 131; 38 N. Y. St. R. 357; *Grace v. McArthur*, 76 Wis. 641; 45 N. W. 518.

may give nominal damages or damages to a greater or less amount as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages by way of example or punishment, when in their judgment defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge."²¹ And the verdict which the jury may award in such a case will not ordinarily be interfered with unless it appear that the damages awarded by them are so grossly in excess of, or inadequate to, the actual injury done, or what the facts of the case would justify, as to clearly indicate that they were influenced by bias, prejudice or some other improper motive, in which case it will be set aside.²² And where, in an action for slander or libel, a misdirection has been given in favor of the plaintiff upon a material part of the libel and a large verdict has been awarded by the jury, who may have been influenced in their award by such misdirection, the judgment may be re-

²¹ *Holmes v. Jones*, 147 N. Y. 59, per *Andrews*, C. J.

²² *Crossdale v. Bright*, 6 Houst. (Del.) 52; *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443; *Sanborn v. Fickett*, 91 Me. 364; 40 Atl. 66; *Libby v. Towle*, 90 Me. 262; 38 Atl. 171; *Mangett v. O'Neill*, 51 Mo. App. 35; *Holmes v. Jones*, 147 N. Y. 59; *Jacquelin v. Morning Journal Assoc.*, 39 App. Div. (N. Y.) 515; 57 N. Y. Supp. 299; *Nunnally v. Taliaferro*, 82 Tex. 286; 18 S. W. 149; *Grace v. McArthur*, 76 Wis. 641; 45 N. W. 518; *Reed v. Keith*, 99 Wis. 672; 75 N. W. 392. See following cases where the question of excessive verdicts was considered. *Chistovich v. Hanchett*, 96 Fed. 681, aff'd 101 Fed. 742; 41 C. C. A. 648. Action for libel—injury to reputation and business—\$4,700 not excessive. *Jones v. Greeley*, 25 Fla. 629; 6 So. 448. Action for libel—injury to character, standing and business of plaintiff by publication in paper of wide circulation—\$3,000 not ex-

cessive. *Bee Pub. Co. v. World Pub. Co.* (Neb.), 82 N. W. 28. Statement in newspaper that a rival newspaper was in bankrupt condition and about to pass out of existence—\$4,000 not excessive. *Turton v. New York Recorder Co.*, 3 Misc. (N. Y.) 314; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766. Action for libel—statement that business man had left town with money of a certain bank through which he had drawn a draft on a bankrupt firm—\$5,000 excessive, and ordered set aside unless plaintiff stipulates to reduce to \$3,000. *Sherwood v. Kyle*, 125 Cal. 652; 58 Pac. 270. Action for slander—statements concerning plaintiff as a school-teacher—trial two years after—shown not to have affected her ability to obtain positions as school-teacher since—\$1,000 excessive—new trial ordered unless plaintiff remit \$700. For verdicts in action for slander or libel directly affecting character and reputation, see sec. 390 herein.

versed, though it does not positively appear that in the absence of the misdirection, the same verdict would not have been rendered.³² The Federal courts, however, in an action for libel, will not set aside a verdict as excessive upon a writ of error where the jury has been properly instructed as to the rule for the computation of damages.³³

§ 387. Injury to feelings—Mental suffering.—In an action for libel or slander the jury may properly consider in estimating the damages, the injury to the plaintiff's feelings, his mental suffering, shame and wounded honor as a result of the act of the defendant.³⁴ And it is not necessary that these elements be especially averred to enable the plaintiff to recover therefor, but such damages are recoverable under the general *ad damnum* clause.³⁵ In determining the injury to the feelings of the plaintiff as the result of a libel published in a newspaper,

³² *Bray v. Ford* (H. L. E.) [1896], A. C. 44; 65 L. J. Q. B. N. S. 213; 73 Law Rep. T. 609.

³³ *Smith v. Sun Printing & P. Assoc.* (U. S. C. C. A. 2d C.), 55 Fed. 240; *Morning Journal Assoc. v. Rutherford* (U. S. C. C. 2d C.), 51 Fed. 513; 1 U. S. App. 296; 2 U. S. C. C. A. 354; 46 Alb. L. J. 305.

³⁴ *Shattuck v. McArthur*, 29 Fed. 136; *Hearne v. De Young*, 132 Cal. 357; 64 Pac. 576; *Cahill v. Murphy*, 94 Cal. 29; 30 Pac. 195; *Lehrer v. Elmore*, 100 Ky. 56; 18 Ky. L. Rep. 551; 37 S. W. 292; *Windisch-Muhlhauser Brew. Co. v. Bacon* (Ky.), 53 S. W. 520; *Louisville Press Co. v. Sennelly*, 20 Ky. L. Rep. 1231; 49 S. W. 15; *Blumhardt v. Rohr*, 70 Md. 328; *Hastings v. Stetson*, 130 Mass. 76; *Cribbs v. Yore*, 119 Mich. 237; 77 N. W. 927; 5 Det. L. N. 794; *Long v. Tribune Printing Co.*, 107 Mich. 207; 65 N. W. 108; 2 Det. L. N. 635; *Derham v. Derham* (Mich.), 82 N. W. 218; *Farrand v. Aldrich*, 85 Mich. 593; 48 N. W. 628; *Baldwin v. Boulware*, 79 Mo. App. 5; 2 Mo. A. Rep.

359; *Michael v. Matheis*, 77 Mo. App. 556; 2 Mo. A. Rep. 175; *Brooks v. Harrison*, 91 N. Y. 83; *Palmer v. New York News Pub. Co.*, 31 App. Div. (N. Y.) 210; 52 N. Y. Supp. 539; *Raines v. New York Press Co.*, 92 Hun (N. Y.), 515; 72 N. Y. St. R. 197; 37 N. Y. Supp. 45; *Ward v. Deane*, 32 N. Y. St. R. 270; 10 N. Y. Supp. 421; *Hamilton v. Eno*, 16 Hun (N. Y.), 599; 81 N. Y. 116; *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30; 44 S. W. 558; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574; 41 S. W. 381; *Forke v. Homann*, 14 Tex. Civ. App. 670; 39 S. W. 210; *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452; 15 L. R. A. 639; 18 S. W. 743; 34 Cent. L. J. 350; 6 Bkg. L. J. 345; *McCarthy v. Miller* (Tex. Civ. App.), 57 S. W. 973. *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532; 35 L. R. A. 611; 45 Pac. 1097; *Rea v. Harrington*, 58 Vt. 181.

³⁵ *Cribbs v. Yore*, 119 Mich. 237; 77 N. W. 927; 5 Det. L. N. 794.

the jury may consider any recklessness or negligence on the part of the employees of such paper in respect to the publication of the libel.³⁷ And in an action by a woman for slander, evidence is admissible of the number and ages of her children, as her mental suffering might be enhanced by the fact that her family would suffer as a result of the slander.³⁸ But in a case where the plaintiff had, as a result of a report made to a protective association, been refused credit by other members of the association, it was held that evidence was not admissible that the plaintiff had a large family dependent on him for support by reason of which his loss of business had caused him great mental suffering.³⁹ And in those cases where a libel is not actionable per se, there must be proof of some other injury or damage in order to allow a recovery for mental suffering.⁴⁰ In Texas under the act of May 4, 1895, which provides that in case of the death of the original plaintiff while an action for libel is pending, the action survives the death, the substituted plaintiff may recover for the mental anguish suffered by the original plaintiff.⁴¹

§ 388. Expenses—Counsel fees.—It is error to instruct the jury in an action for libel or slander that they may allow the plaintiff for the expense to which he has been put by being compelled to vindicate his character, since under such an instruction, the jury might consider an allowance proper for counsel fees for which there can be no recovery.⁴² So again, to instruct the jury that they may allow compensatory damages including compensation for the entire expense of the litigation is erroneous, as the instruction should specify the expenses to which recovery is

³⁷ *Long v. Tribune Printing Co.*, 107 Mich. 207; 65 N. W. 108; 2 Det. L. N. 635.

³⁸ *Cahill v. Murphy*, 94 Cal. 29; 30 Pac. 195.

³⁹ *Windisch-Muhlhauser Brew. Co. v. Bacon* (Ky.), 53 S. W. 520. See in this connection sec. 425 herein.

⁴⁰ *Hirschfield v. Ft. Worth Nat. Bank*, 83 Tex. 452; 15 L. R. A. 639; 18 S. W. 743; 34 Cent. L. J. 350; 6 Bkg. L. J. 345. See *McCarthy v.*

Miller (Tex. Civ. App.), 57 S. W. 973.

⁴¹ *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30; 44 S. W. 538.

⁴² *Grotins v. Ross* (Ind. App.), 57 N. E. 46; *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510; 33 N. E. 991; *Irlbeck v. Bierle* (Iowa), 50 N. W. 36; *Halsched v. Nelson*, 24 Hun (N. Y.), 395. But see *Thompson v. Powning*, 15 Nev. 195.

limited.* And in order to permit of a recovery for expenses it must appear that such expenses were necessarily incurred as the result of the libel or slander. So where in an action for libel, affecting the business standing of the plaintiff, it was alleged in the complaint that as a result of the libel and in order to remove the effect of false impressions as to plaintiff's credit, which had been created thereby with persons with whom he dealt, he had been obliged to expend a certain gross amount in travelling expenses, it was held that he should be required on special demurrer to give a fairly accurate, though not necessarily minute, itemized statement showing for what such expenses were incurred, and that he should allege that the sums stated were necessarily expended.⁴

§ 389. Libelous article concerning member of legislature—Official investigation of charges—Expenses—Loss of time and labor—Case.—In a case in New York which was an action to recover for a libelous article published concerning a member of the state senate, the plaintiff sought to recover for expenses, loss of time and labor in connection with an investigation which was made by the senate as to the charges and statements which were contained in such publication, and it was decided that there could be no recovery therefor unless it appeared that the investigation was caused by the publication complained of, even though the publisher thereof intended such result.⁴

§ 390. Injury to reputation.—As a result of a libel or slander, a person may be injured in his reputation and where such an injury is shown to have been sustained, it is an element which the jury may consider in estimating the damages recoverable by the plaintiff.* Injury to the reputation or character of a person is

⁴ Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510; 33 N. E. 991. See Grotins v. Ross (Ind. App.), 57 N. E. 46.

⁴ Bradstreet Co. v. Oswald, 96 Ga. 396; 23 S. E. 423.

⁴ Robertson v. New York Press Co., 2 App. Div. 49; 72 N. Y. St. R. 547; 37 N. Y. Supp. 187.

⁴ Lehrer v. Elmore, 100 Ky. 56; 37 S. W. 292; 18 Ky. L. Rep. 551; Blumhardt v. Rohr, 70 Md. 328; Farland v. Aldrich, 85 Mich. 593; 48 N. W. 628; McGee v. Baumgartner (Mich.), 80 N. W. 21; Baldwin v. Boulware, 79 Mo. App. 5; 2 Mo. App. Rep. 359; Houston Printing Co. v. Moulden, 15 Tex. Civ. App.

one of the natural and ordinary results of a slander or libel, and in most of the cases a slander or libel is a direct imputation against the character of a person, though not always. So charging a person with dishonesty;⁴¹ with bribery;⁴² with being a thief or robber;⁴³ a "damned thief";⁴⁴ a counterfeiter;⁴⁵ with having passed counterfeit money with intent to defraud;⁴⁶ with having been jailed on a criminal charge;⁴⁷ with burning his house to get insurance money,⁴⁸ with having committed rape;⁴⁹ or with bigamy,⁵⁰ are charges directly against the character of a person and for which damages may be awarded. So also recovery may be had where libelous or slanderous statements are made imputing unchastity or immoral conduct to a woman;⁵¹

574; 41 S. W. 381; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532; 35 L. R. A. 611; 13 Utah, 532. See in this connection *Derham v. Derham* (Mich.), 82 N. W. 218.

⁴¹ *Payne v. Rouss*, 46 App. Div. (N. Y.) 315; 61 N. Y. Supp. 705, where verdict of \$5,000 held not excessive. *Hartman v. Morning Journal Assoc.*, 46 N. Y. St. R. 181; 19 N. Y. Supp. 398, where \$5,000 held not excessive for charging connection with insurance swindle and misappropriation of money.

⁴² *Nally v. Burleigh*, 91 Me. 22; 39 Atl. 285. Sheriff charged with bribery and permitting prisoner to escape—\$896.37 not excessive.

⁴³ *Clark v. Fox*, 10 App. Div. (N. Y.) 514; 41 N. Y. Supp. 1091, \$2,000 not excessive. *Wright v. Gregory*, 9 App. Div. (N. Y.) 85; 41 N. Y. Supp. 139, \$600 not excessive. *Kerr v. Atticks*, 20 Pa. Co. Ct. 233, \$200 not excessive. *Frederickson v. Johnson* (Minn.), 62 N. W. 388; \$5,000 excessive—\$3,000 held sufficient.

⁴⁴ *Shoaff v. Funk*, 182 Ill. 224; 54 N. E. 969, aff'g 73 Ill. App. 550, \$400 not excessive. *Southcombe v. Armstrong*, 28 N. Y. St. R. 753; 8 N. Y. Supp. 361.

⁴⁵ *Pellardis v. Journal Printing Co.*,

99 Wis. 156; 74 N. W. 99, \$450 not excessive.

⁴⁶ *Mequet v. Silverman*, 52 La. Ann. 1369; 27 So. 885, \$1 held inadequate and increased to \$300 in case of boy aged eighteen and of good character.

⁴⁷ *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30; 44 S. W. 588. Person of unimpeachable character—charged with having been jailed on charge of horse stealing—\$1,000 not excessive.

⁴⁸ *Hilbrant v. Simmons*, 18 Ohio C. C. 123; 9 Ohio C. D. 566, \$800 held excessive where spoken in heat of an argument in which plaintiff charged defendant with cutting his fence and no malice or special damage shown.

⁴⁹ *Gilman v. McClatchy*, 111 Cal. 606; 44 Pac. 241, \$500 as compensatory damages not excessive.

⁵⁰ *Weber v. Butler*, 81 Hun (N. Y.), 244; 62 N. Y. St. R. 669; 30 N. Y. Supp. 713. In daily paper having circulation of over fifty thousand, \$800 not excessive.

⁵¹ *Wendt v. Craig*, 17 N. Y. Supp. 748; 45 N. Y. St. R. 23; charging woman with keeping disorderly house and with being morally bad and unchaste—\$2,500 not excessive.

or charging a married woman with having eloped,⁵⁸ or a single woman with eloping with a married man,⁵⁹ or a woman with being a drunken brute of a mother.⁶⁰

§ 391. Injury to business—Loss of employment—Special damages.—Where language used is slanderous or libelous per se, the damage which the law presumes such language will cause to a person's business, profession or calling being general, a recovery therefor may be had under a general allegation of damages,⁶¹ and if in an action for a slander or libel, a person alleges a loss of business generally, it is not necessary for him to give proof of the loss of particular customers, but he may show a general loss of decline of patronage.⁶² But if he has in his allegations as to loss of business, given the names of particular cus-

Luft v. Lingane, 17 R. I.—; 22 Atl. 942, charging woman of good character with keeping company with negro and being assaulted by latter's wife—\$2,485.50 not excessive. Herzog v. Campbell, 47 Neb. 370; 66 N. W. 424. Girl of sixteen with being pregnant by her father—\$1,000 not excessive. Cummings v. Line, 45 N. Y. St. R. 56; 13 N. Y. Supp. 469. Imputing unchastity while in personal altercation with plaintiff or her father—\$3,000 excessive.

⁵⁸ Rutherford v. Morning Journal Assoc. (C. C. S. D. N. Y.), 47 Fed. 487, aff'd 51 Fed. 513; 16 L. R. A. 803; 1 U. S. App. 296; 2 C. C. A. 354. Not prompted by personal malice and injury to reputation probably insignificant—\$4,000 not excessive. Smith v. Sun Pub. Co. (C. C. S. D. N. Y.), 50 Fed. 399. Conspicuous publication in a paper in sensational and somewhat jeering manner of elopement with man with whom her previous intimacy was said to have been freely spoken of—\$7,500, not excessive. See Smith v. Matthews, 21 Misc. (N. Y.) 150; 47 N. Y. Supp. 96, which was an action to

recover damages for charging a married woman with having eloped. In this case a large verdict was awarded and sustained on appeal on the ground that the plaintiff was a chaste and refined woman, and it was held that a new trial should be granted where there was newly discovered evidence that she was not chaste but was living in adulterous intercourse with the person with whom the defendant charged she had eloped.

⁵⁹ Cooper v. Sun Print & P. Assoc. (C. C. S. D. N. Y.), 57 Fed. 566, \$2,500, not excessive.

⁶⁰ Tobin v. Sykes, 71 Hun, 469; 54 N. Y. St. R. 399; 24 N. Y. Supp. 943. Unsuccessfull attempt at justification—\$400 not excessive.

⁶¹ Moore v. Francis, 121 N. Y. 199; Smid v. Bernard, 31 Misc. (N. Y.) 35; 63 N. Y. Supp. 278.

⁶² Bee Pub. Co. v. World Pub. Co. (Neb.), 82 N. W. 28. See Weiss v. Whittemore, 28 Mich. 373; Ryan v. Benger & H. Brew. Co., 37 N. Y. St. R. 287; 13 N. Y. Supp. 660; Bergmann v. Jones, 94 N. Y. 51; Evans v. Harris, 1 H. & N. 254; 26 L. J. Ex. 31.

tomers, he will be confined in his proof to those named.⁶³ Again, where the gist of the action is loss of business, the plaintiff may show the extent and character of the business, both before and after the alleged slander or libel.⁶⁴ And the jury may consider in estimating the damages for loss of business, the probable future as well as the past loss sustained.⁶⁵ And the plaintiff may introduce in evidence a letter received by him from a former customer, refusing to trade with him because of the alleged libel or slander.⁶⁶ So also evidence that a person has been refused credit is admissible.⁶⁷ And where the only element is the general injury to the plaintiff's credit as a merchant and contractor, the fact that a merchant in poor credit is ordinarily compelled to pay more for merchandise than one in good credit, may be considered by the jury, as may also the further fact that parties who have contracts to give are reluctant to give them to persons of doubtful financial reputation.⁶⁸ But though a person may allege a loss in business or of employment, he cannot recover therefor, where it is shown that such loss was due to other causes. So where plaintiff alleged loss of his position, he was not permitted to recover therefor, where it was shown that the cause of his dismissal embraced three other charges.⁶⁹ And again a recovery for loss of employment was not permitted where it appeared that the cause of the plaintiff's discharge was that his employers had decided to dispense with anyone in his capacity.⁷⁰ And where in an action to recover for the publication of a libelous article concerning plaintiff's business standing, he alleges that in order to raise cash to meet an indebtedness he

⁶³ *Hallock v. Miller*, 2 Barb. (N. Y.) 630; *Kendall v. Stone*, 5 N. Y. 14; *Reusch v. Roanoke Cold Storage Co.* (Va.), 22 S. E. 358.

⁶⁴ *Bee Pub. Co. v. World Pub. Co.* (Neb.), 82 N. W. 28.

⁶⁵ *Bee Pub. Co. v. World Pub. Co.* (Neb.), 82 N. W. 28.

⁶⁶ *Weston v. Barnicoat* (Mass.), 56 N. E. 619.

⁶⁷ *Western Union Teleg. Co. v. Putchett*, 108 Ga. 411; 34 S. E. 216; *Muetze v. Tuteur*, 77 Wis. 236; 20 Am. St. Rep. 115; 46 N. W. 123. In

this case an agency for the collection of bad debts had published plaintiff's name on a list of delinquent debtors. As a result of the publication it was shown that plaintiff had been refused credit by one person, and a verdict of \$571 was held not excessive.

⁶⁸ *Daisley v. Dun*, 107 Fed. 218.

⁶⁹ *Wallace v. Rodgers*, 156 Pa. St. 395; 27 Atl. 163; 83 W. N. C. 538.

⁷⁰ *Democrat Pub. Co. v. Jones* (Tex.), 18 S. W. 652.

has been obliged as a result of the publication to pay a specified discount on notes of his where the time of the indebtedness would otherwise have been extended, he may on a special demurrer to such allegation be required to give an itemized statement of the amount thus expended.⁷¹

§ 392. Charge of incapacity in profession—Allegation of special damage not necessary.—As a general rule where a slander or libel is directed against one in his general professional capacity and ability, he may recover without allegation or proof of special damage.⁷² So it is actionable per se to impute to a physician a general ignorance of medical science.⁷³ Or to impute to a lawyer a general incapacity in his profession.⁷⁴ But a charge against a professional man of negligence or want of skill in a particular instance is declared not actionable per se, and to render it actionable, there should be allegations and proof of special damage.⁷⁵ To render the words actionable per se, it is not necessary in all cases, however, that a slander or libel specifically allege a general incapacity in all branches of a profession, but if a physician or lawyer has chosen some particular branch or sphere of professional labor, a charge of general incapacity to properly perform the professional duties involved in such a class of cases is equivalent to a charge of general incapacity in his profession for which recovery may be had without allegation or proof of special damage.⁷⁶ Thus it was so held in an action by a lawyer, who had been employed several times as counsel to a village, to recover for a libelous publication charging him with incapacity to properly perform the duties of defending negligence cases.⁷⁷ The court said: "The plaintiff in this case had been frequently chosen counsel for the village of Oneonta. In such an employment, it would almost necessarily (as in fact it did) happen that

⁷¹ *Bradstreet Co. v. Oswald*, 96 Ga. 396; 23 S. E. 423.

⁷² *Mattice v. Wilcox*, 147 N. Y. 629; 42 N. E. 270; 71 N. Y. St. R. 244; *Cruikshank v. Gordon*, 118 N. Y. 178; *McIntyre v. Weinert*, 195 Pa. St. 52; 45 Atl. 666.

⁷³ *Cruikshank v. Gordon*, 118 N. Y. 178.

⁷⁴ *Mattice v. Wilcox*, 147 N. Y. 629; 42 N. E. 270; 71 N. Y. St. R. 244.

⁷⁵ *Foot v. Brown*, 8 Johns. (N. Y.) 63.

⁷⁶ *Mattice v. Wilcox*, 147 N. Y. 629; 42 N. E. 270; 71 N. Y. St. R. 244.

⁷⁷ *Mattice v. Wilcox*, 147 N. Y. 629; 42 N. E. 270; 71 N. Y. St. R. 244.

among others, cases of negligence would arise, and it would be the duty of the counsel employed by the village to defend such suits. A general incapacity to properly perform the duties of defending that class of cases seems to be under such circumstances equivalent to a general incapacity to properly discharge the duties of his profession. Those duties are in these circumstances to try such cases and he assumes a responsibility in taking such a general class of employment to discharge such duties with ordinary care and capacity. A charge which accuses him of incapacity to perform the ordinary duties appertaining to the practice of his profession in such cases, is of so general a nature as to come within the reason, if not the very letter of the rule as to general incapacity. It is not incapacity as to a single case or a single litigation. It is incapacity as to a general class of actions in regard to which he has assumed knowledge and capacity to a reasonable extent by taking such cases as a class, and defending them as part of his professional duties. . . . To confine an accusation of incapacity to a particular case, the courts hold does not tend to prejudice a man in his profession without proof of special damage, but it surely must tend to so prejudice him in a case where the accusation is a want of capacity to defend a class of cases which the attorney is in the habit of attempting to defend, of holding himself out as capable of defending, and where he has accepted employment from a client, many of whose cases are of that description."⁷⁸ Where false and defamatory charges are published concerning a minister and editor of a religious paper, which if believed would bring his character as minister and editor into disrepute, and would therefore imply injury, it is not necessary to specially allege damages to character in an action to recover therefor.⁷⁹

§ 393. Special damages—Pleading.—Where words which are libelous or slanderous per se are used by one person concerning another, it is not necessary in an action to recover therefor to allege special damage.⁸⁰ And it is declared that though

⁷⁸ Per Peckham, J.

⁷⁹ *Cranfill v. Hayden*, 22 Tex. Civ. App. 656; 55 S. W. 806.

⁸⁰ *Dun v. Maier* (C. C. App. 5th C.),

82 Fed. 169; 52 U. S. App. 381; 27 C. A. 100; *Trimble v. Tautlinger*, 104 Iowa, 665; 69 N. W. 1045; *Morris v. Curtis*, 20 Ky. L. 56; 45 S. W.

words are not in themselves libelous or slanderous, yet if the complaint states extrinsic circumstances which make the words defamatory and contains innuendoes appropriately making the applications of such words to the plaintiff, it is not necessary to allege special damages.⁸¹ As a general rule, however, where words complained of in an action for slander or libel are not actionable per se, since the right to recover depends upon some special loss or damage which the plaintiff has sustained, such special loss must be particularly set forth, and if not so set forth the declaration is bad in substance.⁸² In such a case special damages arising from the use of such words must be averred and proved.⁸³ And the declaration should state in precisely what way the special damages resulted from the words used.⁸⁴ It is not enough for the plaintiff to generally allege that he has suffered special damage or has been put to great costs and expenses, but the declaration should make it appear how such damages were caused by the alleged libelous or slanderous statements.⁸⁵ It must show the relation of cause and effect and the special injury complained of must be the natural and proximate result of such statements.⁸⁶ A complaint in an action for slander or libel if insufficient may be amended by inserting an allegation of special injury and damage.⁸⁷

86; *Smid v. Bernard*, 63 N. Y. Supp. 278; 31 Misc. (N. Y.) 35.

⁸¹ *Slayton v. Hemken*, 91 Hun (N. Y.), 582; 70 N. Y. St. R. 824; 36 N. Y. Supp. 249.

⁸² *Pollard v. Lyon*, 91 U. S. 225; 2 Russell & Winalow's Syllabus Dig., U. S. Sup. Co. Rep. 3196; *Mainire v. Hubbard*, 22 Ky. Law Rep. 1753; 61 S. W. 466; *Dickens v. Shepherd*, 22 Md. 399; *Terwilliger v. Wanda*, 17 N. Y. 54; *Wilson v. Goit*, 17 N. Y. 442; *Sumner v. Buel*, 12 Johns. (N. Y.) 475; *Wallace v. Bennett*, 1 Abb. N. C. 478; *Bell v. Sun Printing & Pub. Co.*, 10 J. & S. (N. Y.) 267; *Bassell v. Elmore*, 48 N. Y. 561; *Havermeyer v. Fuller*, 60 How. Pr. (N. Y.) 316. See *Folkard's Starkie*

on Slander and Libel (Wood's Am. ed. 1877), chaps. 15, 23.

⁸³ *Langdon v. Shearer*, 43 App. Div. (N. Y.) 607; 60 N. Y. Supp. 193. *Smid v. Bernard*, 31 Misc. (N. Y.) 35; 63 N. Y. Supp. 278; *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452; 15 L. R. A. 639; 18 S. W. 743; 34 Cent. L. J. 350; 6 Banking L. J. 345.

⁸⁴ *Bush v. McMann*, 12 Colo. App. 504; 55 Pac. 956; *Cook v. Cook*, 100 Mass. 194.

⁸⁵ *Cook v. Cook*, 100 Mass. 194.

⁸⁶ *Olmstead v. Brown*, 12 Barb. (N. Y.) 652; *Beach v. Ranney*, 2 Hill (N. Y.), 309.

⁸⁷ *Fitzgerald v. Gells*, 84 Hun (N. Y.), 295; 65 N. Y. St. R. 541; 32 N. Y. Supp. 306.

§ 394. **Special damages—Pleading—Continued.**—A complaint which alleges that the plaintiff has been injured in his business but does not state wherein and how he has been injured is not a sufficient allegation of special damage.⁸⁸ And in an action to recover for the publication of a libelous communication concerning the business standing of a person, it is not sufficient for a complaint to allege damage in a gross amount but it should also allege wherein the damage consisted.⁸⁹ And again in an action to recover for a slanderous statement concerning the chastity of the plaintiff, an allegation that the slander was made for the purpose of injuring her business as a school-teacher and that she is damaged in a specified sum, is not sufficient to support an action based upon special damages.⁹⁰ So also where a complaint in an action for slander which did not relate the plaintiff's business, alleged that the plaintiff had been injured in credit and reputation and that he had been sued for debts which he would not have been, except for the slander complained of, and that buyers of live stock and produce had refused as a result of the slander to deal with him, it was held not to sufficiently allege such damage.⁹¹ And again, a complaint alleging that by reason of the speaking of the words charged, "divers persons have refused to associate or transact business with plaintiff and he was therefore deprived of the benefits" resulting to him from "such association and business as aforesaid to his damage in the sum of \$1,000," was held not to sufficiently allege special damages.⁹² So again, in an action to recover for the publication of an article reflecting upon the integrity of the plaintiff as manager of a creamery, it was decided that he could not recover damages accruing from inability to complete a purchase of a creamery unless such special damages were pleaded.⁹³ And in an action for slander, plaintiff was not

⁸⁸ *Langdon v. Shearer*, 43 App. Div. (N. Y.) 607; 60 N. Y. Supp. 193; *Smid v. Bernard*, 31 Misc. (N. Y.) 35; 63 N. Y. Supp. 278. See sec. 391 herein.

⁸⁹ *Bradstreet Co. v. Oswald*, 96 Ga. 396; 23 S. E. 423.

⁹⁰ *Ledlie v. Waller*, 17 Mont. 150; 42 Pac. 289.

⁹¹ *Erwin v. Dezell*, 64 Hun (N. Y.), 391; 46 N. Y. St. R. 595; 19 N. Y. Supp. 784.

⁹² *Flatow v. Von Bremsen*, 19 Civ. Proc. 125; 11 N. Y. Supp. 680.

⁹³ *Roberts v. Breckon*, 31 App. Div. (N. Y.) 431; 52 N. Y. Supp. 638.

permitted to show that in consequence of the slander he was ridiculed by his associates and left his employment temporarily when not alleged as special damages.⁹⁴

§ 395. Special damage—Action by husband for slander of wife.—If a husband brings an action to recover damages because of a slander or libel of his wife, he must, in order to maintain such action, aver special damage.⁹⁵

§ 396. Facts tending to enlarge the scope of a libel should be pleaded.—Though an article may be libelous on its face, yet if the plaintiff desire to enlarge the scope of such article and aggravate its meaning by the proof of facts tending in that direction, such facts should be alleged in the complaint “upon the same principle which compels such averment when the article in and of itself is not libelous. In the one case facts are to be shown which render the publication actionable, while in the other facts are offered in proof for the purpose of enlarging the scope of an article and making it more strong than it appears on its face.”⁹⁶ In the case cited in the note, the defendant had published an article referring to the plaintiff as being “as big a rascal” and a “bigger rascal” than one McDermott. On the trial of the case the plaintiff offered in evidence several articles published years before concerning McDermott, for the purpose of showing in what estimation the defendant held him, and such articles were admitted, though their admission was objected to by the defendant. On appeal it was held that such proof tended to enlarge the character of the libel itself, and that the plaintiff should have apprised the defendant of such intention in his pleading, by alleging the facts upon which he relied to show the estimation in which McDermott was held by the defendant. In this connection the court said: “It was not admissible upon the question of malice or damages without being pleaded. . . . The prior publications contained no libel upon the plaintiff and did not refer to him directly or indirectly. To allow proof of them

⁹⁴ *Hatt v. Evening News Assoc.*, 94 Mich. 119; 54 N. W. 766, rev'g on reh'g 94 Mich. 114; 53 N. W. 952.

⁹⁵ *Harper v. Pinkston*, 112 N. C. 293; 17 S. E. 161.

⁹⁶ *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239, 243, per Peckham, J.

by way of showing malice would as I have said be no more than enlarging by proof the character of the libel, while making no averment in regard to it, or in other words it is an effort to enhance damages by showing other publications against a third person in order to show how big a rascal McDermott was in the estimation of defendant. I think that to admit such proof under a pleading which simply sets forth the libelous article complained of would be unjust to the defendant because it would naturally be a surprise to him. It would be trying a matter of which defendant had not complained, and in regard to which the defendant ought not to be called upon to defend. It is true the plaintiff by this evidence only seeks to prove the kind of rascal that defendant had itself charged against McDermott. But the charges against McDermott were separate articles which had been published years before the one complained of and at that time had no relation to it. If plaintiff should desire to aggravate his damages by proof which in effect goes to enlarge the character of the libel itself, there is no injustice in compelling him to apprise defendant of such intention in his pleading. He ought not to be allowed to add to the natural and legal effect of the libel as it appears on its face by this kind of proof without setting up the facts which form a basis for such addition. I do not see that this rule was at all altered by the fact that the article as published was libelous per se."⁷⁷

§ 397. Exemplary damages—Malice.—Where it appears in an action for libel or slander that the defendant was actuated by express malice, the jury may in their discretion award exemplary damages.⁷⁸ But express malice need not neces-

⁷⁷ Per Peckham, J.

⁷⁸ *Times Pub. Co. v. Carlisle* (C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; *Stallings v. Whittaker*, 55 Ark. 494; 18 S. W. 829; *Childers v. San Jose Mercury Print. & P. Co.*, 105 Cal. 284; 38 Pac. 903; *Kennedy v. Woodrow*, 6 Hous. (Del.) 46; *Jones v. Greeley*, 25 Fla. 629; 6 So. 448; *Montgomery v. Knox*, 23 Fla. 595; *Prussing v. Jack-*

son, 85 Ill. App. 324; *Colby v. McGee*, 48 Ill. App. 294; *Barker v. Prizer*, 150 Ind. 4; 48 N. E. 4; *Casey v. Hulgán*, 118 Ind. 590; 21 N. E. 322; *Hess v. Sparks*, 44 Kan. 465; 24 Pac. 979, reh'g denied 44 Kan. 476; 25 Pac. 580; *Louisville Press Co. v. Sennelly*, 20 Ky. L. Rep. 1231; 49 S. W. 15; *Fresh v. Cutter*, 73 Md. 87; 10 L. R. A. 67; 20 Atl. 774; *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314; *Morgan v. Andrews*, 107 Mich. 33;

sarily exist in order to authorize an award of exemplary damages, for they may be allowed in the case of implied malice.⁹⁹ The implied malice which will authorize the recovery of such damages must, however, be coupled with a wanton or reckless indifference or disregard of the rights of the person concerning whom the libel or slander is published.¹⁰⁰ And it "must be proved not mere general ill-will, but malice in the special case set forth in the pleadings to be inferred from it and the attending circumstances."¹ So, also, in an action for libel or slander, exemplary damages may be given in the discretion of the jury upon proof of the falsity of the statements without regard to the question of actual malice, proof of their falsity being sufficient to sustain an award thereof.² Such damages are not recoverable as a matter of legal right, but their award rests in the discretion of the jury. In this connection it was said in a late case: "The jury were practically told that they must give exemplary damages and were absolutely refused the discretion to withhold them. But in no case has a plaintiff any

64 N. W. 869; 2 Det. L. N. 572; Hatt v. Evening News Assoc., 94 Mich. 114; 53 N. W. 952; Callahan v. Ingram, 122 Mo. 355; 26 S. W. 1020; 43 Am. St. Rep. 583; Krug v. Pitass, 102 N. Y. 154; Holmes v. Jones, 147 N. Y. 67; 69 N. Y. St. R. 310; 41 N. E. 409; Warner v. Press Pub. Co., 132 N. Y. 181; 43 N. Y. St. R. 633, aff'g 15 Daly, 545; Marx v. Press Pub. Co., 134 N. Y. 561; 47 N. Y. St. R. 775, aff'g 34 N. Y. St. R. 316; Brooks v. Harrison, 91 N. Y. 83; McMahon v. New York News Co., 51 App. Div. (N. Y.) 488; 64 N. Y. Supp. 713; Shanks v. Stumpf, 23 Misc. (N. Y.) 264; 51 N. Y. Supp. 154; Miller v. Donovan, 16 Misc. (N. Y.) 453; 39 N. Y. Supp. 820; Van Ingen v. Mail & E. Pub. Co., 14 Misc. (N. Y.) 326; 35 N. Y. Supp. 838; 70 N. Y. St. R. 355; Cotulla v. Kerr, 74 Tex. 89; 11 S. W. 1058; King v. Sassaman (Tex. Civ. App.), 54 S. W. 304; Harman v. Cundiff,

82 Va. 239; Reed v. Keith, 99 Wis. 672; 75 N. W. 392; Allen v. News Pub. Co., 81 Wis. 120; 50 N. W. 1003.

⁹⁹ Hess v. Sparks, 44 Kan. 465; 24 Pac. 979; Callahan v. Ingram, 122 Mo. 355; 43 Am. St. Rep. 583; 26 S. W. 1020; Krug v. Pitass, 102 N. Y. 160; King v. Sassaman (Tex. Civ. App.), 54 S. W. 304; Reed v. Keith, 99 Wis. 672; 75 N. W. 392.

¹⁰⁰ Times Pub. Co. (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; Krug v. Pitass, 102 N. Y. 162.

¹ Krug v. Pitass, 102 N. Y. 162. See Prince v. Brooklyn Daily Eagle, 16 Misc. (N. Y.) 186; 37 N. Y. Supp. 250; 72 N. Y. St. R. 752.

² Bergmann v. Jones, 94 N. Y. 51; Hamilton v. Eno, 81 N. Y. 116; 16 Hun, 599; Samuels v. Evening Mail Assoc., 75 N. Y. 604, rev'g 9 Hun, 288.

legal right to exemplary damages. Such damages depend upon the case and the evidence and finding of the jury.³ Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury. And it is error to instruct them that they must give exemplary damages."⁴

§ 398. Exemplary damages may be awarded though actual damages nominal.—Though the actual damages in an action for libel or slander against one who has acted with malice or in a wanton or reckless manner may be only nominal, yet this will not prevent an award of punitive damages.⁵

§ 399. Exemplary damages—Two defendants.—Where there are two defendants in an action for libel, their respective rights in regard to the allowance of exemplary damages are sufficiently preserved where the jury are instructed that though there may be express malice on the part of one of them, such fact does not affect the other, and that if they believe such damages should be awarded, they should only allow such sum therefor as they believe should be assessed against the defendant against whom the lowest amount of exemplary damages should be given, and that if they believe that such damages should be allowed only against one of the defendants, then nothing should be allowed as exemplary damages.⁶

§ 400. Plea of truth as justification—When damages aggravated thereby.—If the defendant in an action for libel or slander pleads, as a justification of the same, the truth of the statements he has made concerning the plaintiff, and such defense is pleaded in bad faith, no proper investigation having been made to ascertain the truth, and no effort being made to establish it at the trial, such a plea may be considered by the

³ Jerome v. Smith, 48 Vt. 230.

⁴ Gambrill v. Schooley, 93 Md. 48; 48 Atl. 730, per Pearce, J.

⁵ Ferguson v. Evening Chronicle Pub. Co., 72 Mo. App. 462; Prince v. Brooklyn Daily Eagle, 16 Misc. (N. Y.) 186; 72 N. Y. St. R. 752; 37 N.

Y. Supp. 250. See Nailor v. Ponden, 1 Marv. (Del.) 408; 41 Atl. 88; O'Brien v. Semple, Mont. L. Rep. 6 Super. Ct. 344; Gomez v. Joyce, 1 N. Y. Supp. 337.

⁶ Hearne v. De Young, 119 Cal. 670; 52 Pac. 150.

jury in aggravation of damages.⁷ In this connection it is declared in a late case that "if . . . when the party is brought into court to answer a charge of libel, he undertakes to meet it by placing on the public records the allegation that what he published was in fact true, and then utterly fails to establish it, why should he not be held responsible for it? If he made an apology for the publication, it is generally admissible in mitigation, and if he thus still stands by the original libel, it should aggravate the damages. What can do greater injury to the character of a man than to have it known that a responsible party sued for libel has thus asserted the truth of his statement? The public may believe that the original publication was the result of a misunderstanding or false information; but when the publisher has asserted his readiness to prove his statement in a judicial proceeding, many may thereby be led to believe there was some foundation for it. This court has therefore adopted the view that it is evidence of malice."⁸

§ 401. Same subject continued.—The courts are not in harmony upon the question whether the mere failure of the defendant to establish as a justification the truth of his charges, is of itself evidence of malice which will authorize a recovery of increased damages. In some jurisdictions it is said that though the defendant acted in good faith when he pleaded the truth as a justification, yet the injury to the plaintiff is not diminished thereby, but rather a new injury has been done to the plaintiff by the reaffirming of the slander or libel and placing it on the court records by way of justification, and that though the plea was in good faith, yet the new injury was an

⁷ Sun Print. & Pub. Assn. v. Schenck, 98 Fed. 925; 40 C. C. A. 163; Westerfield v. Scripps, 119 Cal. 607; 51 Pac. 958; Henderson v. Fox, 83 Ga. 233; 9 S. E. 839; 80 Ga. 479; 6 S. E. 164; Beasley v. Meigs, 16 Ill. 139; Walker v. Wickens (Kan.), 30 Pac. 181; Holmes v. Jones, 121 N. Y. 461; 31 N. Y. St. R. 379; 24 N. E. 701; Cruikshank v. Gordon, 118 N. Y. 178; 28 N. Y. St. R. 784; 23 N. E. 457, aff'g 48 Hun (N. Y.), 308; 15

N. Y. St. R. 897; Disten v. Rose, 69 N. Y. 122; Tobin v. Sykes, 71 Hun (N. Y.), 469; 54 N. Y. St. R. 399; 24 N. Y. Supp. 943; Low v. Herald Co., 6 Utah, 176; 21 Pac. 991. See Corridan v. Wilkinson, 20 Ont. App. 184.

⁸ Coffin v. Brown (Md. 1901), 50 Atl. 570, citing Blumhardt v. Rohr, 70 Md. 342; 17 Atl. 286; Rigden v. Walcott, 6 Gill. & J. (Md.) 419.

act of the defendants for which he should be responsible, and that such action on his part is evidence of malice which may be considered by the jury in aggravation of damages.⁹ In other states, however, where this question has been considered, it has been held that if the defendant pleads the truth as a justification of a libel or slander, the mere failure to establish such justification is not of itself an aggravation of the damages, but it is for the jury to determine whether the defense was interposed in bad faith or on the other hand in good faith and with no intention to injure the plaintiff, and where the evidence, though not sufficient to fully sustain the pleas of justification, indicates that the defendant had reasonable grounds for believing he could establish such plea, it may in some jurisdictions be considered in mitigation of the damages.¹⁰ Under the New York Code¹¹ which authorizes the defendant in actions for personal injuries to plead and prove facts in mitigation of damages as a partial defense, and also in actions for libel or slander to prove mitigating circumstances notwithstanding he has pleaded or attempted to prove a justification, the fact that the defendant has pleaded the truth of a libelous publication and fails to prove the truth of the same, does not of itself warrant an inference of malice which will justify an award of exemplary damages. To authorize an allowance of such damages under such circumstances, the jury must first find that the defendant interposed such defense either carelessly, recklessly, wantonly, or in bad faith, and for the purpose of further injuring the plaintiff.¹²

⁹ See *Robinson v. Drummond*, 24 Ala. 174; *Shelton v. Simmons*, 12 Ala. 466; *Downing v. Brown*, 3 Colo. 571; *Jackson v. Stetson*, 15 Mass. 48; *Doss v. Jones*, 5 How. (Miss.) 158; *Shartle v. Hutchinson*, 3 Oreg. 337; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Burckhalter v. Coward*, 16 S. C. 436; *Cavanaugh v. Austin*, 42 Vt. 576; *Faucitt v. Booth*, 31 Up. Can. Q. B. 283.

¹⁰ See *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75; *Ransome v. Christian*, 49 Ga. 491; *Corbley v. Wilson*, 71 Ill. 209; *Sloan v. Petrie*, 15 Ill. 425; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83; *Huson v. Dale*, 19 Mich. 17; *Pallett v. Sargent*, 36 N. H. 497; *Raynor v. Kinney*, 14 Ohio St. 283; *Kennedy v. Holborn*, 16 Wis. 457.

¹¹ Code Civ. Proc. secs. 508, 535, 536.

¹² *Willard v. Press Pub. Co.*, 52 App. Div. (N. Y.) 448; 65 N. Y. Supp. 73; *Klinck v. Colby*, 46 N. Y. 427; *Aird v. Fireman's Journal Co.*, 10 Daly (N. Y.) 254. Formerly in this state the rule prevailed that if the defendant reaffirmed the slander or libel in his pleadings, alleging the truth thereof as a justification, and he failed to establish the truth of his pleas, such facts might be considered

The question of the bad faith of the defendant in pleading such a defense is for the jury to determine in connection with the evidence offered to sustain such plea or other circumstances of the case.¹³

§ 402. Exemplary damages—Malice—Reckless or wanton conduct.—As we have stated in the preceding section, express malice is not necessary to authorize a recovery of exemplary damages, but malice sufficient for that purpose may be inferred from the facts and circumstances of the case. So such damages may be allowed in an action for libel or slander where it appears that the defendant acted with such gross negligence, recklessness or wantonness as was equivalent to an intentional violation or utter disregard of the rights of the plaintiff.¹⁴ So where a person wilfully and with a reckless indifference of the conse-

in aggravation of damages, though the attempt was made in good faith or in an honest belief that the plaintiff was guilty of the matter laid to his charge. *Fero v. Roscoe*, 4 N. Y. 165; *Cumming v. Arrowsmith*, 5 C. H. Rec. (N. Y.) 52. See *Root v. King*, 7 Cow. (N. Y.) 613.

¹³ *Holmes v. Jones*, 121 N. Y. 461; 31 N. Y. St. R. 379; 24 N. E. 701.

¹⁴ *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; *Bennett v. Salisbury* (C. C. App. 2d C.) 78 Fed. 769; 45 U. S. App. 636; *Press Pub. Co. v. McDonald* (C. C. App. 2d C.), 63 Fed. 238; 26 L. R. A. 531; 11 C. C. A. 155; 27 Chic. Leg. News, 53; *Cooper v. Sun Printing & P. Assoc.* (C. C. S. D. N. Y.), 57 Fed. 566; *Morning Journal Assoc. v. Rutherford* (C. C. App. 2d C.), 51 Fed. 513; 16 L. R. A. 803; 1 U. S. App. 296; 2 C. C. A. 354; 46 Alb. L. J. 305; *Courier-Journal Co. v. Sallee*, 20 Ky. L. Rep. 634; 47 S. W. 226; *Louisville Press Co. v. Sennelly*, 20 Ky. L. Rep. 1231; 49 S. W. 15; *Fulkerson v. Mur-*

dock, 53 Mo. App. 151; *Smith v. Matthews*, 152 N. Y. 152; 46 N. E. 164; 55 Alb. L. J. 202; *Holmes v. Jones*, 147 N. Y. 59; 69 N. Y. St. R. 310; 41 N. E. 409; *Warner v. Press Pub. Co.*, 132 N. Y. 181; 43 N. Y. St. R. 633, aff'g 15 Daly, 545; *McMahon v. New York News Co.*, 51 App. Div. (N. Y.) 488; 64 N. Y. Supp. 713; *Payne v. Rouss*, 46 App. Div. (N. Y.) 315; 61 N. Y. Supp. 705; *Grant v. Herald Co.*, 42 App. Div. (N. Y.) 354; 59 N. Y. Supp. 84; *Young v. Fox*, 26 App. Div. (N. Y.) 261; 49 N. Y. Supp. 634; *Schoepflin v. Coffey*, 25 App. Div. (N. Y.) 438; 49 N. Y. Supp. 627; *Karwowski v. Pitass*, 20 App. Div. (N. Y.) 118; 46 N. Y. Supp. 691; *Van Ingen v. Star Co.*, 1 App. Div. (N. Y.) 429; 37 N. Y. Supp. 114; 72 N. Y. St. R. 565; *Weber v. Butler*, 81 Hun (N. Y.), 244; 30 N. Y. Supp. 713; 62 N. Y. St. R. 669; *Waltenberg v. Bernhard*, 26 Misc. (N. Y.) 659, 56 N. Y. Supp. 396; *Prince v. Socialistic Co-op. Pub. Assoc.*, 364 N. Y. Supp. 285; *Ullrich v. New York Press Pub. Co.*, 23 Misc. (N. Y.) 163; 50 N. Y. Supp. 788; *Alliger v. Mail*

quences to a woman charges her with incontinency, punitive damages may be awarded against him.¹⁵

§ 403. Same subject—Newspaper publications.—The publication of a libel by a newspaper without any effort to verify the statements made therein constitutes such a reckless and wanton indifference to the rights of others as to justify an award of punitive damages.¹⁶ So where an article is published which names a certain person as the one charged by a woman with being the father of her illegitimate child, and no investigation is made to determine the truthfulness of such statement, the facts show such a disregard of the rights of the person to whom the article refers as will justify an award of punitive damages.¹⁷ And again, a statement in a newspaper article upon the affidavit of a person living hundreds of miles away, that a person of good character and reputation is the head of a gang of thieves, without any inquiries for the purpose of verifying the truth of the statement, and against his denial and protest, will render the newspaper liable in punitive damages.¹⁸ So, also, the publication of stories of elopements and other gossip taken from the columns of another paper without any attempt to verify the truth

Printing Asso., 20 N. Y. Supp. 763; 49 N. Y. St. R. 495; Bowden v. Bailes, 101 N. C. 612; 8 S. E. 342; Hayner v. Cowden, 27 Ohio St. 292; 22 Am. Rep. 303; Becker v. Public Ledger (C. P. Pa.), 6 Pa. Dist. Rep. 89.

¹⁵ Bowden v. Bailes, 101 N. C. 612; 8 S. E. 342.

¹⁶ Press Pub. Co. v. McDonald (C. C. App. 2d C.), 63 Fed. 238; 11 C. C. A. 155; 26 L. R. A. 531; 27 Chic. Leg. News, 53; Smith v. Sun Printing & P. Asso. (C. C. App. 2d C.), 55 Fed. 240; Smith v. Matthews, 152 N. Y. 152; 46 N. E. 164; 55 Alb. L. J. 202; Van Ingen v. Star Co., 1 App. Div. (N. Y.) 429; 72 N. Y. St. R. 565; 37 N. Y. Supp. 114; Turton v. New York Recorder, 3 Misc. (N. Y.) 314; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766. See Rutherford v.

Morning Journal Assoc. (C. C. S. D. N. Y.), 47 Fed. 487, aff'd 51 Fed. 513; 16 L. R. A. 803; 1 U. S. App. 296; 2 C. C. A. 354, where a verdict of \$4,000, was held not excessive for publication of a false statement, without previous investigation that plaintiff had eloped. In Luft v. Lingane, 17 R. I.—; 22 Atl. 942, a verdict of \$2,485.50 was held not excessive for publication, without any attempt at verification, of the charge the female plaintiff had been seen in the company of a negro and had been assaulted by the latter's wife.

¹⁷ Grant v. Herald Co., 42 App. Div. (N. Y.), 354, 59 N. Y. Supp. 84.

¹⁸ Times Pub. Co. v. Carlisle (C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633.

of such statements will justify an award of such damages.¹⁹ But where a newspaper publishes a libelous article which it has received from a reliable and correct news agency in the ordinary course of business, under such circumstances as will excuse the duty of investigation, inquiry or delay, it should not be liable therefor in exemplary damages.²⁰ But the fact that an article is based on information received from a news agency will not relieve a newspaper from liability for such damages where it is guilty of gross negligence in not attempting to verify the truth of the article before publication.²¹ So a finding that an article received from such a source was wantonly published, and that the defendant is liable in exemplary damages, may be justified by facts showing that the publication was false and that the defendant when requested to retract the same refused to do so and merely stated that if the plaintiff would furnish proof that the article was untrue, he would be glad to make a retraction.²² If, however, a libel is published by inadvertence or mistake and no malice or gross negligence prompted such publication, and an immediate and full retraction is made, exemplary damages should not be allowed.²³

§ 404. Evidence of prior statements of like import—Reiteration.—Evidence of the use by defendant of like statements in regard to the plaintiff or of the substantial reiteration of libelous or slanderous charges is admissible as showing malice and in aggravation of damages.²⁴ And evidence of repetition of the

¹⁹ *Morning Journal Asso. v. Ruth-
erford* (C. C. App. 2d C.), 51 Fed.
513; 2 C. C. A. 354; 16 L. R. A. 803;
1 U. S. App. 296; 46 Alb. L. J. 305.

²⁰ *Smith v. Sun Printing & P. Assoc.*
(C. C. App. 2d C.), 55 Fed. 240.

²¹ *Smith v. Sun Printing & P.
Assoc.* (C. C. App. 2d C.), 55 Fed.
240.

²² *Palmer v. New York News Co.*,
31 App. Div. (N. Y.) 210; 52 N. Y.
Supp. 539.

²³ *Becker v. Public Ledger* (C. P.
Pa.), 6 Pa. Dist. R. 89. See sec. 413,
herein.

²⁴ *Rausch v. Anderson*, 75 Ill. App.

526; *Barker v. Prizer*, 150 Ind. 4; 48
N. E. 4; *Sharp v. Bowlar*, 19 Ky. L.
Rep. 2018; 45 S. W. 90; *Leonard v.*
Pope, 27 Mich. 145; *Williams v. Har-*
rison, 3 Mo. 411; *Cruikshank v. Gor-*
don, 118 N. Y. 178; 28 N. Y. St. R.
784; 23 N. E. 457, aff'g 48 Hun (N.
Y.) 308; 15 N. Y. St. R. 897; 1 N. Y.
Supp. 443; *Turton v. New York Re-*
recorder Co., 144 N. Y. 144; 63 N. Y.
St. R. 69; 38 N. E. 1009, aff'g 3 Misc.
314; 52 N. Y. St. R. 398; 22 N. Y.
Supp. 766; *Bassell v. Elmore*, 48 N.
Y. 561; *Titus v. Sumner*, 44 N. Y.
266; *Wright v. Gregory*, 9 App. Div.
(N. Y.) 85; 41 N. Y. Supp. 139;

charges made after the commencement of the suit is admissible to show malice but not as an independent ground of damage.²⁵ In this connection it is said in a recent New York case: "It is the prevailing doctrine that the reiteration of a libel or slander after suit brought may be proved on the question of malice and damages, probably with this qualification, however, that the cause of action for the reiteration has been barred by the statute of limitations, or that the language subsequently reiterated is for some other reason not actionable. The authorities upon this point are not harmonious.²⁶ No case holds that a repetition of a libel or slander after suit brought is in its nature not competent evidence on the question of malice and damage, and whenever it has been excluded as evidence, it has always been upon the ground that it was an independent cause of action, and thus if such evidence were received, that there would be danger of a double recovery."²⁷ So where unchastity is imputed to an unmarried woman she may, in an action to recover therefor, show that the defendant substantially reiterated the charges after the commencement of the action.²⁸ And where an action is brought

Morrison v. Press Pub. Co., 38 N. Y. St. R. 357; 13 N. Y. Supp. 131; *Rosenwald v. Hammerstein*, 12 Daly (N. Y.), 377; *Inman v. Foster*, 8 Wend. (N. Y.) 602; *Root v. Loundes*, 6 Hill (N. Y.), 518; *Distin v. Rose*, 7 Hun (N. Y.), 83; *Swalm v. Walbourn* (C. P. Pa.), 15 Lanc. L. Rev. 118; *Beebe v. Missouri Pac. R. Co.*, 71 Tex. 424; 9 S. W. 449. See *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75. In *Evening Journal Assoc. v. McDermott*, 15 Vroom (N. J.), 430; 43 Am. Rep. 392, it was held that for the purpose of showing malice, evidence of previous publications was admissible though an action for such publications might be barred by the statute of limitations. In *Stitzell v. Reynolds*, 67 Pa. St. 54, it has been held that subsequent declarations are admissible to show malice, but that damages for such declarations should not awarded.

²⁵ *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75; *Van Cleef v. Lawrence*; 2 C. H. Rec. (N. Y.) 41.

²⁶ Citing "Townshend on Slander and Libel (4th. ed.), 653 et seq.; *Stuart v. Lovell*, 2 Stark. 84; *Thomas v. Crosswell*, 7 Johns. 264; *Inman v. Foster*, 8 Wend. 602; *Keenholts v. Becker*, 3 Den. 346; *Root v. Loundes*, 6 Hill, 518; *Johnson v. Brown*, 57 Barb. 118; *Thorn v. Knapp*, 42 N. Y. 474; *Titus v. Sumner*, 44 N. Y. 266; *Bassell v. Elmore*, 48 N. Y. 561; *Frazier v. McClosky*, 60 N. Y. 337; *Daly v. Byrne*, 77 N. Y. 182; *Cruikshank v. Gordon*, 118 N. Y. 178."

²⁷ *Turton v. New York Recorder Co.*, 144 N. Y. 144; 63 N. Y. St. R. 69; 38 N. E. 1009, aff'g 3 Misc. 314; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766, per Earl, J. But see *Daly v. Byrne*, 77 N. Y. 182.

²⁸ *Craven v. Walker*, 101 Ga. 845; 29 S. E. 152.

against a newspaper to recover for the publication of a libelous article charging dishonest, fraudulent and criminal conduct on the part of the plaintiff, the latter may show that when a demand for retraction was made, such paper published a second article, which might be construed as containing an evasive and covert reiteration of the original charges, and in such case punitive damages may be recovered.²⁹ But where the manager of a department store had made a charge of theft against a former employee of the store, and upon a demand by the latter's attorneys for a retraction of such charge had made to a law clerk of such attorneys, in reply to the demand, a repetition of the charge, it was held that his reply was *prima facie* privileged, and express malice must be shown to maintain an action for slander thereon.³⁰ And the repetition by others of the charges made by defendant concerning the plaintiff are held to be too remote to be recovered.³¹

§ 405. Repetition after recovery.—The fact that a person has recovered damages for a slander or libel will not prevent a subsequent recovery from the same defendant for the repetition of the slanderous or libelous statements subsequent to such recovery, since such repetition constitutes a new injury for which there is another cause of action, and the judgment recovered in a former case is in no way a satisfaction for the subsequent injury.³²

§ 406. Evidence—Social standing and wealth of defendant.—In an action for libel or slander evidence is admissible as to the character, social standing and influence of the defendant in the community.³³ And where punitive damages may be allowed, evidence as to the financial standing of the defend-

²⁹ *Hoboken Printing & Pub. Co. v. Kahn*, 59 N. J. L. 218; 35 Atl. 1053; 5 Am. & Eng. Corp. Cas. N. S. 1.

³⁰ *McCarty v. Lambley*, 20 App. Div. (N. Y.) 264; 40 N. Y. Supp. 792.

³¹ *Prime v. Eastwood*, 45 Iowa, 640; *Shurtleff v. Parker*, 130 Mass. 293; 39 Am. Rep. 454; *Hastings v. Stet-*

son, 126 Mass. 329; 30 Am. Rep. 683; *Terwilliger v. Wands*, 17 N. Y. 57.

³² *Woods v. Pangburn*, 75 N. Y. 495, rev'g 14 Hun (N. Y.), 540.

³³ *Broughton v. McGrew* (C. C. D. Ind.), 39 Fed. 672; 5 L. R. A. 406; *Nailor v. Ponder*, 1 Marv. (Del.) 408; 41 Atl. 88.

ant is also admissible.³¹ And evidence thereof is also admissible for the purpose of showing the effect defendant's words would have in the community.³² But though such evidence may be admissible in the case of an individual defendant, yet if the defendant is a corporation, it is declared that evidence is not admissible to show the actual or reputed wealth of the corporation.³³ And where there are several defendants, evidence is not admissible as to the wealth of one of them as bearing on the allowance of punitive damages, since the verdict must be against all the defendants and may be collected from anyone of them.³⁴ And where such evidence is erroneously admitted and not specifically withdrawn, its admission cannot be cured by merely charging the jury that punitive damages cannot be recovered.³⁵

§ 407. Exemplary damages—Several defendants—Malice of one not imputed to others.—In an action against several defendants for libel or slander, malice of one defendant cannot be imputed to the others for the purpose of aggravating the damages, without connecting proof. Thus, in an action against several defendants for the publication of an article libelous per se, it was decided that a judgment against all must be reversed where the plaintiff, in order to establish express malice, was permitted

³¹ *Broughton v. McGrew*, 39 Fed. (N. Y.) 90; *Young v. Kuhn*, 71 Tex. 672; *Barkly v. Copeland*, 74 Cal. 1; 645; 9 S. W. 860.
³² 5 Am. St. Rep. 413; 15 Pac. 307; *Barber v. Barber*, 33 Conn. 335; *Botsford v. Chase*, 108 Mich. 432; 66 N. W. 325; 2 Det. L. N. 802.
³³ *Jones v. Greeley*, 25 Fla. 629; 6 So. 448; *Wilson v. Shepler*, 86 Ind. 275; *Story v. Early*, 86 Ill. 461; *Randall v. Evening News Assoc.*, 97 Mich. 136; 56 N. W. 361; 44 Am. & Eng. Corp. Cas. 347; *Rosewater v. Hoffman*, 24 Neb. 222.
³⁴ *Washington Gas Light Co. v. Lansden*, 172 N. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.
³⁵ *Washington Gas Light Co. v. Lansden*, 172 U. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.
³⁶ *Broughton v. McGrew*, 39 Fed. (N. Y.) 90; *Young v. Kuhn*, 71 Tex. 672; *Barkly v. Copeland*, 74 Cal. 1; 645; 9 S. W. 860.
³⁷ 5 Am. St. Rep. 413; 15 Pac. 307; *Barber v. Barber*, 33 Conn. 335; *Botsford v. Chase*, 108 Mich. 432; 66 N. W. 325; 2 Det. L. N. 802.
³⁸ *Jones v. Greeley*, 25 Fla. 629; 6 So. 448; *Wilson v. Shepler*, 86 Ind. 275; *Story v. Early*, 86 Ill. 461; *Randall v. Evening News Assoc.*, 97 Mich. 136; 56 N. W. 361; 44 Am. & Eng. Corp. Cas. 347; *Rosewater v. Hoffman*, 24 Neb. 222.
³⁹ *Washington Gas Light Co. v. Lansden*, 172 N. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.
⁴⁰ *Washington Gas Light Co. v. Lansden*, 172 U. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.
⁴¹ *Broughton v. McGrew*, 39 Fed. (N. Y.) 90; *Young v. Kuhn*, 71 Tex. 672; *Barkly v. Copeland*, 74 Cal. 1; 645; 9 S. W. 860.
⁴² 5 Am. St. Rep. 413; 15 Pac. 307; *Barber v. Barber*, 33 Conn. 335; *Botsford v. Chase*, 108 Mich. 432; 66 N. W. 325; 2 Det. L. N. 802.
⁴³ *Jones v. Greeley*, 25 Fla. 629; 6 So. 448; *Wilson v. Shepler*, 86 Ind. 275; *Story v. Early*, 86 Ill. 461; *Randall v. Evening News Assoc.*, 97 Mich. 136; 56 N. W. 361; 44 Am. & Eng. Corp. Cas. 347; *Rosewater v. Hoffman*, 24 Neb. 222.
⁴⁴ *Washington Gas Light Co. v. Lansden*, 172 N. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.
⁴⁵ *Washington Gas Light Co. v. Lansden*, 172 U. S. 534; 43 L. Ed. 543; 19 Sup. Ct. Rep. 296; 9 Am. & Eng. Corp. Cas. N. S. 596, rev'g 9 App. D. C. 508; 24 Wash. L. Rep. 807.

to show as against all the defendants, that several years prior to the publication in question, one of the defendants had made remarks concerning the plaintiff, expressing contempt and ill-will for him.³⁹ In this case the court said: "There was no connection between these remarks and the other defendants, who neither heard them nor ever heard of them so far as appears. It is undisputed that Pitass knew nothing about the article until some time after it had been published. He did not directly or indirectly cause or consent to its publication. He was liable only because he owned the newspaper and was responsible for the acts of his agents in publishing it. His previous statements did not cause the publication nor have any effect upon it. Between those statements and the fact of publication, there was no connection and no relation of cause and effect. They did not enter into, or become part of, or have any bearing upon the wrong of which the plaintiff complains. As the article would have been published if they had not been made, they were immaterial for they did not touch the wrongful act and could not aggravate the damages. Punitive damages which are in excess of the actual loss are allowed where the wrong is aggravated by evil motives in order to punish the wrongdoer for his misconduct and furnish a wholesome example. . . . In an action for tort, there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done and which had some influence in causing it to be done. . . . Neither the author nor editor was a party to the malice of the publisher and his malice did no harm, because it had no effect upon the result. While he was responsible for their acts, they were not responsible for his motives of which they had no knowledge. He was not responsible for his motives in connection with their acts because there was no connection. The malice proved in this case did not cause the conduct complained of. The one guilty of the malice did not commit the wrong except through an agent who knew nothing about the malicious feelings of his principal. The principal was not liable for general malice, but only for such particular malice as was connected with the publication. The agent was not liable for the general malice of his principal of which he knew nothing and which had

³⁹ *Krug v. Pitass*, 162 N. Y. 154.

no connection with the wrong done. The writer of the article was not liable for the malice of another of which he had never heard and which had no influence upon the wrongful act. Yet the general malice of one of three defendants, although it had no connection with the wrong, has, as it must be presumed, entered into the verdict of \$6,250 against all, in violation of the rights of each. As the malice proved neither caused nor prompted the publication of the libel, the judgment must be reversed and a new trial granted."⁴⁰ In a case in Massachusetts, however, it is held that where a newspaper is conducted by a partnership, the malice of one of the partners in the publication of a libel in such newspaper will be imputed to his copartners although proof of actual malice is required by statute.⁴¹

§ 408. Exemplary damages—Slander by wife.—Where a slander has been uttered by a married woman against another, and the husband is made a party defendant because of his marital relation, and not because of any active participation of his in the slander, and he is in fact an innocent party, a narrower limit of exemplary damages exists.⁴² So where he is absent at the time slanderous words are spoken by his wife, and they are uttered without his consent or knowledge, the exemplary damages against him should be less than if he had participated therein.⁴³

§ 409. Exemplary damages—Telegraph company—Libelous message.—A telegraph company is liable for the acts of its agents within the scope of their authority. So where a libelous message is maliciously transmitted by an agent of the company, within the scope of his employment, punitive damages therefor may be recovered against the company.⁴⁴

§ 410. Exemplary damages as affected by statute.—Under the California Civil Code,⁴⁵ if the publication of a libel was not

⁴⁰ Per Vann, J.

⁴¹ Lathrop v. Adams, 133 Mass. 471; 43 Am. Rep. 528.

⁴² Upton v. Upton, 51 Hun (N. Y.), 184; 21 N. Y. St. R. 559.

⁴³ Webber v. Vincent, 29 N. Y. St. R. 603; 9 N. Y. Supp. 101.

⁴⁴ Peterson v. Western Union Teleg. Co., 75 Minn. 368; 43 L. R. A. 581; 77 N. W. 985; 5 Am. Neg. Rep. 376. See Joyce on Electric Law (ed. 1900), sec. 982.

⁴⁵ Sec. 3294.

made with ill-will or intention to injure or defame, there can be no recovery of exemplary damages.⁴⁶ And under the Colorado laws,⁴⁷ which provide that there shall be an allowance of punitive damages only in those cases where wrongs are attended by circumstances of fraud, malice or insult, or a wanton disregard of the injured party's rights and feelings, there can be no recovery of such damages in an action for libel, where it was published in the belief of its truth and with no desire or intention to do injury.⁴⁸ So again, under the Indiana laws if a person who has published a libel is subject to a criminal prosecution therefor, exemplary damages cannot be awarded in a civil action to recover damages for such libelous publication.⁴⁹ But a contrary rule seems to prevail in Missouri.⁵⁰ In Nebraska there can be no recovery of exemplary damages against a newspaper for the publication of a libelous article therein.⁵¹ In an action in a Federal court to recover damages for a libelous publication, such court is not bound to follow the statute of the state in which it is sitting, which requires that when actual and punitive damages are allowed by a jury in a libel case, they shall return such damages separately.⁵²

§ 411. Justification.—The defendant in an action for libel or slander may set up as a defense to the action the truth of his statements, and where the truth of the same is established, it will operate as a justification, and no recovery can be had.⁵³ But the truth of such a publication cannot be shown either as

⁴⁶ *Taylor v. Hearst* (Cal.), 40 Pac. Rep. 394; 41 Cent. L. J. 54.

⁴⁷ Colo. Sess. Laws, 1889, p. 64.

⁴⁸ *Republican Pub. Co. v. Conroy*, 5 Colo. App. 262; 38 Pac. 423.

⁴⁹ *Tracy v. Hackett*, 19 Ind. App. 133; 49 N. E. 185; *Wabash Printing & Pub. Co. v. Crumrine* (Ind.), 21 N. E. 904.

⁵⁰ *Baldwin v. Fries*, 46 Mo. App. 288.

⁵¹ *Rosewater v. Hoffman*, 24 Neb. 222; 38 N. W. 857.

⁵² *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. Rep. 762.

⁵³ *Ratcliff v. Louisville Courier-Journal Co.*, 99 Ky. 416; 18 Ky. L. Rep. 291; 36 S. W. 177; *Owen v. Dewey*, 107 Mich. 67; 65 N. W. 8; 2 Det. L. N. 573; *McCloskey v. Pulitzer Pub. Co.*, 152 Mo. 339; 53 S. W. 1087; *Press Co. v. Stewart*, 119 Pa. St. 584; 14 Atl. 51; 21 W. N. C. 294; 12 Cent. 275; *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; 56 S. W. 134; *Trudel v. La Campagne D'Imprimerie et de Publication*, Montreal L. Rep. 5 Sup. Ct. 297, aff'd 5 Q. B. 510; *Leduc v. Graham*, Montreal L. Rep. 5 Q. B. 511.

a justification of the defendant's act or in mitigation of damages, unless pleaded.⁵⁴ And an answer alleging such a defense must set up therein with some particularity the facts which go to establish the truth of the statement made and for which the action is brought.⁵⁵ But where the purpose of proving the truth of a charge for which an action is brought is not as a justification, but to rebut malice and in mitigation of damages, evidence tending to prove its truth is admissible under a plea of the general issue only.⁵⁶ If the truth is set up as a justification it is not necessary that it be established beyond a reasonable doubt, but it is sufficient if it be shown by a preponderance of evidence.⁵⁷ And where an action is brought for the publication of a statement that the plaintiff had been discharged from the employ of the defendants upon a confession by him that he had misappropriated money belonging to them, the burden of proof is not upon the defendants to show an actual conversion of the money, but they merely have the burden of proving the confession.⁵⁸ So, also, in an action by contractors to recover for defamation of them in their business, where it is alleged in defense that the article complained of was merely a comment or criticism in reference to a public work made by citizens and taxpayers who were interested therein, it must appear to sustain such defense that there was no malice on the part of the defendants towards the contractors, either individually or in a business way in the making of such comment or criticism, and that the statements in the publication were fair and reasonable.⁵⁹

⁵⁴ *Atwater v. Morning News Co.*, 67 Conn. 504; 34 Atl. 865.

⁵⁵ *Brush v. Blot*, 16 App. Div. (N. Y.) 80; 44 N. Y. Supp. 1073. In this case which was an action for libel, the defendant in his answer alleged that he had knowledge of the alleged libelous article, and at the time of publication believed it to be true, and that his motive in publishing the same was worthy and the ends justifiable, and that it was done in the discharge of a duty to the public, whom he believed were entitled

to be informed as to the conduct of the plaintiff, who had held a public office in the city prior to the publication. See *Funk v. Beverly*, 112 Ind. 190; 11 West. 229; 13 N. E. 573.

⁵⁶ *Huson v. Dale*, 19 Mich. 17; 2 Am. Rep. 66; *Stanley v. Webb*, 21 Barb. (N. Y.) 148.

⁵⁷ *Owen v. Dewey*, 107 Mich. 67; 65 N. W. 8; 2 Det. L. N. 573.

⁵⁸ *Hall v. Elgin Dairy Co.*, 15 Wash. 542; 46 Pac. 1049.

⁵⁹ *Bearce v. Bass*, 88 Me. 521; 34 Atl. 411.

§ 412. **Mitigation of damages—Generally.**—Evidence is admissible in mitigation of damages, of the facts and circumstances which induced the use of the alleged libelous or slanderous statements by the defendant.⁶⁰ And in an action for slander in imputing unchastity to a female, the defendant may show that the slander was repeated many years after it first started and after the reputation of the plaintiff had become bad.⁶¹ Evidence, however, is not admissible in mitigation of damages of facts and circumstances which did not come to the knowledge of the defendant before the libelous or slanderous statements were made by him.⁶² So where the defendant had charged the plaintiff with having charge of a fund for the corruption of voters at an election, he was not permitted to show specific acts of the plaintiff as to the use of money at prior elections, where no evidence was given showing knowledge of such acts on the part of the defendant prior to the publication in question.⁶³ And in an action for libel, the defendant cannot show in mitigation of damages, that actions have been commenced for the publication of the same libel against other newspapers.⁶⁴ Nor is it material in such a case that a judgment has been recovered against another newspaper,⁶⁵ since it is declared that a person who has committed a tortious act cannot offset against the damages resulting therefrom, damages to the same person from the separate tortious act of another.⁶⁶ And where a series of articles have been published by a paper or magazine, the defendant cannot show in mitigation of damages that the same plaintiff has previously recovered against him in another action for libel based on a former article of the series, though such article contained the libelous words charged in the second action.⁶⁷ Again, evidence is not admissible for the purpose of excuse or defense, that the libel

⁶⁰ *Donnelly v. Swain*, 3 Phil. (Pa.) 93.

⁶¹ *Nelson v. Wallace*, 48 Mo. App. 193.

⁶² *Simons v. Burnham*, 102 Mich. 189; 60 N. W. 476; *Morey v. Morning Journal Assoc.*, 17 N. Y. St. R. 266; *Hatfield v. Lasher*, 17 Hun (N. Y.), 23.

⁶³ *Edwards v. San Jose Printing & P. Co.*, 99 Cal. 431; 34 Pac. 128.

⁶⁴ *Palmer v. New York News Pub. Co.*, 31 App. Div. (N. Y.) 210; 52 N. Y. Supp. 539.

⁶⁵ *Bennett v. Salisbury* (C. C. App. 2d C.), 78 Fed. 769; 45 U. S. App. 636; 24 C. C. A. 329.

⁶⁶ *Arnold v. Sayings Co.*, 76 Mo. App. 159.

⁶⁷ *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56.

may not be believed,⁶⁶ or that it was published accidentally, inadvertently or by mistake.⁶⁷ Though the fact that the publication was accidental or by mistake cannot affect the question of substantial damages, it may, under certain circumstances, go to the question of exemplary damages.⁷⁰ And as bearing upon the questions of malice and such damages, evidence is admissible showing that the language was rendered libelous by a mistake in punctuation,⁷¹ or by reason of a typographical error.⁷² In the case of the accidental or inadvertent publication of libelous matter, the evidence should, it would seem, tend to show that the publication was purely by accident or inadvertence, for in such case the question of negligence would enter, and if the publication was due to gross negligence or recklessness, exemplary damages should be allowed. It is also no defense to an action for the publication of an article reflecting upon the integrity of a person, that such article was intended as a political joke or pleasant gibe, where the article or paper contains nothing to indicate that it was so intended.⁷³ And in those cases where a recovery may be allowed for loss of time and for trouble as the result of a slander, the amount of recovery therefor should be reduced by the fact that no deduction for such time was made by plaintiff's employer.⁷⁴

§ 413. Evidence of good faith in mitigation—Absence of malice.—For the purpose of rebutting any presumption of malice which may arise from the publication of libelous words, the

⁶⁶ *Bishop v. Journal Newspaper Co.*, 168 Mass. 327; 47 N. E. 119; *Hastings v. Stetson*, 130 Mass. 76; *Van Ingen v. Star Co.*, 1 App. Div. (N. Y.) 429; 72 N. Y. St. R. 565, *aff'd* on opinion below, 157 N. Y. 642. See *Richardson v. Barker*, 7 Ind. 567.

⁶⁷ *Henderson v. Fox*, 83 Ga. 233; 9 S. E. 839; *Morgan v. Rice*, 35 Mo. App. 591; *Moore v. Francis*, 121 N. Y. 199; 8 L. R. A. 214; 30 N. Y. St. R. 467; 31 Cent. L. J. 10; 23 N. E. 1127; *Griebel v. Rochester Printing Co.*, 38 N. Y. St. R. 788; 14 N. Y. Supp. 848.

⁷⁰ *McClean v. New York Press Co.*, 19 N. Y. Supp. 262; 46 N. Y. St. R. 706.

⁷¹ *Arnott v. Standard Assoc.*, 57 Conn. 86; 17 Atl. 361; 3 L. R. A. 69.

⁷² *McClean v. New York Press Co.*, 19 N. Y. Supp. 262; 46 N. Y. St. R. 706. See *Sullings v. Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166.

⁷³ *Truth Pub. Co. v. Reed*, 13 Ky. L. Rep. 323.

⁷⁴ *Eimee v. Fessenden*, 154 Mass. 427; 28 N. E. 299.

defendant may show the circumstances of publication, the sources from which the information was received and the reliability of the same, and his honesty of purpose, good faith and belief in the truth of the allegations.⁷⁵ So evidence is admissible in behalf of the defendant to show that the publication was made in good faith and in an honest belief of its truth, and where such facts are established, they are to be considered by the jury in mitigation of damages.⁷⁶ But the good faith of the defendant in the publication will not affect the recovery of the actual damages sustained. Such facts, when established, will only affect the allowance of exemplary damages.⁷⁷ So in the case of an action against a newspaper for the publication of a libelous article, though the defendant's motives were good and there was no intention to injure the reputation or character of the plaintiff, and the publication was made in the ordinary course of business and with justifiable ends, the plaintiff may still recover his actual damages, and he will be restricted to such damages where such facts appear.⁷⁸ In some cases it has been declared that if the defendant acted in good faith in the publication of such an article and with an honest belief in its truth, and has made reasonable and proper investigation, the jury will be warranted under certain circumstances in reducing the damages to a minimum.⁷⁹ In

⁷⁵ *Owen v. Dewey*, 107 Mich. 67; 65 N. W. 8; 2 Det. L. N. 573. See *Taylor v. Church*, 8 N. Y. 452.

⁷⁶ *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; *Hotchkiss v. Porter*, 30 Conn. 414; *Cox v. Strickland*, 101 Ga. 482; 28 S. E. 655; *Nolte v. Herter*, 65 Ill. App. 430; *Tottleben v. Blankenship*, 58 Ill. App. 47; *Louisville Press Co. v. Tennyly*, 20 Ky. L. Rep. 1231; 49 S. W. 15; *Blackwell v. Johnston* (Ky.), 56 S. W. 12; *Bronson v. Bruce*, 59 Mich. 467; 60 Am. Rep. 307; 26 N. W. 671; *Evening News Assoc. v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450; *Sharpe v. Larson*, 74 Minn. 323; 74 N. W. 233; *McCloskey v. Pulitzer Pub. Co.*, 152 Mo.

339; 53 S. W. 1087; *Morgan v. Rice*, 35 Mo. App. 591; *Lewis v. Humphreys*, 64 Mo. App. 466; 2 Mo. App. Rep. 1011; *Bush v. Prosser*, 11 N. Y. 347; *Erwin v. Sumrow*, 1 Hawks (N. C.), 472; *Morrison-Jewell Filtration Co. v. Lingane*, 19 R. I.; 33 Atl. 452.

⁷⁷ *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633; *Evening News Assoc. v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450; *Lewis v. Humphreys*, 64 Mo. App. 466; 2 Mo. App. Rep. 1011.

⁷⁸ *Fitzpatrick v. Daily States Pub. Co.*, 48 La. Ann. 1116; 20 So. 173. See *Hearne v. De Young*, 119 Cal. 670; 52 Pac. 150.

⁷⁹ *Bronson v. Bruce*, 59 Mich. 467;

another case, however, it was held to be erroneous as stating an incorrect rule of damages to instruct the jury, in an action against a newspaper for the publication of a libelous article, that though it was not a defense to the action that the defendant published the article in good faith, as a matter of news and without malice, yet such fact might be considered in mitigation of damages, and with other mitigating circumstances might be sufficient to reduce the damages to a mere minimum.⁶⁰

§ 414. *Same subject continued.*—In an action for the alleged libelous publication by a newspaper of a sectarian or club meeting at which it stated that certain speakers insinuated that funds were being diverted from their intended purposes, and the report further insinuated that such funds had been embezzled by the plaintiff, the defendant may show for the purpose of establishing good faith on its part and in mitigation of damages that the article complained of was a fair and true report of the meeting.⁶¹ And as tending to disprove malice and to show the good faith of the defendant in an action for libel, evidence is admissible showing what he said when printing the article.⁶² But the defendant cannot show that the actions and conduct of the plaintiff were such as to excite his suspicions, either for the purpose of proving that he acted in good faith or in any way tending to mitigate damages,⁶³ and only facts which the defendant had knowledge of at the time of the publication and which might have influenced him in making the statements contained therein are admissible.⁶⁴ And evidence showing the insanity of the defendant is admissible on the question of malice and in mitigation of damages,⁶⁵ or that he was drunk at the time the slanderous statements were made by him.⁶⁶ If the publication of an article

60 Am. Rep. 307; 26 N. W. 671; *Morgan v. Rice*, 35 Mo. App. 591.

⁶¹ *Fenstermaker v. Tribune Pub. Co.*, 12 Utah, 439; 43 Pac. 112; 35 L. R. A. 611.

⁶² *Sarasohn v. Workingmen's Pub. Assn.*, 44 App. Div. (N. Y.) 302; 60 N. Y. Supp. 640.

⁶³ *Taylor v. Church*, 8 N. Y. 452.

⁶⁴ *Sickra v. Small*, 87 Me. 493; 33

Atl. 9; 47 Am. St. Rep. 344. But see *Coogler v. Rhodes*, 38 Fla. 240; 21 So. 109.

⁶⁵ *Sun Printing & Pub. Assn. v. Schenck*, 98 Fed. 925; 40 C. C. A. 163.

⁶⁶ *Yeates v. Reed*, 4 Blackf. (Ind.) 463.

⁶⁷ *Gates v. Meredith*, 7 Ind. 440.

libelous per se is admitted and the recovery is expressly limited to compensatory damages, evidence is irrelevant either as to the good faith or the negligence of the publisher of such article.⁸⁷

§ 415. Evidence that defamatory matter was common rumor.—The courts do not seem to be in harmony upon the question whether in an action for slander or libel the defendant may show upon the question of malice and in mitigation of damages that the defamatory matter which he has spoken or published concerning the plaintiff was a general rumor or report. It would seem that such evidence should be admissible for such purpose, for if there was in fact a general rumor or report in substance the same as the alleged libelous or slanderous statements, damages in such a case should certainly not be awarded to the same amount as where no rumor or report had previously been in circulation affecting the plaintiff in the manner in which the alleged libel or slander affected him, and such seems to be the rule in the majority of the jurisdictions in which the question has arisen, though nearly an equal number hold otherwise.⁸⁸ So in an action for slander for charging a woman with being an adulteress and prostitute, evidence is admissible of general rumors or reports of guilt of adultery on her part,⁸⁹ and the defendant is entitled to give proof that the defamatory matters which were charged against the plaintiff were current rumor and report prior to the publication, and that the publication was made

⁸⁷ Taylor v. Hearst, 118 Cal. 366; 50 Pac. 541.

⁸⁸ See Broughton v. McGrew, 39 Fed. 672; Fuller v. Dean, 31 Ala. 654; Swan v. Thompson, 124 Cal. 193; 56 Pac. 878; Republican Pub. Co. v. Mosman, 15 Colo. 399; 24 Pac. 1051; Nailor v. Poudier, 1 Marv. (Del.) 408; 41 Atl. 88; Gray v. Ellzroth, 10 Ind. App. 587; 37 N. E. 551; Barr v. Hack, 46 Iowa, 308; Nicholson v. Rust (Ky.), 52 S. W. 933; Brewer v. Chase, 121 Mich. 526; 46 L. R. A. 397; Hoboken Printing & P. Co. v. Kahn, 58 N. J. L. 359; 33 Atl. 382; Cook v. Barkley, 2 N. J. L. 169; McCurry v. McCurry, 82 N. C. 296;

Lambert v. Pharis, 3 Head (Tenn.), 622; Richards v. Richards, 2 Mood. & Rob. 557. But see Strader v. Snyder, 67 Ill. 404; Ensor v. Bolgiano, 67 Md. 190; 9 Atl. 529; 8 Cent. 296; Peterson v. Morgan, 116 Mass. 350; Baldwin v. Boulware, 79 Mo. App. 5; 2 Mo. App. Rep. 359; Dame v. Kenney, 25 N. H. 318; Gilman v. Lowell, 8 Wend. (N. Y.) 579; Com. v. Place, 153 Pa. St. 314; 32 W. N. C. 107; 26 Atl. 620; Pease v. Shippen, 80 Pa. St. 513; 21 Am. Rep. 116; Blackwell v. Landreth, 90 Va. 748; 19 S. E. 791; Bowen v. Hall, 20 Vt. 232.

⁸⁹ Gray v. Ellzroth, 10 Ind. App. 587; 37 N. E. 551.

in good faith in reliance in such rumor though the plea of justification fail and the publication be false.⁹⁰ But though evidence of a general rumor or report is admissible, yet witnesses should not be permitted to detail conversations which took place in reference to such report or rumor;⁹¹ nor should evidence of the existence of a general rumor to the same effect as the alleged slanderous or libelous statements be admitted unless it also be shown that such rumor or report was communicated to the defendant prior to the statements complained of.⁹² And if in an action for slander or libel it appear that the alleged defamatory matter was positively stated with no reference or suggestion of its resting on rumor merely, it is declared that evidence of the existence of a rumor is not admissible.⁹³

§ 416. Source of information—Authority of others—News agency—Copied from newspapers.—It is not a justification or excuse in an action for libel or slander that the defendant was told by another the matter which he stated.⁹⁴ But the defendant may plead in mitigation of damages that the words were uttered on the authority and information of others whose names he gave at the time the words were spoken by him,⁹⁵ and that he also stated at that time that he did not believe the statement to be true.⁹⁶ So, also, for the same purpose, evidence is admissible that he was informed that the statements made by him were true,⁹⁷ and the defendant may testify that he made the statement upon information, in the belief of its truth, and without malice.⁹⁸ But where a libel purports to be based upon the

⁹⁰ *Republican Pub. Co. v. Mosman*, 15 Colo. 399; 24 Pac. 1061. But see *Baldwin v. Boulware*, 79 Mo. App. 5; 2 Mo. App. Rep. 359.

⁹¹ *Nicholson v. Rust* (Ky.), 52 S. W. 933.

⁹² *Wolff v. Smith*, 112 Mich. 359; 4 Det. L. N. 73; 70 N. W. 1010.

⁹³ *Haskins v. Lumsden*, 10 Wis. 359.

⁹⁴ *Edwards v. Kansas City Times* (C. C. W. D. Mo.), 32 Fed. 813; *Wimbish v. Hamilton*, 47 La. Ann. 246; 16 So. 856.

⁹⁵ *Baldwin v. Boulware*, 79 Mo. App. 5; 2 Mo. App. Rep. 359. See *Hinkle v. Davenport*, 38 Iowa, 355. But see *Inman v. Foster*, 8 Wend. (N. Y.) 602.

⁹⁶ *Nicholson v. Rust* (Ky.), 52 S. W. 933.

⁹⁷ *Fowler v. Fowler*, 113 Mich. 575; 71 N. W. 1064; 4 Det. L. N. 412. See *Story v. Early*, 86 Ill. 461.

⁹⁸ *Scullin v. Harper* (C. C. App. 7th C.), 78 Fed. 460; 46 U. S. App. 673; 24 C. C. A. 169. See *Mattice v. Wilcox*, 147 N. Y. 624; 71 N. Y. St.

writer's own knowledge, evidence is not admissible in mitigation of what he was told or heard before publishing the same.⁹⁹

§ 417. Same subject continued.—If, as in the case of an action against a newspaper for the publication of a libelous article, such article appears on its face to be derived from sources other than the publisher's own knowledge, though the source of information may not be stated, evidence is admissible to show that the publisher acted on apparently reliable information and in good faith.¹⁰⁰ And for the purpose of showing good faith and due care in the publication of an article by a newspaper, and as tending to mitigate damages, the defendant may show that the article was received from a news' agency, which had theretofore been found trustworthy.¹ But evidence that the information upon which an article is based was received from a reliable source, is not of itself admissible in mitigation of damages, in the absence of evidence showing that the publisher had reason to and did believe that the information was true.² So in an action to recover damages for the publication of a statement by a newspaper, that the plaintiff was to have charge of a fund for the purpose of corrupting voters at an election, it was held that in order to mitigate the damages, the defendant must not only show the source of its information, but it must also show that the persons who informed it were possessed of such a character and standing as would command a belief in their utterances.³ In an action for libel the defendant may also prove that the publication was based on an article published in a newspaper of large circulation, which he had seen, read and believed to be true,⁴ or that the article in question was taken

R. 244; 42 N. E. 270; *Dolevin v. Wilder*, 7 Rob. (N. Y.) 319; *Witcher v. Jones*, 17 N. Y. Supp. 491; 43 N. Y. St. R. 151.

⁹⁹ *Clifton v. Lange*, 108 Iowa, 472; 79 N. W. 276; *Fenstermaker v. Tribune Pub. Co.*, 12 Utah, 439; 35 L. R. A. 611; 43 Pac. 112.

¹⁰⁰ *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532; 35 L. R. A. 611; 45 Pac. 1097.

¹ *Folwell v. Providence Journal Co.*, 19 R. I. 551; 37 Atl. 6.

² *Robinson v. Evening Post Pub. Co.*, 39 App. Div. (N. Y.) 525; 57 N. Y. Supp. 303, rev'g 25 Misc. 243; 28 Civ. Proc. 239; 55 N. Y. Supp. 62.

³ *Edwards v. San Jose Print. & P. Co.*, 99 Cal. 431; 34 Pac. 128.

⁴ *Hoey v. Fletcher*, 39 Fla. 325; 22 So. 716. See *Turner v. Hearst*, 115 Cal. 394; 47 Pac. 129; *Hewitt v.*

therefrom as a mere matter of news.⁵ Although where an instruction has been given that no exemplary damages can be allowed, but that plaintiff is entitled to compensatory damages, it is improper to instruct the jury that they may consider in mitigation of damages the fact that other similar articles were published in other newspapers immediately prior to the publication of the article in question.⁶ But in order to render such articles admissible in evidence in mitigation of damages, they must be pleaded for that purpose in the answer.⁷ The defendant in such an action may also allege in mitigation of damages that the article in question was published as a matter of news in accordance with its regular custom upon information furnished by the police authorities for the purpose of restoring the plaintiff—whom the article said had mysteriously disappeared—to her friends, and was published in a friendly spirit and without malice.⁸ But where, in the publication of an article in reference to a seduction case, the name and address of an innocent party was given as the complaining witness, and the reporter, who wrote the article, based it on information received over the telephone and a note left by the justice on the reporter's desk, it was held that the justice's docket was not admissible in evidence in mitigation of damages, where neither the reporter nor the publisher saw the docket prior to the publication.⁹

§ 418. Provocation in mitigation.—In an action for slander or libel there may have been conduct on the part of the plaintiff which amounted to a provocation and in consequence of which the statements for which action is brought were made by the defendant and evidence of such conduct is admissible in mitiga-

Pioneer Press Co., 25 Minn. 178; 23 Am. Rep. 680; *Wier v. Allen*, 51 N. H. 177. But see *Reade v. Sweetzer*, 6 Abb. Pr. N. S. (N. Y.) 9.

⁵ *Edwards v. Kansas City Times* (C. C. W. D. Mo.), 32 Fed. 813.

⁶ *Van Ingen v. Mail & Ex. Pub. Co.*, 14 Misc. (N. Y.) 326; 35 N. Y. Supp. 838; 70 N. Y. St. R. 355. See *Hoey v. Fletcher*, 39 Fla. 325; 22 So. 716; *Fitzpatrick v. Daily States Pub.*

Co., 48 La. Ann. 1116; 20 So. 173; *Upton v. Hume*, 24 Oreg. 420; 21 L. R. A. 493; 33 Pac. 810.

⁷ *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 636.

⁸ *Evening Post Co. v. Hunter*, 18 Ky. L. Rep. 726; 38 S. W. 487.

⁹ *Hulbert v. New Nonpareil Co.* (Iowa), 82 N. W. 928.

tion of damages.¹⁰ So in an action for libel, previous articles published by the plaintiff may, in certain cases, be considered in mitigation of damages.¹¹ Thus, the fact that the article for which an action in libel is brought is professedly an answer to a publication made by the plaintiff, and which is referred to in such article, is admissible in evidence under the general issue, in mitigation of damages.¹² So where defendant had in a publication charged the plaintiff with being "a degraded scoundrel, liar and blackguard," he was, in an action to recover damages for such a statement, permitted to show under the general issue that shortly prior to the publication of said libel he had been charged by the defendant with false swearing in an action in which he was a witness.¹³ But to render a previously published libelous article admissible in mitigation of damages, it must be shown that the plaintiff caused or had some part in its preparation or publication.¹⁴ And in an action for slander, the defendant may show that in consequence of the plaintiff's violent conduct or language, he was provoked in a moment of anger to the use of the words charged.¹⁵

¹⁰ *Freeman v. Tinsley*, 59 Ill. 497; *Monsler v. Harding*, 33 Ind. 176; *Janch v. Janch*, 50 Ind. 135; 19 Am. Rep. 699; *Simons v. Lewis*, 51 La. Ann. 327; 25 So. 406; *Davis v. Griffith*, 4 Gill & J. (Md.) 342; *Brewer v. Chase*, 121 Mich. 526; 46 L. R. A. 397; 80 N. W. 575; *Newman v. Stein*, 75 Mich. 402; 42 N. W. 956; *Ritchie v. Stenins*, 73 Mich. 563; 41 N. W. 687; *Warner v. Lockerby*, 31 Minn. 421; *Powers v. Presgrove*, 38 Miss. 227; *Richardson v. Northrop*, 56 Barb. (N. Y.) 105; *Else v. Ferris Auth. N. P. (N. Y.)*, 36; *Massnere v. Dickens*, 70 Wis. 83.

¹¹ *Pugh v. McCarty*, 40 Ga. 444; *Brewer v. Chase*, 121 Mich. 526; 46 L. R. A. 397; 80 N. W. 575; *Maynard v. Beardsley*, 7 Wend. (N. Y.) 580.

¹² *Hotchkiss v. Lothrop*, 1 Johns. (N. Y.) 286; *Gould v. Weed*, 12

Wend. (N. Y.) 12; *Thompson v. Boyd, Mills. Const. (S. C.)* 80.

¹³ *Davis v. Griffith*, 4 Gill & J. (Md.) 342.

¹⁴ *Dressel v. Shippman*, 57 Minn. 23; 58 N. W. 684.

¹⁵ *Simons v. Lewis*, 51 La. Ann. 327; 25 So. 406; *Newman v. Stein*, 75 Mich. 402; 42 N. W. 956; *Palmer v. Long*, 7 Daly (N. Y.), 33; *Else v. Ferris Auth. N. P. (N. Y.)*, 36. *Hilbrant v. Simmons*, 9 Ohio C. D. 566; 18 Ohio C. C. 123, where a verdict for \$800 was held excessive for charging the plaintiff in the course of a quarrel with him, with burning his house to get insurance money. In *Cummings v. Line*, 45 N. Y. St. R. 56; 18 N. Y. Supp. 469, a verdict for \$3,000 was held excessive for imputing unchastity to the plaintiff in the course of a quarrel which was heard by but few witnesses.

§ 419. *Same subject—When insufficient.*—In an action against an employer for abusing an employee and calling him a thief in a public place in the presence of others, the fact that the employer was at the moment very angry with the employee because of reports which had come to him as to trouble between the employee and the manager, does not excuse the employer for uttering such statements.¹⁶ And the fact that slanderous words were spoken by the defendant in a moment of anger or sudden resentment will not preclude the plaintiff from the recovery of other than nominal damages.¹⁷ Again, a previous provoking publication by the plaintiff in reference to the defendant can neither be considered in justification or in mitigation of damages in an action for libel or slander, where such previous publication is entirely irrelevant to and wholly independent of the publication for which the action is brought, and where the publication of the plaintiff was not so connected in point of time with that of the defendant as to justify the belief that the latter's statement was made in a moment of anger.¹⁸ And in an action for slander or libel, the defendant cannot plead as a set-off, damages suffered by him as a result of a previous slanderous or libelous attack, or charges made concerning him by the plaintiff.¹⁹ In New York under the Code provision²⁰ which requires that a counterclaim to be available must be "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," the defendant cannot avail himself, as a counterclaim, in an action for slander, of a slander uttered by the plaintiff after the slander of which he complains is complete, though uttered in the same conversation.²¹

¹⁶ *Poissonet v. Reuther*, 51 La. Ann. 965; 25 So. 937.

¹⁷ *Ledgerwood v. Elliott* (Tex.), 51 S. W. 872.

¹⁸ *Battell v. Wallace* (C. C. S. D. N. Y.), 30 Fed. 229; *Child v. Hoiner*, 13 Pick. (Mass.) 503; *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528; 38 N. W. 623; *Baldwin v. Boulware* 1 Mo. App. Rep. 466.

¹⁹ *Baldwin v. Boulware*, 1 Mo.

App. Rep. 466; *Trudel v. Vian*, Montreal L. Rep. 5 Q. B. 502. But see *Trudel v. La Campagne D'Impression et de Publication du Canada*, Montreal L. Rep. 5 Q. B. 510, aff'd 5 Super. Ct. 297.

²⁰ N. Y. Code Civ. Proc. sec. 520.

²¹ *Sheehan v. Pierce*, 70 Hun (N. Y.), 22; 53 N. Y. St. R. 438; 23 N. Y. Supp. 1119.

§ 420. **Retraction in mitigation.**—If subsequent to the publication of a libelous article or slanderous statement, the publisher makes a retraction of the same, such fact may be considered in mitigation of damages.²² A retraction, however, to be available in mitigation should be full and fair, and not evasive. So where the defendant had published a libelous article charging the plaintiff with fabricating the story of an assault and battery for the purpose of concealing the fact that his wounds were received in a row over a woman, it was held that the retraction was not a full and fair one where the publication of the original article was not referred to or admitted therein and no retraction or desire to retract was expressed, but it was in effect a criticism upon the police department upon whom it attempted to place the responsibility for the rumor.²³ And though a retraction may be made after the commencement of an action for libel, yet if such action is commenced without any request on the part of the plaintiff to retract and the defendant promptly after the commencement of the suit publishes a full and fair retraction, such publication may be proved and submitted to the jury in mitigation of damages.²⁴ In this connection it was said by the court in this case: "Under such circumstances a retraction after suit brought may be as valuable and effective as one published before and there is the same reason for the submission to the jury of the one as the other. . . . No case holds that a repetition of a libel or slander after suit brought is in its nature not competent evidence on the question of malice and damages. . . . If the plaintiff can give in evidence the language published or uttered subsequently to the commencement of the action for the purpose of aggravating damages, it seems quite reasonable that the defendant ought to be permitted to give in evidence a fair and honest retraction of the charges promptly made subsequently to the commencement of the action in mitigation of damages."²⁵ In California a similar rule pre-

²² Storey v. Wallace, 60 Ill. 51; Silv. S. C. (N. Y.) 5; 6 N. Y. Supp. 110.
 Davis v. Marxhausen (Mich.), 61 N. W. 504; Hotchkiss v. Oliphant, 2 Hill (N. Y.), 510.

²³ Gray v. Times Newspaper Co., 74 Minn. 452; 77 N. W. 204. See N. E. 1009, aff'g 3 Misc. (N. Y.) 314; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766.

Alliger v. Brooklyn Daily Eagle, 2 ²⁴ Per Earl, J.

vails,²⁸ but in Michigan it has been held that a retraction of a libel published after the commencement of an action therefor cannot be considered in mitigation.²⁷ In this case, however, it appeared that the retraction was not made promptly but that considerable time elapsed after the commencement of the suit. While a retraction subsequently to the commencement of the action may, under certain circumstances, be considered by the jury in reduction of damages, yet a mere offer to retract at such time cannot.²⁸ So an offer made under stress of an impending suit to publish an interview with a person libeled, or a letter from him, is not a retraction which will operate to mitigate the damages.²⁹ Again, it is no justification nor a fact to be considered in mitigation of damages, that the person concerning whom a libel is published did not go to the publisher and ask him to retract the same.³⁰ The Illinois act of 1895³¹ which provided that where a libel was published in good faith and retracted, the plaintiff should be limited in his recovery to his actual damages, is construed as applying only to the publishers of newspapers.³²

§ 421. Exemplary damages—How affected by rules of absent proprietor of newspaper as to investigation.—The fact that the proprietor of a newspaper, who is himself absent from the place of publication and who has placed the general management of such paper in the hands of others, has made a rule that no article reflecting upon any person or corporation shall be published until after strict investigation the truth of the matter shall have been established, does not of itself relieve such absent owner from liability for punitive damages for the publication of a libelous article, for though he may have made such a rule, yet if it appear that the article was carelessly or recklessly published,

²⁸ *Turner v. Hearst*, 115 Cal. 394; 47 Pac. 129.

²⁷ *Evening News Assoc. v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450.

²⁸ *Turton v. New York Recorder Co.*, 144 N. Y. 144; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766, aff'g 3 Misc. 314; 52 N. Y. St. R. 398; 22 N. Y. Supp. 766.

²⁹ *Evening Post Pub. Co. v. Voight* (C. C. App. 2d C.), 72 Fed. 885; 324.

38 U. S. App. 394; *Constitution Pub. Co. v. Way*, 94 Ga. 120; 21 S. E. 139.

³⁰ *Times Pub. Co. v. Carlisle* (C. C. App. 8th C.), 94 Fed. 762; 36 C. C. A. 475; 10 Am. & Eng. Corp. Cas. N. S. 633.

³¹ Act June 24, 1895; *Laws*, 1895, p. 315.

³² *Prussing v. Jackson*, 85 Ill. App.

such damages may be recovered.³³ Rules of such a character will not relieve the publisher from liability for exemplary damages unless it be shown that they are enforced.³⁴ In a case in the Federal courts, where this question arose, it was claimed that exemplary damages could not be recovered from an absent owner where he had made a rule that communications of a personal nature sent by unknown correspondents must be verified by an investigation by an accredited correspondent, and when thus verified might be published. In this case it was held that the existence of such a rule did not, as a matter of law, free the publisher from liability, but that it was a question for the jury whether such a rule showed a reckless indifference to the rights of others, and that if they found it did so show, exemplary damages might be awarded, and a verdict for plaintiff was sustained, the court declaring that the jury probably found the rule inadequate to meet the imperative demands of prudence and caution which investigation demands. And it was also said that if such a rule could protect an absent publisher from the recovery of exemplary damages in an action for libel, the principle of law which permits of the recovery of such damages in cases of careless or reckless indifference to injury to others, could be easily evaded.³⁵ In this case it was also held that the testimony of the city editor of the paper as to his belief in the thoroughness of an investigation made by an accredited correspondent to whom the article in question was referred, was properly stricken out as the good faith or malice of the city editor was not in issue and the question of punitive damages turned entirely on the negligence of the defendant.³⁶

§ 422. Evidence as to bad character and reputation of plaintiff.—In an action for libel and slander, evidence is not only admissible as to the bad character of the plaintiff in the

³³ *Morgan v. Bennett*, 44 App. Div. (N. Y.) 323; 60 N. Y. Supp. 619; *McMahon v. Bennett*, 31 App. Div. (N. Y.) 16; 52 N. Y. Supp. 390.

³⁴ *Morgan v. Bennett*, 44 App. Div. (N. Y.) 323; 60 N. Y. Supp. 619; *McMahon v. Bennett*, 31 App. Div. (N. Y.) 16; 52 N. Y. Supp. 390.

³⁵ *Bennett v. Salisbury* (C. C. App. 2d C.), 78 Fed. 769; 45 U. S. App. 636.

³⁶ *Bennett v. Salisbury* (C. C. App. 2d C.), 78 Fed. 769; 24 C. C. A. 329; 45 U. S. App. 636.

trait involved in the alleged slanderous or libelous statements,⁵⁷ but also as a general rule evidence as to the general bad character of the plaintiff is in most jurisdictions admissible, as in the majority of the cases libelous or slanderous statements affect the character of the person against whom they are directed, and where the general character of a person concerning whom such charges are made is bad, the damages awarded him should not be the same as if the charges were made concerning a person against whose character no improper charges had ever been made.⁵⁸ And under the general issue or general denial evidence is admissible in mitigation of damages as to the general bad character of the plaintiff in those cases where the plaintiff claims damages for a libel or slander which contain charges involving his character.⁵⁹ So where a newspaper published an article stating of a certain person that he had "made his name notorious and hated," defendant was permitted to show in an action for libel, the general reputation of the plaintiff in the community in which he lived.⁶⁰ And in such cases the evidence need not be

⁵⁷ *Treat v. Browning*, 4 Conn. 408; *Fletcher v. Burroughs*, 10 Iowa, 557; *Clark v. Brown*, 116 Mass. 504; *Warner v. Lockerly*, 31 Minn. 421; *Sowers v. Sowers*, 87 N. C. 303; *Dewitt v. Greenfield*, 5 Ohio St. 225; *Drown v. Allen*, 91 Pa. St. 394; *Conroe v. Conroe*, 47 Pa. St. 198; *Bridgman v. Hopkins*, 34 Vt. 532.

⁵⁸ *Broughton v. McGrew* (C. C. D. Ind.), 39 Fed. 672; *Pope v. Welsh*, 18 Ala. 631; *Adams v. Smith*, 58 Ill. 417; *Tracy v. Hackett*, 19 Ind. App. 133; 49 N. E. 185; *Armstrong v. Pierson*, 8 Iowa, 29; *Sickra v. Small*, 87 Me. 493; 33 Atl. 9; 47 Am. St. Rep. 344; *Shilling v. Carson*, 27 Md. 175; *Peterson v. Morgan*, 116 Mass. 350; *Stone v. Varney*, 7 Metc. (Mass.) 86; *Thibault v. Sessions*, 101 Mich. 279; 59 N. W. 624; *Nelson v. Wallace*, 57 Mo. App. 397; *Lamor v. Snell*, 6 N. H. 413; *Sayre v. Sayre*, 25 N. J. L. 235; *Remsen v. Bryant*, 47 App. Div. (N. Y.) 503; 62 N. Y. Supp. 434;

Bernstein v. Singer, 1 App. Div. (N. Y.) 63; 36 N. Y. Supp. 1093; 72 N. Y. St. R. 41; *Carpenter v. Matt*, 66 Hun (N. Y.), 632; 50 N. Y. St. R. 261; *Foot v. Tracy*, 1 Johns. (N. Y.) 46; *Maynard v. Beardsley*, 7 Wend. (N. Y.) 560; *Baddock v. Salisbury*, 2 Cow. (N. Y.) 811; *Buford v. McLuny*, 1 Nott. & M. (S. C.) 268; *Campbell v. Campbell*, 54 Wis. 90.

⁵⁹ *Commons v. Walters*, 1 Port. (Ala.) 323; *Tracy v. Hackett*, 19 Ind. App. 133; 49 N. E. 185; *Stone v. Varney*, 7 Metc. (Mass.) 86; *Thibault v. Sessions*, 101 Mich. 279; 59 N. W. 624; *Holmes v. Jones*, 147 N. Y. 59; 69 N. Y. St. R. 310; 41 N. E. 409; *Root v. King*, 7 Cow. (N. Y.) 613; *Buford v. McLuny*, 1 Nott. & M. (S. C.) 268. See *Melton v. State*, 3 Humph. (Tenn.) 389; *Candrian v. Miller*, 98 Wis. 164; 73 N. W. 1004.

⁶⁰ *Remsen v. Bryant*, 47 App. Div. (N. Y.) 503; 62 N. Y. Supp. 434.

restricted to the particular charges contained in the alleged libel or slander, but evidence of the general reputation of the plaintiff either as a man of moral worth or in the particular relation is admissible.⁴¹ As bearing upon the actual damages recoverable, evidence is admissible of the reputation and character of the plaintiff prior to the time when the alleged libel or slander was published.⁴² So the plaintiff in such an action may be cross-examined as to his reputation and character prior to the time when the alleged libel or slander was published, as tending to show his credibility as a witness.⁴³ And again in an action to recover for the publication of a charge that plaintiff kept a disorderly house, the defendant may show not only the general reputation of inmates and frequenters of such house, but evidence is also admissible of specific acts of lewdness and immorality on the part of the plaintiff.⁴⁴ So also in an action for libel for publishing a statement of the plaintiff that he had "run" the only house of prostitution in the place, the defendant may show in mitigation of damages that the plaintiff became a surety on the bond of the inmates of such house, and also on the bond of the proprietress, whom the evidence tends to prove was his kept mistress.⁴⁵ And in a similar action for the publication of a statement that the plaintiff had been indicted several times for maintaining a gambling house, evidence is admissible showing that the plaintiff is a gambler and permits gambling in a house owned and controlled by him.⁴⁶

§ 423. Evidence as to bad character and reputation of plaintiff—Continued.—In those cases where the action is to recover for an attack made upon the chastity of a female plaintiff, the jury may properly consider in mitigation of damages the fact that her reputation in this respect was bad prior to the statements made in reference thereto by the defendant, since a

⁴¹ *Sickra v. Small*, 87 Me. 493; 33 Atl. 9; 47 Am. St. Rep. 344. See also cases cited in first two notes in this section.

⁴² *Bernstein v. Singer*, 1 App. Div. (N. Y.) 63; 72 N. Y. St. R. 41; 36 N. Y. Supp. 1093.

⁴³ *Bernstein v. Singer*, 1 App. Div.

(N. Y.) 63; 72 N. Y. St. R. 41; 36 N. Y. Supp. 1093.

⁴⁴ *Lampher v. Clark*, 149 N. Y. 472; 44 N. E. 182.

⁴⁵ *Coogler v. Rhodes*, 38 Fla. 240; 21 So. 109; 2 Chic. L. J. Wkly. 127.

⁴⁶ *George Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 199; 36 S. W. 765.

woman whose reputation for chastity is bad cannot suffer the same damages for statements reflecting upon her chastity as a woman of good reputation would, and a refusal by the court to so instruct the jury is error.⁴⁷ So where an action is brought for calling a married woman a whore, the defendant may show that she has been guilty of acts of adultery, both before and subsequent to the time of speaking of her in such terms.⁴⁸ So, also, in an action to recover damages for the publication of a statement which charged the plaintiff with political perjury and which declared that he would lie to defend himself against such charges, the defendant may prove the general reputation of the plaintiff for truth and veracity, and that his word in political matters was generally regarded by the community as unworthy of belief.⁴⁹ And again, in an action for libel, the defendant may show that the plaintiff is by general reputation a common libeler.⁵⁰ While as a general rule the defendant may, in mitigation of damages, prove the general bad character of the plaintiff, and may in certain cases give specific instances of immorality on the plaintiff's part, yet the defendant cannot show in mitigation of damages for a specific libel other and disconnected immoralities on the plaintiff's part.⁵¹ So evidence is not admissible that the plaintiff has been guilty of a specific crime which is in no way connected with the defamatory words.⁵² And in an action for slander for charging the plaintiff with drunkenness, where the answer contains a plea of justification, evidence of acts of drunkenness which did not occur within the period covered by the plea are not admissible in support thereof.⁵³ So in an action for slander for charging the plaintiff with robbing the defend-

⁴⁷ *Nellis v. Cramer*, 86 Wis. 337; 56 N. W. 911. In this case an error in refusing to so instruct was held not to be cured by an instruction that the jury should consider the general reputation of the plaintiff for chastity, her social standing among her friends and acquaintances and the public generally, and the mental suffering she experienced as a result of the publication of the article in question. See *Smith v. Matthews*, 21 Misc. (N. Y.) 150; 47 N. Y. Supp. 96.

⁴⁸ *Claypool v. Claypool*, 65 Ill. App. 446.

⁴⁹ *Sanford v. Rowley*, 93 Mich. 119; 52 N. W. 1119.

⁵⁰ *Maynard v. Beardsley*, 7 Wend. (N. Y.) 560. But see *Gould v. Weed*, 12 Wend. (N. Y.) 12.

⁵¹ *Holmes v. Jones*, 147 N. Y. 59; 69 N. Y. St. R. 310; 41 N. E. 409.

⁵² *Fisher v. Tice*, 20 Iowa, 479. See *Fisher v. Patterson*, 14 Ohio, 418.

⁵³ *Swan v. Thompson*, 124 Cal. 193; 56 Pac. 873.

ant evidence is not admissible under a general denial that the plaintiff had misappropriated certain money.⁵⁴ And where the defendant in his answer has pleaded the truth of the charge that the plaintiff was a liar, he cannot testify in support of such plea that he conversed with certain neighbors of the plaintiff, and that he was informed by them that plaintiff's reputation was bad.⁵⁵ So, also, if the defendant has certain evidence of plaintiff, excluded on the ground that no attack was made by him upon the social standing or the character of the plaintiff, he is thereby estopped from subsequently introducing any evidence as to the social position, standing or character of the plaintiff, for the purpose of mitigating the damages.⁵⁶

§ 424. Allegation of two libelous charges—Only one submitted to jury—Proof of other charge in mitigation.—Where an action is brought to recover for the alleged libelous publication of two charges which relate to the same transaction and subject-matter, and are not disconnected and independent, and the plaintiff, though he alleges both charges in his complaint, only submits one of them to the jury, and the other charge was justified in the answer, the defendant may, under certain circumstances, give evidence in substantiation of such other charge which may go in mitigation of damages on the charge submitted to the jury.⁵⁷

⁵⁴ *Clarke v. Fox*, 10 App. Div. 514; 41 N. Y. Supp. 1091.

⁵⁵ *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; 56 S. W. 134.

⁵⁶ *Smith v. Sun Pub. Co.* (C. C. S. D. N. Y.), 50 Fed. 399.

⁵⁷ *Holmes v. Jones*, 147 N. Y. 59; 69 N. Y. St. R. 310; 41 N. E. 409. In this case it appeared that the plaintiff, who had rendered services as an undertaker, in connection with the death of General Grant, had, by a letter to a newspaper, provoked a public discussion as to the non-payment of his bill by General Grant's family, and that the defendant newspaper, in the present action, had published an article in reference

thereto, stating that the bill was extortionate, and that the defendant was intoxicated at the time the services were rendered. The charge of extortion was justified on the first trial. On the second trial, though alleging both charges in his complaint, only submitted the charge as to intoxication to the jury. Evidence by the defendant showing that the charge of extortion was offered for the purpose of mitigating damages on the charge of intoxication, but was excluded. On appeal, the exclusion of this evidence was held to be error. The court said: "The two charges were made in respect to the same subject-matter. They re-

§ 425. Evidence in behalf of plaintiff as to his social position—Reputation—Financial condition.—In an action for slander or libel, evidence is admissible as to the position in life of the plaintiff and his social standing as bearing on the extent of his injury.⁸⁸ But he should not be permitted to introduce evidence of his character or reputation, where it is not a material issue or has not been attached, since it is unnecessary to prove that which the law assumes, and the character of the plaintiff in such a case is not a basis for the recovery of general damages.⁸⁹ If, however, the libelous or slanderous charge directly affects the character of the person, as in the case of a charge against his integrity, and evidence has been offered to sustain such charge, he may show his general reputation and character for

lated to the same transaction, and the plaintiff makes no denial of the main matter in which the calumny originated, namely, the extortionate and unjust bill, but does deny the truth of one of the incidents of his conduct alleged in the article. He comes claiming damages for injury to his character. It is well settled that defendant cannot show in mitigation of damages for a specific libel, other and disconnected immoralities, but can attack only the plaintiff's general character. But the charges in the article were not disconnected and independent in any proper sense, and we think it plain in reason that the plaintiff ought not in justice to recover punitive damages for a misstatement in the article as to his intoxication, if it appeared that his conduct in other matters in the transaction to which the charge related had been reprehensible, and when he himself had provoked public discussion. The conduct of both parties in the whole matter should have been permitted to be shown so as to aid the jury in determining the extent of the dam-

ages to be awarded." Per Andrews, Ch. J.

⁸⁸ Klumph v. Dunn, 86 Pa. St. 141; 5 Am. Rep. 355. See also Hosley v. Brooks, 20 Ill. 115; Wilson v. Shepler, 86 Ind. 275; Larned v. Buffington, 3 Mass. 546; Clements v. Maloney, 55 Mo. 352; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532; 35 L. R. A. 611; 45 Pac. 1097; Harman v. Cundiff, 82 Va. 239. In Enos v. Enos, 135 N. Y. 609; 48 N. Y. St. R. 392; 32 N. E. 123, which was an action to recover damages for a slanderous statement imputing unchastity to a female, evidence that the plaintiff had a family of young children was declared admissible on the question of damages. But see Prescott v. Toncey, 18 J. & S. (N. Y.) 1.

⁸⁹ Stafford v. Morning Journal Assoc., 142 N. Y. 598; 37 N. E. 625; 60 N. Y. St. R. 309; Houghtaling v. Kilderhouse, 1 N. Y. 530, aff'd 2 Barb. 149; Blakeslee v. Hughes, 50 Ohio St. 490; 34 N. E. 793; 30 Ohio L. J. 248; Chubb v. Grell, 34 Pa. St. 115. But see Bennett v. Hyde, 6 Conn. 24; Nettles v. Somervell, 6 Tex. Civ. App. 627; 25 S. W. 658.

integrity.⁶⁰ So where a person is charged with stealing, and under a plea of justification defendant has attempted to show that his general reputation as a law-abiding citizen is bad, he may introduce evidence showing that his general reputation for honesty and integrity is good.⁶¹ And where a slanderous statement had been made imputing unchastity to a woman, and in an action therefor evidence had been introduced tending to show that she had intercourse with her husband before marriage, that she made an indecent exposure of her person, and that she otherwise conducted herself in a licentious manner, she was permitted to show that her general reputation for chastity was good.⁶² And if the plaintiff in such an action alleges that his character and reputation are good, and the defendant puts such allegation in issue by his answer, the plaintiff will thus be permitted to introduce evidence to sustain his allegations.⁶³ While evidence is generally held to be admissible as to the wealth of the defendant, yet on the other hand evidence is not admissible as to the pecuniary condition of the plaintiff, for the purpose of enhancing the damages,⁶⁴ although it is declared that it may be admissible to show actual damage.⁶⁵

§ 426. Evidence to show sense in which words were spoken—To whom applicable.—In an action for slander to recover for words not actionable per se and which were perhaps ambiguous, evidence is admissible as to the understanding of hearers or bystanders as to the sense in which they understood such words to be used.⁶⁶ If, however, the language used is plain and direct such evidence is not admissible.⁶⁷ Again, in

⁶⁰ Post Pub. Co. v. Hallam (C. C. App. 6th C.), 59 Fed. 530; 8 C. C. A. 201.

⁶¹ Balcom v. Michels, 49 Ill. App. 379.

⁶² Sheehy v. Cokley, 43 Iowa, 183; 22 Am. Rep. 239.

⁶³ Stafford v. Morning Journal Assoc., 142 N. Y. 598; 37 N. E. 625; 60 N. Y. St. R. 309.

⁶⁴ Reeves v. Winn, 97 N. C. 246; 1 S. E. 448; 2 Am. St. Rep. 287. See also Case v. Marks, 20 Conn. 248.

⁶⁵ Reeves v. Winn, 97 N. C. 246; 1 S. E. 448; 2 Am. St. Rep. 287.

⁶⁶ Nolte v. Herter, 65 Ill. App. 430; Lewis v. Humphreys, 64 Mo. App. 466; 2 Mo. App. Rep. 1011; Knapp v. Fuller, 55 Vt. 311; 45 Am. Rep. 618. See Fawcett v. Clark, 48 Md. 494; 30 Am. Rep. 481.

⁶⁷ Jarnigan v. Fleming, 43 Miss. 710; 5 Am. Rep. 514. See Beardsley v. Maynard, 4 Wend. (N. Y.) 336; Gould v. Weed, 12 Wend. (N. Y.) 12.

an action for libel, though the name of the plaintiff may not be mentioned in the article complained of, he may show by witnesses who were familiar with the relations existing between the parties, both immediately prior to and at the time of the publication, that when they read the publication they understood the plaintiff to be the person referred to therein.⁶⁸ But the defendant in an action for slander should not be allowed to state what the party to whom the slander is alleged to be uttered, understood by his statements to him, though he may testify that he told such party the source of his information and what it was.⁶⁹ In an action to recover for a publication libelous per se, the plaintiff may, by extrinsic evidence, show that the libelous words were published concerning him. So in an action by a lawyer to recover for such a publication he may, by such evidence, connect the libelous words with his professional character, and where such connection is shown, the natural and proximate damages resulting to him in his profession may be recovered.⁷⁰ And in such an action a witness may be permitted to testify as to whom he understood the alleged libelous publication applied.⁷¹

§ 427. **Actions against mercantile agencies.**—Where information is furnished by a mercantile agency to a subscriber in response to an inquiry by him, and such information is given in good faith, on the authority of one apparently well qualified to give it, and there is no reason to doubt its correctness, the fact that such information is false will not render the agency liable for damages in an action for libel.⁷² But if false and unfounded communications are negligently circulated by a commercial agency concerning the business standing of a certain person, as a natural result of which the latter sustains special damage, such agency will be liable therefor though it acted innocently

⁶⁸ *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 169.

⁶⁹ *Scullin v. Harper* (C. C. App. 7th C.), 78 Fed. 460; 46 U. S. App. 673; 24 C. C. A. 169.

⁷⁰ *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105.

⁷¹ *Enquirer Co. v. Johnston* (C. C. App. 7th C.), 72 Fed. 443; 18 C. C. A. 628; 34 U. S. App. 607.

⁷² *Robinson v. Dun*, 24 Ont. Rep. 287. See *Ormsby v. Douglass*, 37 N. Y. 477; *Bradstreet Co. v. Gill*, 72 Tex. 115; 2 L. R. A. 405. As to privilege of mercantile agencies, see notes 2 L. R. A. 405; 9 L. R. A. 86, 103; 20 L. R. A. 138; 49 L. R. A. 614.

and no malice existed.⁷³ And where a mercantile agency voluntarily sends out a false statement to all its customers whether creditors of a certain firm or not, that such firm has assigned and refuses to retract such statement upon request, the statement will not be considered a privileged one, and the agency will be liable for the damages sustained as a natural result thereof.⁷⁴ Though the person concerning whom an erroneous report has been made by a mercantile agency stating that an action has been commenced against him may be negligent in not taking reasonable steps to have the error corrected, yet such negligence will not prevent the recovery by him of such damages as he sustained as the result of the false publication prior to his own negligence.⁷⁵ But the publication by a mercantile agency that an action has been commenced against a certain person though it may be false is not actionable per se, and in order to support an action for libel thereon special damages must be shown.⁷⁶

§ 428. Slander of title.—In an action for slander of title, the plaintiff must show both the falsity of the words and that they were uttered with malicious intent.⁷⁷ Malice may, however, in some cases be inferred, as where the language used by the defendant was known by him to be false and was uttered with intent to injure.⁷⁸ In such an action only such damages as are the natural and direct results of the words used can be recovered.⁷⁹ And where special damages are claimed by the plaintiff, they must be alleged in the complaint, and the proof confined to the losses alleged therein. So where the plaintiff alleges special damages from the loss of sale of property, as the result of false and ma-

⁷³ *Bradstreet Co. v. Oswald*, 96 Ga. 396; 23 S. E. 423. See *Brown v. Durham* (Tex. Civ. App.), 22 S. W. 868.

⁷⁴ *Mitchell v. Bradstreet Co.*, 116 Mo. 244; 20 L. R. A. 138; 22 S. W. 358.

⁷⁵ *Giacona v. Bradstreet Co.*, 48 La. Ann. 1191; 20 So. 706.

⁷⁶ *Giacona v. Bradstreet Co.*, 48 La. Ann. 1191; 20 So. 706.

⁷⁷ *Hill v. Ward*, 13 Ala. 310; *Mc-*

Daniel v. Baca, 2 Cal. 329; *Graham v. Reno* (Colo. App.), 38 Pac. 835; *May v. Anderson*, 14 Ind. App. 251; 42 N. E. 946; *Cardon v. McConnell*, 120 N. C. 461; 27 S. E. 109; *Pater v. Baker*, 3 C. B. 869.

⁷⁸ *Hopkins v. Drowne*, 21 R. L. (part 1) 82; 41 Atl. 567.

⁷⁹ *Burkett v. Griffith*, 90 Cal. 532; 13 L. R. A. 707; 27 Pac. 527; 25 Am. St. Rep. 151. See *Kendall v. Stone*, 5 N. Y. 14.

licious statements concerning such property published by the defendant, evidence is not admissible of the value of such property for exhibition or as a scientific curiosity.⁸⁰

⁸⁰ *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

CHAPTER XVIII.

MALICIOUS PROSECUTION.

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| <p>§ 429. Malicious prosecution—Generally.</p> <p>430. Malice and want of probable cause must both exist.</p> <p>431. Malice—What amounts to—May be inferred.</p> <p>432. Probable cause—What is.</p> <p>433. Conviction in criminal prosecution—Evidence of probable cause.</p> <p>434. Probable cause—Burden of proof—Evidence.</p> <p>435. Acquittal in criminal prosecution—Evidence of want of probable cause.</p> <p>436. Measure of damages—Generally.</p> <p>437. Measure of damages—Generally—Continued.</p> | <p>438. Mental suffering.</p> <p>439. Evidence in mitigation of damages.</p> <p>440. Advice of attorney.</p> <p>441. Advice of prosecuting attorney, magistrate, etc.</p> <p>442. Exemplary damages.</p> <p>443. Wealth of defendant—Evidence—Generally.</p> <p>444. Malicious prosecution of civil suit—Attachment.</p> <p>445. Malicious attachment—Where business unlawful no recovery for injury to.</p> <p>446. Maliciously causing person to lose employment.</p> <p>447. Pleading.</p> |
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§ 429. **Malicious prosecution—Generally.**—Malicious prosecution is the setting in motion of the machinery of the law against a person, without probable cause and with malice. The nature of the action is closely allied to that for false imprisonment, since arrest and false imprisonment is frequently a result of malicious prosecution, but malicious prosecution does not always include false imprisonment. The elements of damage in an action for malicious prosecution are declared in an early case¹ to be as follows: 1. Damages to a man's fame, as in the case of a scandalous accusation. 2. Injuries to a person such as danger of losing life, limb or liberty. 3. Damages to a man's property as where he is accused of crime and is obliged to expend money in order to acquit himself. This classification has generally been accepted as the basis for the award of damages in an action for malicious prosecution, and the various items which

¹ *Saville v. Roberts*, 1 *Ld. Raym.* 374.

the jury may properly consider in estimating the damages recoverable are included therein.

§ 430. Malice and want of probable cause must both exist.

—In an action to recover for a malicious prosecution, it is necessary in order to maintain the action that both malice and want of probable cause exist.² So a mere arrest, though without legal authority, is not a sufficient ground to support such an action in the absence of want of probable cause or malice.³ Nor in the absence of such elements is the bringing of a multiplicity of suits sufficient to authorize the recovery of damages.⁴ So one who in good faith procures the arrest of another is not liable to damages for malicious prosecution.⁵ But where a person executes a dispossession warrant against another who has entered as the tenant of a prior owner, and both malice and want of probable cause exist, he is responsible for the damages caused by such act.⁶ Since it is essential to the support of an action that

² *Crescent City Live Stock Co. v. Butchers Union, etc., Co.*, 120 U. S. 141; 1 *Russell & Winslow's Syllabus* Dig. U. S. Rep. 1001; *Jones v. Jones*, 71 Cal. 89; 11 Pac. 817; *Spitzer v. Friedlander*, 14 App. D. C. 556; *Seamans v. Hoge*, 105 Ga. 159; 31 S. E. 156; *Smith v. Michigan Buggy Co.*, 66 Ill. App. 516; *Wright v. Hayter*, 5 Kan. App. 638; 47 Pac. 546; *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 790; 50 S. W. 740; *Moore v. Large*, 20 Ky. Law Rep. 409; 46 S. W. 508; *McCormick v. Conway*, 12 La. Ann. 53; *McNulty v. Walker*, 64 Miss. 198; 1 So. 55; *Talbott v. Great Western Plaster Co.*, 86 Mo. App. 538; *Stricker v. Penn. R. R. Co.*, 60 N. J. L. 230; 37 Atl. 776; 7 Am. & Eng. R. Cas. N. S. 758; *McGowan v. McGowan*, 122 N. C. 145; 29 S. E. 97; *Kolka v. Jones*, 6 N. D. 461; 71 N. W. 558; *Schondorf v. Griffith*, 13 Pa. Super. Ct. 580; *Auer v. Mauser*, 6 Pa. Super. Ct. 618; 42 Wkly. N. & C. 40; *Fry v. Wolf*, 8 Pa. Super. Ct.

468; 43 Wkly. N. & C. 124; 29 Pitts. L. J. N. S. 200; *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278; 38 Wkly. N. C. 516; 27 Pitts. L. J. N. S. 86; *Baker v. Hornik*, 57 S. C. 213; 35 N. E. 524; *Graham v. Fidelity Mut. L. Asso.*, 98 Tenn. 48; 37 S. W. 995; *Tavener v. Morehead*, 41 W. Va. 116; 23 S. E. 673. See *Magowan v. Rickey* (N. J.), 45 Atl. 804. In an action to recover for the malicious prosecution of a civil suit, it has been held that such action will lie though such suit was prosecuted without probable cause, but it is also declared that such suits are not encouraged. *Clements v. Odorless Excavating Co.*, 67 Md. 461; 10 Atl. 442; 8 Cent. 900.

³ *Tavener v. Morehead*, 41 W. Va. 116; 23 S. E. 673.

⁴ *Otis v. Sweeney*, 48 La. Ann. 940; 20 So. 229.

⁵ *Grimes v. Miller*, 23 Ont. App. 764.

⁶ *Porter v. Johnson*, 99 Ga. 275; 25 S. E. 631.

both malice and want of probable cause must exist, the burden of proof is upon the plaintiff in this class of cases to establish the existence of such elements.⁷ So in an action to recover for the malicious suing out of a writ of attachment, the existence of malice and want of probable cause must be affirmatively shown by the plaintiff.⁸ But in an action to recover for malicious prosecution, it is not necessary to show that the defendant acted maliciously and without probable cause, both in the commencement and continuance of the prosecution, but the existence of such elements either in the commencement or the continuance of the action is sufficient.⁹ In the absence, however, of evidence showing malice, though want of probable cause may be proved, a verdict may properly be directed for the defendant.¹⁰

§ 431. Malice — What amounts to—May be inferred. — Where a person seeks to recover for malicious prosecution the malice which is necessary to support the action is declared to mean the evil mind, which is regardless of social duty and the rights of others.¹¹ Malice of this character may be inferred by the jury from want of probable cause, though such inference does not necessarily arise therefrom.¹² And the inference of malice arising from want of probable cause is one of fact for the jury to

⁷ *Scheldrup v. Farwell Co.*, 67 Ill. App. 630; *Taylor v. Baltimore & O. S. W. R. Co.*, 18 Ind. App. 692; 48 N. E. 1044; *Wright v. Hayter*, 5 Kan. App. 638; 47 Pac. 546; *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 1790; 50 S. W. 40; *Warren v. Dennett*, 17 Misc. (N. Y.) 86; 39 N. Y. Supp. 830; *Hilbrant v. Donaldson*, 69 Mo. App. 92.

⁸ *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 1790; 50 S. W. 40.

⁹ *Hilbrant v. Donaldson*, 69 Mo. App. 92.

¹⁰ *Hatjie v. Hare*, 68 Vt. 247; 35 Atl. 54.

¹¹ *Graham v. Fidelity Mut. L. Assoc.*, 98 Tenn. 48; 37 S. W. 995. See *Noble v. White*, 103 Iowa, 352; 72 N. W. 556.

¹² *Foster v. Pitts*, 63 Ark. 387; 38 S. W. 1114; *Harpham v. Whitney*, 77 Ill. 32; *Paddock v. Watts*, 116 Ind. 146; *Parker v. Parker*, 102 Iowa, 500; 71 N. W. 421; *Markly v. Kirby*, 6 Kan. App. 494; 50 Pac. 953; *Wright v. Hayter*, 5 Kan. App. 638; 47 Pac. 546; *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 1790; 50 S. W. 40; *Decoux v. Lieux*, 33 La. Ann. 392; *Straus v. Young*, 36 Md. 246; *Carson v. Edgworth*, 43 Mich. 241; *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 95; *Kolka v. Jones*, 6 N. D. 461; 71 N. W. 558; *Fry v. Wolf*, 8 Pa. Super. Ct. 488; 29 Pitts. L. J. N. S. 200; 43 W. N. C. 124; *Auer v. Mauser*, 6 Pa. Super. Ct. 618; 42 W. N. C. 40; *Richardson v. Dybedahl* (S. D. 1900), 84 N. W. 486; *Gra-*

determine and is not one of law.¹³ Malice may, however, in some cases, exist as a matter of law. So where the defendant, after the dismissal of an action by his immediate vendors against the plaintiff, which involved the latter's right to land and the timber thereon, caused the arrest of the plaintiff on the charge of feloniously cutting and removing timber from such land, it was held that the malice essential to support an action for malicious prosecution existed as a matter of law.¹⁴ Again, malice may exist though the defendant believe the charge he makes to be true, and a failure to so instruct the jury, though no request for such instruction is made, is error.¹⁵

§ 432. Probable cause—What is.—Probable cause, in an action for malicious prosecution which will constitute a defense to such action, is such a state of facts and circumstances as would lead an ordinarily prudent and cautious man, acting reasonably, conscientiously and without prejudice upon the same facts to believe that the person accused is guilty.¹⁶ While from

ham v. Fidelity Mut. L. Asso., 98 Tenn. 48; 37 S. W. 995; Jacobs v. Crum, 62 Tex. 401; San Antonio & A. P. R. Co. v. Griffin, 20 Tex. Civ. App. 91; 48 S. W. 542; Vinal v. Core, 18 W. Va. 1.

¹³ Thompson v. Bell, 11 Tex. Civ. App. 1; 32 S. W. 142. See cases in preceding note.

¹⁴ Proctor Coal Co. v. Moses, 19 Ky. L. Rep. 419; 40 S. W. 681. See Clement v. Major, 8 Colo. App. 86; 44 Pac. 776.

¹⁵ Hawkins v. Snow, 28 N. S. 259.

¹⁶ Wheeler v. Nesbitt, 24 How. (U. S.) 544; Hiltson v. Sims (Ark. 1901), 64 S. W. 219; Clement v. Major, 8 Colo. App. 86; 44 Pac. 766; Knickerbocker Ice Co. v. Scott, 76 Ill. App. 645; Chic. Forge & B. Co. v. Rose, 69 Ill. App. 123; 29 Chic. Leg. News, 239; 2 Chic. L. J. Wkly. 207; Ford v. Buckley, 68 Ill. App. 447; Lacey v. Mitchell, 23 Ind. 67; Moore v. Large, 20 Ky. L. Rep. 409; 46 S. W. 508; Decoux v. Lieux, 33 La. Ann. 392;

Fitzgibbon v. Brown, 43 Me. 169; Wilson v. Bowen, 64 Mich. 133; Ellis v. Simonds, 168 Mass. 316; 47 N. E. 116; Smith v. Munch, 65 Minn. 256; 68 N. W. 19; Nolen v. Kaufman, 70 Mo. App. 651; Wise v. McNichols, 63 Mo. App. 141; Hagelund v. Murphy, 54 Neb. 545; 74 N. W. 956; Fry v. Kaessner, 48 Neb. 133; 66 N. W. 1126; Stricker v. Penn. R. Co., 60 N. J. L. 230; 37 Atl. 776; 7 Am. & Eng. R. Cas. N. S. 758; Hodges v. Richards, 30 App. Div. (N. Y.) 158; 51 N. Y. Supp. 869; Carl v. Ayers, 53 N. Y. 17; Root v. Rose, 6 N. D. 575; 72 N. W. 1022; 2 Chic. L. J. Wkly. 664; Miles v. Salisbury, 21 Ohio Cir. Ct. R. 333; 12 C. C. D. 7; Ash v. Marlow, 20 Ohio St. 119; Hess v. Oregon German Bkg. Co., 31 Oreg. 503; 49 Pac. 803; Ritter v. Ewing, 174 Pa. St. 341; 34 Atl. 584; Graham v. Fidelity Mut. L. Assoc., 98 Tenn. 48; 37 S. W. 995; Barron v. Mason, 31 Vt. 197; Billingsley v. Maas, 93 Wis. 176; 67 N. W. 49; Spear v. Hiles,

want of probable cause an inference of malice may in some cases arise, yet want of probable cause cannot be implied from malice.¹⁷

§ 433. Conviction in criminal prosecution—Evidence of probable cause.—While an acquittal is *prima facie* evidence of want of probable cause, a conviction on the other hand is conclusive evidence that there was probable cause for commencing and continuing the prosecution and will relieve the defendant in an action for malicious prosecution from liability therefor.¹⁸ And this is declared to be the effect of evidence showing a conviction in the criminal action, even though such conviction may be reversed on writ of error.¹⁹ And it is said that where a decision of a court is interposed as conclusive evidence of probable cause, no inquiry can be made into the honesty of such decision.²⁰ But in another case it is held that a conviction in a criminal action raises a presumption of probable cause in an action for malicious prosecution, which may be rebutted by proof of facts depriving the conviction of any probative effect.²¹ Again, an indictment

67 Wis. 350; *Hicks v. Faulkner*, 8 Q. B. Div. 167. In the foregoing case, facts have been considered as showing probable cause. See following cases where on various facts the question of whether probable cause existed or not is considered: *Carl Corper Brew. & M. Co. v. Minwegen & W. Mfg. Co.*, 77 Ill. App. 213; *Lancaster v. Langston*, 18 Ky. L. Rep. 299; 36 S. W. 521; *Call v. Hays*, 169 Mass. 586; 48 N. E. 777; *Eagleton v. Kabrich*, 66 Mo. App. 231; *Hamilton v. Davey*, 28 App. Div. (N. Y.) 457; 51 N. Y. Supp. 88; *Francis v. Tilyon*, 26 App. Div. (N. Y.) 340; 49 N. Y. Supp. 799; *Siefke v. Siefke*, 6 App. Div. (N. Y.) 472; 39 N. Y. Supp. 601; *Durham v. Jones*, 119 N. C. 262; 25 S. E. 873; *Kolka v. Jones*, 6 N. D. 461; 71 N. W. 558; *Britton v. Granger*, 13 Ohio C. C. 281; 7 Ohio Dec. 182; *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278; 27 Pitts. L. J. N. S. 86; 38 W. N. C. 516; *Wuest v.*

American Tobacco Co., 10 S. D. 394; 73 N. W. 903; *Johnston v. Meagher*, 14 Utah, 426; 47 Pac. 861; *Strehlow v. Pettit*, 96 Wis. 22; 71 N. W. 102; *Charlebois v. Surveyor*, 27 Can. S. C. 556.

¹⁷ *Brown v. Smith*, 83 Ill. 291; *Auer v. Mauser*, 6 Pa. Super. Ct. 618; 42 Wkly. N. C. 40; *Graham v. Fidelity Mut. L. Assoc.*, 98 Tenn. 48; 37 S. W. 995.

¹⁸ *Morrow v. Wheeler & W. Mfg. Co.*, 165 Mass. 349; 43 N. E. 105.

¹⁹ *Hartshorne v. Smith*, 104 Ga. 235; 30 S. E. 666. See *Neher v. Dobbs*, 47 Neb. 863; 66 N. W. 864.

²⁰ *Root v. Rose*, 6 N. D. 575; 72 N. W. 1022; 2 Chic. L. J. Wkly. 664.

²¹ *Neher v. Dobbs*, 47 Neb. 863; 66 N. W. 864, where it was held that evidence was admissible showing that the convicting court acted under a misapprehension of the law applicable to the facts of the case.

or the commitment of the accused by an examining magistrate is *prima facie* evidence of probable cause.²²

§ 434. Probable cause—Burden of proof—Evidence.—As we have stated elsewhere an action for malicious prosecution cannot be maintained in the absence of proof of want of probable cause.²³ And want of probable cause cannot be implied.²⁴ It must be expressly and substantially proved and the burden of proof to establish it is upon the plaintiff.²⁵ The question of probable cause in an action of this character, where the facts are not in dispute, is for the court to decide as one of law.²⁶ And a judgment of the court upon this point in favor of the plaintiff is generally considered as conclusive proof of probable cause unless it appear that such judgment was obtained by means of fraud,²⁷ though it may subsequently be reversed by an appellate court. Again, facts tending to show that the plaintiff in an action for malicious prosecution was guilty of the crime charged in the criminal prosecution are declared to be admis-

²² Sharpe v. Johnston, 76 Mo. 660.

²³ Vinson v. Flynn, 64 Ark. 453; 39 L. R. A. 415; 43 S. W. 146; 46 S. W. 186; Petry v. Schillo, 61 Ill. App. 236.

²⁴ Graham v. Fidelity Mut. L. Assoc., 98 Tenn. 48; 37 S. W. 995.

²⁵ Spitzer v. Friedlander, 14 App. D. C. 556; 27 Wash. L. Rep. 368; Epstein v. Berkowski, 64 Ill. App. 498; 1 Chic. L. J. Wkly. 309; Skala v. Bus, 60 Ill. App. 479; Paddock v. Watts, 116 Ind. 146; Lancaster v. Langston, 18 Ky. L. Rep. 299; 36 S. W. 521; Girot v. Graham, 41 La. Ann. 511; Black v. Buckingham, 174 Mass. 102; 54 N. E. 494; Keating v. Pitts, 13 App. Div. (N. Y.) 1; 43 N. Y. Supp. 124; Welch v. Cheek, 115 N. C. 310; 20 S. E. 460; Mitchell v. Logan, 172 Pa. St. 349; 33 Atl. 554; 26 Pitts. L. J. N. S. 392; 37 Wkly. N. C. 398; Graham v. Fidelity Mut. L. Assoc., 98 Tenn. 48; 37 S. W. 995; Hicks v. Faulkner, 8 Q. B. Div. 167. But see Mann v. Cowan, 8 Pa. Super. Ct. 30. In this case it appeared that

the defendant had without process or warrant and without the advice of counsel placed plaintiff in the custody of an officer, and that he was subsequently regularly arrested and discharged, and it was held that the burden of proof was on the defendant to show probable cause.

²⁶ Reisterer v. Lee Sum (C. C. App. 2d C.), 94 Fed. 343; 36 C. C. A. 285; Clement v. Major, 8 Colo. App. 86; 44 Pac. 776; Atchison, T. & S. F. Ry. Co. v. Smith, 44 Kan. 4; 55 Pac. 272; Matlick v. Crump, 62 Mo. App. 21; 1 Mo. App. Rep. 712; Neher v. Dobbs, 47 Neb. 863; 66 N. W. 864; Bell v. Atlantic City R. R. Co. (N. J.), 33 Atl. 211; Shipman v. Learn, 92 Hun (N. Y.), 568; 72 N. Y. St. R. 73; 36 N. Y. Supp. 969; Mitchell v. Logan, 172 Pa. St. 349; 33 Atl. 554; 26 Pitts. L. J. N. S. 392; 37 Wkly. N. C. 398; Gyles v. Jefferis, 5 Pa. Dist. Rep. 129. But see Johnson v. McDaniel, 4 Ohio Leg. News, 53; Billingsley v. Maas, 93 Wis. 176; 67 N. W. 49.

sible, though unknown by the defendant at the time he instituted such prosecution.²⁸

§ 435. Acquittal in criminal prosecution—Evidence of want of probable cause.—Where a criminal prosecution is voluntarily dismissed or the defendant is acquitted, such dismissal or acquittal is not conclusive, but merely prima facie evidence of a want of probable cause,²⁹ which throws upon the defendant in an action for malicious prosecution the burden of showing that probable cause existed for his making the charge.³⁰ So where the grand jury returns an indictment as “not a true bill,” such action will cast upon the defendant the burden of proving that he had probable cause for the prosecution.³¹ But where the complaint in a criminal prosecution is defective and the action is dismissed on that account, such dismissal is not an acquittal for the purpose of commencing an action for malicious prosecution.³² The general rule that the acquittal of the defendant in a criminal action throws upon the defendant in a civil action for malicious prosecution the burden of showing probable cause, is not applicable where the plaintiff’s own testimony shows its existence.³³

§ 436. Measure of damages—Generally.—In an action for malicious prosecution, the plaintiff may recover damages for such injury as is the natural and direct result of the wrongful act, and he is not confined in his recovery to the loss which he has sustained up to the time of the trial, but evidence is also admissible as to any loss which it is reasonably certain will ensue in

²⁷ Crescent City Live Stock Co. v. Butchers Union, etc., Co., 120 U. S. 141; 1 Russell & Winslow’s Syllabus Dig. U. S. Rep. 1001.

²⁸ Thurber v. Eastern Bldg. & L. Assoc., 118 N. C. 129; 24 S. E. 730.

²⁹ Eagleton v. Kabrich, 66 Mo. App. 231; Christian v. Hanna, 58 Mo. App. 37; Britton v. Granger, 13 Ohio C. C. 281; 7 Ohio Dec. 182; Auer v. Mauser, 6 Pa. Super. Ct. 618; 42 Wkly. N. C. 40. But see Philpot v. Lucas, 101 Iowa, 478; 70 N. W. 625.

³⁰ Hidy v. Murray, 101 Iowa, 65; 69 N. W. 1138; Ritter v. Ewing, 174 Pa. St. 341; 34 Atl. 584.

³¹ Gaertner v. Heyl, 179 Pa. St. 391; 36 Atl. 146; 39 Wkly. N. C. 393; 27 Pitts. L. J. N. S. 358.

³² Wakely v. Johnson, 115 Mich. 285; 73 N. W. 238; 4 Det. L. N. 859.

³³ Ruffner v. Hooks, 2 Pa. Super. Ct. 278; 27 Pitts. L. J. N. S. 86; 38 Wkly. N. C. 516.

the future.³⁴ So the jury in estimating the damages may consider such injury to his reputation as the plaintiff may have sustained.³⁵ But a person who though morally guilty has escaped in a criminal action cannot recover damages for injury to his reputation resulting from the unsuccessful prosecution.³⁶ So, also, the plaintiff may recover for injury to his business or loss of employment³⁷ and injury to his credit.³⁸ So where a person was arrested on the charge of embezzlement, in an action for the malicious prosecution of such charge, evidence was admitted of the nature of the plaintiff's business, of the amount of his earnings, as to the difficulty he had in getting employment, as to the tools necessary for him to use therein, and as to the trouble which the taking away of his property, on which he relied to obtain other tools, subjected him to.³⁹ And where the complaint alleges that as a result of the malicious prosecution of the plaintiff he was obliged to surrender a contract with an insurance company, evidence is admissible not only to show the surrender of the contract, but also of conversations between the plaintiff and the company's agent at the time of the surrender as part of the *res gestæ* of the surrender.⁴⁰ But under a general allegation that plaintiff was "greatly injured in his business," evidence to show the forfeiture of earnings under a special contract is not admissible.⁴¹

§ 437. Measure of damages—Generally—Continued.—The jury may also consider the indignity, shame and humiliation

³⁴ *Wheeler v. Hanson*, 161 Mass. 370; 37 N. E. 382.

³⁵ *Clark v. American Dock & Imp. Co.*, 35 Fed. 478; *Lunsford v. Dietrich*, 86 Ala. 250; *Spencer v. Cramblett*, 56 Kan. 794; 44 Pac. 985; *Wheeler v. Hanson*, 161 Mass. 370; 37 N. E. 382; *Minneapolis Threshing-Mach. Co. v. Regier*, 51 Neb. 402; 70 N. W. 934; *Sheldon v. Carpenter*, 4 N. Y. (4 Comst.) 578; *Willard v. Holmes*, 2 Misc. (N. Y.) 303; 21 N. Y. Supp. 998; 51 N. Y. St. R. 569; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717; *Zantzing v. Weightman*, 2

Cranch C. Ct. 478; *Saville v. Roberts*, 1 Ld. Raym. 374.

³⁶ *Sears v. Hathaway*, 12 Cal. 277.

³⁷ *Spencer v. Cramblett*, 56 Kan. 794; 44 Pac. 985; *Willard v. Holmes*, 2 Misc. (N. Y.) 303; 21 N. Y. Supp. 998; 51 N. Y. St. R. 569.

³⁸ *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717.

³⁹ *Wheeler v. Hanson*, 161 Mass. 370; 37 N. E. 382.

⁴⁰ *Oldfather v. Zent*, 21 Ind. App. 307; 52 N. E. 236.

⁴¹ *Oldfather v. Zent*, 14 Ind. App. 89; 41 N. E. 555.

directly resulting from the charge made against a person.⁴² And where a person was arrested he may show, in a civil action for malicious prosecution, the bad condition of the place in which he was confined and any discomfort or deprivation which he may have suffered.⁴³ But the jury should not, in estimating the damages, consider an aggravation of injuries which existed prior to his arrest, where the evidence tends to show negligence or other conduct on his part which may have caused the aggravation.⁴⁴ Expenses of the defense of a person in a criminal prosecution is also an element to be considered in an action by him for malicious prosecution.⁴⁵ And this includes attorneys' fees which have been paid, unless they are obviously excessive, in which case a reasonable sum should be allowed.⁴⁶ The amount of damages to be awarded in such actions is a proper subject for the jury to determine, and whether a verdict is excessive or not is to be determined by the same general principles as in the case of awards in other actions for damages.⁴⁷

⁴² *McWilliams v. Hoban*, 42 Md. 56; *Wheeler v. Hanson*, 161 Mass. 370; 37 N. E. 382; *Willard v. Holmes*, 2 Misc. (N. Y.) 303; 21 N. Y. Supp. 998; 51 N. Y. St. R. 569; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717.

⁴³ *Drumm v. Cessnum*, 61 Kan. 467; 59 Pac. 1078; *Zebbley v. Storey*, 117 Pa. St. 478; 12 Atl. 569; 10 Cent. 828; 21 W. N. C. 68.

⁴⁴ *Fletcher v. Chic. & N. W. R. Co.*, 109 Mich. 363; 67 N. W. 330; 3 Det. L. N. 100.

⁴⁵ *Easton v. Bank of Stockton*, 66 Cal. 123; *Lawrence v. Hagerman*, 56 Ill. 68; 8 Am. Rep. 674; *Ziegler v. Powell*, 54 Ind. 173; *Walker v. Pittman*, 108 Ind. 341; *Sheldon v. Carpenter*, 4 N. Y. 578; *Willard v. Holmes*, 2 Misc. (N. Y.) 303; 21 N. Y. Supp. 998; 51 N. Y. St. R. 569; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Magner v. Renk*, 65 Wis. 364. See *Wilmerton v. Sample*, 39 Ill. App. 60.

⁴⁶ *Drumm v. Cessnum*, 61 Kan. 467; 59 Pac. 1078; *Wheeler v. Han-*

son, 161 Mass. 370; 37 N. E. 382; 42 Am. St. Rep. 408; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717.

⁴⁷ *Chapman v. Dodd*, 10 Minn. 350. See following cases as to amounts awarded under various circumstances: Attempt by landlord to seize property of tenant under distress warrant, though no rent due, and subsequent arrest of latter—\$212.50 not excessive. *Gruel v. Mengler*, 74 Ill. App. 36. Charges involving integrity of man high in financial circles and holding several important fiduciary positions—\$31,700 not excessive. *Willard v. Holmes*, 2 Misc. (N. Y.) 303; 51 N. Y. St. R. 569; 21 N. Y. Supp. 998. Arrest of person without probable cause—\$1,000 not excessive, though greatly in excess of expense incurred and plaintiff was treated with proper care and consideration. *Neys v. Taylor* (S. D.), 81 N. W. 901. Malicious prosecution on charge of assault with intent to murder—wilful perjury—\$3,000 not excessive.

§ 438. Mental suffering.—In an action to recover damages for malicious prosecution, mental suffering is one of the elements for which damages may be assessed, and it may be considered though there be no physical injury or pain in connection therewith.⁴⁸

§ 439. Evidence in mitigation of damages.—Defendant in an action for malicious prosecution may show in mitigation of damages the general bad reputation of the plaintiff.⁴⁹ And evidence in such an action that the plaintiff voluntarily surrendered himself for arrest, but was in fact never really arrested, is admissible in mitigation of damages.⁵⁰ But evidence is not admissible, that the period of the plaintiff's imprisonment might have been shortened if he had availed himself of his right to a preliminary examination, unless it be shown that his object in waiving such examination was to enhance the damages.⁵¹ And the defendant cannot for such purpose show that the plaintiff had instituted a similar suit against him.⁵²

§ 440. Advice of attorney.—As a general rule it is a defense to an action for malicious prosecution that the defendant acted upon the advice of an attorney. But such advice must have been sought of a reputable attorney and not a co-conspirator and must have been asked for in good faith, and the defendant must have disclosed to such attorney all the facts within his knowledge, and must have acted in good faith upon such advice.⁵³ So

Jonec v. Jenkins, 3 Wash. 17; 27 Pac. 1022. Arrest and confinement in hotel for fifteen hours—no injury to business or reputation—\$2,500 excessive. *O'Boyle v. Shivley*, 65 Ill. App. 278. In jail fifteen hours—money damages nominal—\$750 excessive—should remit \$250. *Myers v. Litts* (C. P. Pa.), 3 Laok. L. News, 363.

⁴⁸ *Lunsford v. Dietrich*, 86 Ala. 250; *Shatto v. Crocker*, 87 Cal. 629; *Tisdale v. Major*, 100 Iowa, 1; 75 N. W. 663; *Parkhurst v. Mastellar*, 57 Iowa, 474; *Fisher v. Hamilton*, 49 Ind. 341; *Friel v. Plumer* (N. H.),

43 Atl. 618; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717; *Vinal v. Core*, 18 W. Va. 1; *Rowland v. Samuel*, 11 Q. B. 39.

⁴⁹ *Rosenkrantz v. Barker*, 115 Ill. 333; *Fitzgibbon v. Brown*, 43 Me. 169; *Bostwick v. Rutherford*, 4 Hawks L. (N. C.) 83; *Britton v. Granger*, 13 Ohio C. C. 281; 7 Ohio Dec. 182.

⁵⁰ *Chatfield v. Bunnell*, 69 Conn. 511; 37 Atl. 1074.

⁵¹ *King v. Colvin*, 11 R. I. 582.

⁵² *Bliss v. Franklin*, 13 Allen (Mass.), 244.

⁵³ *O'Neal v. McKinna*, 116 Ala. 606;

advice of an attorney is no defense to such an action, where it appears that defendant had the plaintiff rearrested on same day after his discharge in habeas corpus proceedings, and did not communicate the fact of such discharge to the attorney.⁵⁴ The defendant, however, in such cases is not necessarily relieved from liability by stating to his attorney all the facts which he actually knew, but the rule extends to those facts which he should have known by reasonable diligence.⁵⁵ But where the question of probable cause is for the jury, advice of counsel that plaintiff is guilty, is declared not to be a complete defense to an action for malicious prosecution, but it is to be considered by the jury in determining whether or not probable cause existed, and also upon the question of malice, for which smart money may be given.⁵⁶ The good or bad faith of the counsel, however, in giving the advice is not an element to be considered in determining the merits of such a defense,⁵⁷ unless it appear that such attorney was a

22 So. 905; *Holliday v. Holliday*, 122 Cal. 26; 55 Pac. 703, aff'd in banc 53 Pac. 42; *Seabridge v. McAdam*, 119 Cal. 460; 51 Pac. 691; *Struby-Estabrook Mercantile Co. v. Keyes*, 9 Colo. App. 190; 48 Pac. 663; *Clement v. Major*, 8 Colo. App. 86; 44 Pac. 776; *Gruel v. Mengler*, 74 Ill. App. 36; *Chicago Forge & P. Co. v. Rose*, 69 Ill. App. 123; 29 Chic. Leg. News, 239; 2 Chic. L. J. Wkly. 207; *Paddock v. Watts*, 116 Ind. 146; *Bowman v. Western Fur Mfg. Co.*, 96 Iowa, 188; 64 N. W. 775; *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785; 48 Pac. 31; *Mesker v. McCourt*, 19 Ky. L. Rep. 1897; 44 S. W. 975; *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 1790; 50 S. W. 40; *Womack v. Fudiaker*, 47 La. Ann. 33; 16 So. 645; *Pullen v. Glidden*, 68 Me. 566; *Stone v. Swift*, 4 Pick. (Mass.) 389; *Pawlowski v. Jenks*, 115 Mich. 275; 73 N. W. 238; 4 Det. L. N. 874; *Alexander v. Harrison*, 38 Mo. 258; *Brown v. McBride*, 24 Misc. (N. Y.) 235; 52 N. Y. Supp. 620; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717;

Johnson v. McDaniel (C. P.), 4 Ohio Leg. News, 53; *Hess v. Oregon German Bkg. Co.*, 31 Oreg. 503; 49 Pac. 803; *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Myers v. Litts* (C. P. Pa.), 3 Lack. L. News, 363; *Goldstein v. Foulkes*, 19 R. I. —; *Ravenga v. Mackintosh*, 2 B. & C. 693.

⁵⁴ *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374.

⁵⁵ *Seabridge v. McAdam*, 119 Cal. 460; 51 Pac. 691; *Chic. Forge & B. Co. v. Rose*, 69 Ill. App. 123; 29 Chic. L. News, 239; 2 Chic. L. J. Wkly. 207; *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785; 48 Pac. 31; *Anderson v. Columbia Finance & T. Co.*, 20 Ky. L. Rep. 1790; 50 S. W. 40; *St. Denis v. Shultz*, 25 Ont. App. 131. But see *Holliday v. Holliday*, 122 Cal. 26; 55 Pac. 703; *Hess v. Oregon German Bkg. Co.*, 31 Oreg. 503; 49 Pac. 803.

⁵⁶ *Brown v. McBride*, 24 Misc. (N. Y.) 235; 52 N. Y. Supp. 620.

⁵⁷ *Seabridge v. McAdam*, 119 Cal. 460; 51 Pac. 691; *Sandell v. Sherman*, 107 Cal. 391.

co-conspirator aiding others to extort money for personal gain.⁵⁸ Again, where after a statement of facts made by a client to his attorney, which do not constitute probable cause for an arrest, the latter personally swears to the information upon which a warrant of arrest is issued, he will be personally liable to the person arrested, and his professional privilege will not shield him.⁵⁹

§ 441. Advice of prosecuting attorney, magistrate, etc.— The fact that a criminal prosecution was instituted upon the advice of the prosecuting attorney is admissible in evidence for the purpose of exoneration in an action for malicious prosecution.⁶⁰ But in order that the defendant may be exonerated by such advice, he is bound to state the facts in connection therewith to the same extent as if he were seeking the advice of his personal attorney, and to have acted upon such advice in good faith.⁶¹ And the facts that the defendant stated all the facts and circumstances of the case to a magistrate, that the latter declared that the accused was guilty if the statement was true, and that the prosecution was instituted upon such assurance, are admissible in evidence on the question of malice and in mitigation of damages.⁶²

§ 442. Exemplary damages.—The plaintiff in an action for malicious prosecution is not limited in the damages which he may recover to those which are compensatory for the injury sustained, but may, in those cases where the defendant acted wantonly, recklessly or with actual malice, recover exemplary damages.⁶³ So evidence is admissible in such an action for the

⁵⁸ *Clement v. Major*, 8 Colo. App. 86; 44 Pac. 776.

⁵⁹ *Whitney v. New York Casualty Ins. Assoc.*, 27 App. Div. (N. Y.) 320; 50 N. Y. Supp. 227.

⁶⁰ *Maffit v. Chic. R. I. & P. R. Co.*, 57 Kan. 912; 48 Pac. 1116; *Wakely v. Johnson*, 115 Mich. 285; 73 N. W. 238; 4 Det. L. N. 859; *Rogers v. Mullen* (Tex. Civ. App. 1900), 63 S. W. 897; *Peterson v. Reisdorph*, 49 Neb. 529; 68 N. W. 943.

⁶¹ See sec. 440 herein. See *Struby-*

Estabrook Mercantile Co. v. Keys, 9 Colo. App. 190; 48 Pac. 663; *Rogers v. Mullen* (Tex. Civ. App. 1900), 63 S. W. 897.

⁶² *Hirsch v. Feeney*, 83 Ill. 350; *White v. Tucker*, 16 Ohio St. 468; *Sisk v. Hurst*, 1 W. Va. 53.

⁶³ *Brown v. Master*, 111 Ala. 397; 20 So. 344; *Stewart v. Cole*, 46 Ala. 646; *Foster v. Pitts*, 63 Ark. 387; 38 S. W. 1114; *Coleman v. Allen*, 79 Ga. 637; *Lawrence v. Hagerman*, 56 Ill. 68; 8 Am. Rep. 874; *Wanzer v.*

purpose of showing the motive of the defendant in causing the arrest of the plaintiff.⁶⁴ And evidence of a subsequent arrest is admissible as showing a vindictive spirit on the part of the defendant.⁶⁵ In determining the amount of exemplary damages which may be awarded, the jury may consider the respective social positions of the parties to the action.⁶⁶ And evidence of the wealth or financial ability of the defendant in such an action is admissible.⁶⁷ But though the plaintiff may be entitled to exemplary damages, it is improper to instruct the jury that they are to assess such damages in such sum as in their judgment plaintiffs are entitled to.⁶⁸

§ 443. Wealth of defendant—Evidence—Generally—In an action to recover for a malicious prosecution where the facts of the case may justify an award of punitive damages, evidence of the wealth of the defendant is admissible.⁶⁹ And where a person has been arrested for a wilful wrong, he may in an action for malicious prosecution give evidence for the purpose of negating wilfulness on his part.⁷⁰ But statements of a local attorney of a railroad company, are not admissible in an action against the company for malicious prosecution, as tending to show malice on the part of the company, where such attorney was not authorized to speak or act for the company.⁷¹ And where a village

Bright, 52 Ill. 35; Parkhurst v. Masteller, 57 Iowa, 474; Schippel v. Norton, 38 Kan. 567; McWilliams v. Hoban, 42 Md. 56; Frank v. Curtis, 58 Mo. App. 349; McGarry v. Mo. Pac. R. Co., 36 Mo. App. 340; Brown v. McBride, 24 Misc. (N. Y.) 235; 52 N. Y. Supp. 620; Fuller v. Redding, 16 Misc. (N. Y.) 634; 39 N. Y. Supp. 109; Johnson v. McDaniel, 5 Ohio S. & C. P. Dec. 717; Orr v. Seiler, 1 Penny. (Penn.) 445; Jacobs v. Crum, 62 Tex. 401; Shear v. Hiles, 67 Wis. 350; Winn v. Peckham, 42 Wis. 493. See Hawkins v. Snow, 29 N. S. 444.

⁶⁴ Fuller v. Redding, 16 Misc. (N. Y.) 634; 39 N. Y. Supp. 109.

⁶⁵ Miller v. Potter, 59 Ill. App. 125.

⁶⁶ Johnson v. McDaniel (C. P.), 4 Ohio Leg. News, 53.

⁶⁷ Eagleton v. Kabrich, 66 Mo. App. 231.

⁶⁸ Foster v. Pitts, 63 Ark. 387; 38 S. W. 1114.

⁶⁹ Atkinson v. Vancleave (Ind. App. 1900), 57 N. E. 731; Whitfield v. Westbrook, 40 Miss. 311. See Eggett v. Allen, 106 Wis. 633; 82 N. W. 556. See sec. 442 herein.

⁷⁰ Parker v. Parker, 102 Iowa, 500; 71 N. W. 421. In this case plaintiff had been arrested for a wilful trespass in cutting down and removing timber, and he was permitted to show in an action for malicious prosecution that his object was to make the land available as pasture land.

⁷¹ Fletcher v. Chic. & N. W. R. Co., 109 Mich. 363; 67 N. W. 330; 3 Det. L. N. 100.

trustee procured the arrest of a person for the violation of an ordinance forbidding the riding of a bicycle on a sidewalk, it was declared in an action against such trustee for false imprisonment and malicious prosecution that evidence showing that the road was obstructed where plaintiff turned on to the sidewalk was inadmissible as showing defendant's motive.⁷² Again, in an action based on the arrest of a woman for purchasing goods on the credit of her husband, pending her appeal from a decree of divorce against her, evidence showing that goods were purchased by her from other dealers is not admissible for the purpose of showing probable cause.⁷³ And where the arrest of a person is procured on the charge of wilful trespass on the land of another, in an action for malicious prosecution based on such arrest, the defendant should not be permitted to show that certain persons had said that plaintiff was damaging his property to a certain specified amount.⁷⁴

§ 444. Malicious prosecution of civil suit—Attachment.— Damages may also be recovered for the malicious prosecution of a civil suit, and in an action to recover therefor the jury may compensate the plaintiff for such mental, physical and financial loss as has directly and naturally resulted.⁷⁵ And as a ground for special damage he may show his peculiar situation and circumstances at the time the suit was brought.⁷⁶ And for the purpose of showing malice, evidence is admissible that the defendant has brought several suits against the plaintiff upon the same groundless claim.⁷⁷ So for the prosecution of a civil suit, maliciously and without reasonable or probable cause, which is terminated in favor of the defendant, the latter may recover from the plaintiff in an action for the damages sustained in the defense of the original suit, in excess of the taxable costs obtained by him.⁷⁸ And where a person was indebted to another

⁷² Fuller v. Redding, 13 App. Div. (N. Y.) 61; 43 N. Y. Supp. 96.

⁷³ Rosenfeld v. Stix, 67 Mo. App. 582.

⁷⁴ Noble v. White, 108 Iowa, 352; 72 N. W. 556.

⁷⁵ Nichols v. Bronson, 2 Day, (Conn.) 211; Friel v. Plumer (N. H.),

43 Atl. 618; Thomas v. Rouse, 2 Brev. (S. C.) 75; Churchill v. Sigers, 3 El. & Bl. 929.

⁷⁶ Nichols v. Bronson, 2 Day, (Conn.) 211.

⁷⁷ Magner v. Renk, 65 Wis. 164.

⁷⁸ Closson v. Staples, 42 Vt. 209; 1 Am. Rep. 316.

in the sum of fifteen dollars and the latter maliciously and without probable cause brought an attachment suit for \$2,030 against him, it was held that he could recover for the injury resulting from the bringing of such suit.⁷⁹ And in such an action evidence showing injury to the credit of the plaintiff is admissible.⁸⁰ And there may be a recovery for injury to the business of a person against whom an attachment is maliciously procured, and for this purpose a witness may testify as to what, from his own knowledge, was the effect upon the business and credit of the plaintiff.⁸¹ But evidence is not admissible as to the profits usually made in the same kind of business in the plaintiff's neighborhood.⁸² And where the plaintiff claims that he has been injured in his business as the result of a malicious attachment, in order to authorize a recovery therefor the evidence must not only show a loss in his business, but must also show that it was attributable to the attachment, and in the absence of such evidence it is not proper for the plaintiff to show the course of his business from the time of its inception down to the time he disposed of it, covering a period of several years before and several months subsequent to the attachment.⁸³ And where the delay of a firm to forward goods purchased is not shown to have been the result of an attachment, evidence of such fact is not admissible.⁸⁴ But where as the result of an action maliciously instituted by the lessor of property, the lessee is ejected therefrom, the latter in an action to recover therefor is entitled to damages for the value of the use of the premises to him during the time he was out of possession and also for any permanent injury to the leasehold due to the lack of ordinary care by the lessor while he was in possession of the same.⁸⁵ And again, in an action for maliciously issuing a writ of attachment on a crop of potatoes which were not dug until after the release of the levy, it was held that damages were recoverable,

⁷⁹ *Clark v. Nordholt*, 121 Cal. 26; 53 Pac. 400. See *Weaver v. Page*, 6 Cal. 681.

⁸⁰ *Brewer v. Jacobs*, 22 Fed. 217; *Tynberg v. Cohen* (Tex. Civ. App.), 24 S. W. 314. See *Fine v. Navarre* (Mich.), 62 N. W. 142; *Sonneborn v. Stewart*, 2 Woods, 599.

⁸¹ *O'Grady v. Julian*, 34 Ala. 88.

⁸² *O'Grady v. Julian*, 34 Ala. 88.

⁸³ *Zinn v. Rice*, 154 Mass. 1; 12 L. R. A. 288; 37 N. E. 747.

⁸⁴ *Tynberg v. Cohen* (Tex. Civ. App.), 24 S. W. 314.

⁸⁵ *Moffatt v. Fisher*, 47 Iowa, 473.

the measure of such damages being the difference between the value of the potatoes in the ground at the time of the levy, and its value at the time of release thereof.⁸⁵

§ 445. Malicious attachment—Where business unlawful no recovery for injury to.—Though there may be a recovery for any loss which a person has sustained in his credit, business or reputation, owing to the wrongful suing out of an attachment, yet if the business in which a person, against whom such an attachment is issued, is engaged, is carried on in violation of the law, such as the business of keeping a gambling house, there can be no recovery for injury thereto.⁸⁷

§ 446. Maliciously causing person to lose employment.—Where a person maliciously procures the discharge of another from his position or employment, he will be liable to such person for the damages sustained as a direct result of such malicious act, and such damages will include the time lost by the person discharged, and it is declared that he need not look for employment in other localities.⁸⁸

§ 447. Pleading.—A complaint in an action for malicious prosecution should allege that the prosecution was malicious and without probable cause.⁸⁹ And it should set forth the alleged malicious conduct of the defendant, it not being sufficient to merely allege that the defendant acted maliciously.⁹⁰ And likewise facts showing want of probable cause should be alleged. And want of probable cause was held to be sufficiently set out in the complaint where it alleged that under a misapprehension of the law applicable to the facts of the case, which were known to the complainant and which established the innocence of the defendant, the latter was convicted, and

⁸⁵ *Pratt v. Hampe* (Iowa, 1901), 86 N. W. 292.

⁸⁷ *Kauffman v. Babcock*, 67 Tex. 241; 2 S. W. 878.

⁸⁸ *Connell v. Stalker*, 20 Misc. (N. Y.) 423; 45 N. Y. Supp. 1048, *aff'd* 21 Misc. (N. Y.) 609; 48 N. Y. Supp. 77.

⁸⁹ *Hilbrant v. Donaldson*, 69 Mo.

App. 92; *Ely v. Davis*, 111 N. C. 24; 15 S. E. 878; *Cousins v. Swords*, 14 App. Div. (N. Y.) 338; 43 N. Y. Supp. 907; *Palmer v. Palmer*, 8 App. Div. (N. Y.) 331; 40 N. Y. Supp. 829.

⁹⁰ *Tavenner v. Morehead*, 41 W. Va. 116; 23 S. E. 673.

that such conviction was reversed on appeal.⁹¹ Again, in an action to recover damages based on an alleged conspiracy to injure and oppress the plaintiff, he may in his complaint properly allege injury and suffering of his wife, and injury to his own feelings, resulting from acts done in pursuance of the conspiracy.⁹²

⁹¹ *Neher v. Dobbs*, 47 Neb. 863; 66 4th C.), 76 Fed. 699; 42 U. S. App. N. W. 864.

⁹² *Gaillard v. Cantini* (C. C. App.

183; 22 C. C. A. 498.

CHAPTER XIX.

FALSE ARREST AND IMPRISONMENT.

- § 448. False arrest and imprisonment—Measure of damages.
 449. Same subject continued.
 450. Measure of damages—Generally—Excessive damages.
 451. Mental suffering.

452. Punitive damages.
 453. Same subject continued.
 454. Mitigation of damages.
 455. Evidence—Generally.
 456. Pleading.

§ 448. False arrest and imprisonment—Measure of damages.—In an action to recover damages for false arrest and imprisonment, the plaintiff is entitled to recover for such injury as he has sustained as the result of the wrongful act. The question of motive does not affect his recovery of compensatory damages, but the plaintiff upon proof of the false arrest and imprisonment is entitled to compensation for the injury ensuing therefrom, and his recovery may include damages for deprivation of liberty, physical pain and suffering, mental suffering, humiliation and indignity of the act, loss of time from labor or in business, expenses of procuring release, for any physical injury due to imprisonment in an unhealthy or unwholesome place, and for any permanent injury.¹ So it is proper to instruct the jury that

¹ *Bryan v. Congdon* (C. C. App. 8th C.), 57 U. S. App. 505; 86 Fed. 221; 29 C. C. A. 670; *Clarke v. American Dock & I. Co.*, 35 Fed. 478; *Lavender v. Hudgens*, 32 Ark. 763; *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Blanchard v. Burbank*, 16 Ill. App. 375; *Stewart v. Maddox*, 63 Ind. 51; *Lytton v. Baird*, 95 Ind. 349; *Yount v. Carney*, 91 Iowa, 559; *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593; *Wheeler & W. Manufg. Co. v. Boyce*, 36 Kan. 350; *Miller v. Ashcraft*, 98 Ky. 314; 32 S. W. 1085; 17 Ky. L. Rep. 894; *Wentz v. Bernhardt*, 37 La. Ann. 636; *Sillphen v.*

Ulmer, 88 Me. 211; 33 Atl. 980; *Ross v. Leggett*, 61 Mich. 445; *Josselyn v. McAllister*, 22 Mich. 300; *Page v. Mitchell*, 13 Mich. 63; *Bacon v. Bacon*, 76 Miss. 458; 24 So. 968; *Hewlett v. George*, 68 Miss. 703; 13 L. R. A. 682; 9 So. 885; *Cone v. Central R. Co.*, 62 N. J. L. 99; 40 Atl. 780; 12 Am. & Eng. R. Cas. N. S. 278; 4 Am. Neg. Rep. 659; *Toomey v. Del. L. & W. R. R. Co.*, 4 Misc. (N. Y.) 392; 53 N. Y. St. R. 967; 24 N. Y. Supp. 108; *Ball v. Horrigan*, 47 N. Y. St. R. 384; *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 995; *Duggan v. Baltimore & O. R. R. Co.*, 159 Pa. St.

defendant's motives in making an arrest cannot affect the plaintiff's right to recover for physical inconvenience, loss of time, physical and mental suffering, humiliation of mind and expenses incurred.² And the jury in estimating the damages should consider the jeopardy of the person arrested, his age and physical condition when arrested, and the distance he was obliged to walk, together with his physical and mental pain and suffering.³ And the taking of a man through a crowded thoroughfare causing him humiliation may be considered.⁴ So for humiliation and insult and subjection to great indignity, the jury may properly give compensation.⁵

§ 449. Same subject continued.—In estimating the damages in such an action, the jury may also properly consider the discomforts experienced while confined in jail, due to the unclean or unhealthy condition of the same, or to other causes,⁶ and suffering due to the absence of the proper necessities and comforts of life, such as food, bed, or sufficient heat may be considered.⁷ So in an action for false imprisonment by confinement in an industrial school, evidence is admissible as to the restraints imposed, the treatment received and the sleeping facilities afforded.⁸ Again, in the case of the wrongful imprisonment

248; 28 Atl. 182; 33 W. N. C. 381; 25 Pitts. L. J. N. S. 13; Buchanan v. Goettman (C. P.), 29 Pitts. L. J. N. S. 302; Abrahams v. Cooper, 81 Pa. St. 232; Miller v. Grice, 2 Rich. (S. C.) 27; McQueen v. Hale, 1 Coldw. (Tenn.) 212; Cabell v. Arnold, 86 Tex. 102; 22 L. R. A. 87; Karner v. Stump, 12 Tex. Civ. App. 461; 34 S. W. 656; Coffin v. Varilla, 8 Tex. Civ. App. 417; Vanderberg v. Connolly, 18 Utah, 112; 54 Pac. 1097; Bolton v. Vellines, 94 Va. 393; 26 S. E. 847; 3 Va. L. Reg. 120; Parsons v. Harper, 16 Gratt. (Va.) 64; Ogg v. Murdock, 25 W. Va. 139; Fenelon v. Butts, 53 Wis. 344; Plath v. Brannsdorff, 40 Wis. 107; Bonesteel v. Bonesteel, 30 Wis. 511; Jay v. Almy, 1 Woodb. & M. 262. See sec. 451 herein as to mental suffering.

² Karner v. Stump, 12 Tex. Civ. App. 461; 34 S. W. 656; Miller v. Grice, 2 Rich. (S. C.) 27; McQueen v. Hale, 1 Coldw. (Tenn.) 212; Parsons v. Harper, 16 Gratt. (Va.) 64.

³ Ahern v. Collins, 39 Mo. 145.

⁴ Toomey v. Del. L. & W. R. Co., 4 Misc. (N. Y.) 392; 53 N. Y. St. R. 567; 24 N. Y. Supp. 108.

⁵ Ball v. Horrigan, 47 N. Y. St. R. 384; 19 N. Y. Supp. 913; Limbeck v. Gerry, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 96.

⁶ San Antonio & A. P. R. Co. v. Griffin, 20 Tex. Civ. App. 91; 48 S. W. 542; Fenelon v. Butts, 53 Wis. 344.

⁷ Abrahams v. Cooper, 81 Pa. St. 232.

⁸ Scott v. Flowers, 60 Neb. 675; 80 N. W. 81.

of a passenger, he may recover from the railroad company responsible therefor, for his physical and mental suffering, injury to feelings, loss of time, interruption in business and actual expenses incurred.⁹ So, also, may a similar recovery be had for wrongful confinement in an insane asylum.¹⁰ But the loss of a job of work or employment because of being detained beyond a certain hour is not an element to be considered by the jury.¹¹ And where plaintiff alleged that he was hindered from transacting his business and from engaging in business which he otherwise could and would have engaged in, it was held that he could not, under such allegations, give evidence that while under bonds not to go out of the county he could twice have done so in his business as claim collector.¹² And if at the time of the arrest or during the imprisonment of the plaintiff, the defendant took, injured or destroyed property of the plaintiff, the latter may recover for such loss, where he alleges it in his complaint.¹³ Again, where a person has been arrested, it is the duty of whoever makes the arrest to bring such person within a reasonable time and without unnecessary delay before a magistrate, who shall deal with the case as the facts may require, and though an arrest may be lawful, yet for any undue and unnecessary delay in so acting, the persons responsible therefor may be liable in damages.¹⁴

§ 450. Measure of damages—Generally—Excessive damages.—In estimating the damages recoverable in an action for a wrongful arrest and imprisonment, the malice or bad motive of the person responsible therefor is an element to be considered. So, also, the jury may consider circumstances of aggravation in making the arrest, or in the imprisonment, the place and dura-

⁹ *Duggan v. Baltimore & O. R. Co.*, 159 Pa. St. 248; 28 Atl. 182; 33 W. N. C. 381; 25 Pitts. L. J. N. S. 13.

¹⁰ *Hewlett v. George*, 68 Miss. 703; 9 So. 885.

¹¹ *Carpenter v. Penn. R. Co.*, 13 App. Div. (N. Y.) 328; 43 N. Y. Supp. 208; *Hoey v. Felton*, 11 C. B. (N. S.) 142. See *Thompson v. Ellsworth*, 39 Mich. 7.

¹² *Fuller v. Bowker*, 11 Mich. 204.

¹³ *Blanchard v. Burbank*, 16 Ill. App. 375.

¹⁴ *Kirk v. Garrett*, 84 Md. 383; 35 Atl. 1089. See in this connection *Potter v. Swindle*, 77 Ga. 419; *Diers v. Mallon*, 46 Neb. 121; 64 N. W. 722; *Gibbs v. Randlett*, 58 N. H. 407; *Pastor v. Regan*, 9 Misc. (N. Y.) 547; *Burk v. Howley*, 179 Pa. St. 589; 36 Atl. 327; 39 W. N. C. 473; 27 Pitts. L. J. N. S. 266.

tion of imprisonment, and the standing, financially or socially, of the person arrested. The length of the imprisonment may be brief, but the circumstances accompanying the arrest as of insult or false and malicious accusation of a criminal offense or malicious imprisonment, either with criminals or in a foul or loathsome place, may be circumstances which justify an award of more than actual damages.¹³

¹³ See the following cases where these various elements have been considered: Woman—arrested on false charge of forcible entry into house of one of defendants—confined with disorderly women—required to give surety of the peace without trial—arrest without probable cause and to keep plaintiff away from house until defendant could remove plaintiff's things therefrom and tear house down—\$4,000 not excessive. *Clarke v. American Dock & Improvement Co.*, 35 Fed. 478. Arrest and detention from Friday until Monday—\$3,500 not excessive. *Cuthbert v. Galloway*, 35 Fed. 466. Evidence of passion or prejudice—prosecution conducted with much bitterness—some of property recovered, but fact withheld from court and jury—\$2,000 not excessive. *Williams v. Casebeer*, 126 Cal. 77; 58 Pac. 380. Woman—illegally arrested and detained three days and nights in detective agency—chained to bed one night—\$1,271 not excessive. *Pinkerton v. Snyder*, 87 Ill. App. 76. Arrest by private person on charge of shoplifting—not guilty—allowed to go only after she had paid five times the price of goods she was accused of stealing—\$2,500 not excessive. *Siegel-C. & Co. v. Connor*, 70 Ill. App. 116; 2 Chic. L. J. Wkly. 271. Young man of high personal character, excellent family and social connections—imprisonment rigorous and loathsome and health

seriously and permanently impaired—imprisoned eight weeks—\$40,000 not excessive. *Mexican C. R. Co., v. Gehr*, 66 Ill. App. 173; 12 Nat. Corp. Rep. 651; 1 Chic. L. J. Wkly. 419. In custody eight days—forty dollars expended to secure release—\$100 not excessive. *Johnson v. Bouton*, 35 Neb. 898; 53 N. W. 995. Elderly gentleman charged with attempting to steal ride on train—\$500 not excessive. *Toomey v. Del. L. & W. R. R. Co.*, 53 N. Y. St. R. 567; 24 N. Y. Supp. 108. Unlawful arrest—only locked up an hour and a half—\$1,000 not excessive. *Thorp v. Carvalho*, 14 Misc. (N. Y.) 554; 70 N. Y. St. R. 760; 36 N. Y. Supp. 1. Arrest on charge of horse stealing—confined in jail twelve hours—\$400 not excessive. *Karner v. Stump*, 12 Tex. Civ. App. 461; 34 S. W. 656. Arrest of police captain for wearing uniform and badge which he did under belief that he had right to do so until his successor qualified—carried through streets in van—searched—and confined in prison until released by habeas corpus—\$1,000 not excessive. *Bolton v. Vellines*, 94 Va. 393; 26 S. E. 847; 3 Va. L. Reg. 120. Woman accused of shoplifting—required to go to office, where she voluntarily remained some time—mistake—innocent—\$1,000 excessive. *The Fair v. Himmel*, 50 Ill. App. 215. No humiliation, expense or inconvenience—restrained of liberty only a few minutes—\$500 excessive.

§ 451. Mental suffering.—In case of wrongful arrest or false imprisonment, damages for mental suffering, wounded pride, indignity and humiliation are recoverable.¹⁶ So where a wrongful arrest is made in a public place and in the presence of a large number of persons, damages for mental suffering may be properly allowed.¹⁷ And the fact that the jail in which the plaintiff was confined was in a filthy condition, is admissible in evidence upon the question of his mental suffering, as is also any fact showing the circumstances of his family, or that he was deprived of certain comforts or necessities.¹⁸ But in an action for false imprisonment it is decided that evidence is not admissible as to the amount of plaintiff's damages per day as a result of mental suffering; all the facts should be submitted to the jury and it is for them to determine the damages recoverable.¹⁹

§ 452. Punitive damages.—The motive of the defendant is properly considered in determining whether punitive damages shall be awarded. If there appears no evidence of bad motive, malice, or wanton, or oppressive conduct, such damages should not be given, and the plaintiff is properly confined to the actual damages sustained, but if it appear that the false arrest

Miller v. Ashcraft, 98 Ky. 314; 32 S. W. 1085; 17 Ky. L. Rep. 894. Arrested for making threats—ordered to give bonds for \$500—but refused to though he could have easily done so, and went to jail—damage from loss of time merely nominal—\$288 excessive. *Yost v. Tracy*, 13 Utah, 431; 45 Pac. 346. No actual confinement—after being in custody only an hour released upon making a small deposit and promising to appear in court when no examination was made and there was no objection to discharge—\$3,500 grossly excessive and reduced to \$1,000. *Billingsley v. Maus*, 93 Wis. 176; 67 N. W. 49.

¹⁶ *Gibney v. Lewis*, 68 Conn. 392; 36 Atl. 799; *Stewart v. Maddox*, 63 Ind. 51; *Yount v. Carney* (Iowa), 60 N. W. 114; *Morgan v. Curley*, 142

Mass. 107; *Ross v. Leggett*, 61 Mich. 445; *Landrum v. Wells* (Tex. C. A.), 26 S. W. 1001; *Hays v. Creary*, 60 Tex. 445; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Fenelon v. Butts*, 53 Wis. 344.

¹⁷ *Yount v. Carney* (Iowa), 60 N. W. 114.

¹⁸ *Fenelon v. Butts*, 53 Wis. 344; *Clark v. American Dock, etc., Co.*, 35 Fed. 478; *McCall v. McDowell, Deady*, 233; *Abraham v. Cooper*, 81 Pa. St. 232. It is held, however, that if the plaintiff is subjected to annoyances, inconveniences, discomforts or any other wrongful act which the defendant did not in any way authorize, evidence thereof is not admissible. *Ocean Steamship Co. v. Williams*, 69 Ga. 251.

¹⁹ *Landrum v. Wells* (Tex. C. A.), 26 S. W. 1001.

and imprisonment was actuated by malice or oppression, or wantonness on the part of the defendant, then such facts may properly be considered by the jury and will justify an award of exemplary or punitive damages.²⁰ But the allowance of such damages is in the discretion of the jury.²¹ So for the purpose of showing malice and as bearing upon the question of exemplary damages, the jury may properly consider the damage done by defendant to household furniture of the plaintiff shortly after his arrest.²² And where an arrest is made under circumstances indicating a wanton disregard of the rights of the person arrested, punitive damages may be awarded, though there be no actual malice.²³ And gross negligence or insult may be sufficiently aggravating to justify the award of such damages.²⁴

§ 453. Same subject continued.—It is not necessary to show malice in the ordinary sense to entitle one to recover punitive damages in an action for false imprisonment, but legal malice is sufficient.²⁵ Though an arrest may not be prompted by anger, bad motive or vindictiveness, yet an improper motive may be inferred from a wrongful act, as in the case of an arrest based on no reasonable ground, and such a motive will constitute malice in

²⁰ *McCall v. McDowell*, 1 Abb. (N. S.) 212; *Roza v. Smith* (D. C. N. D. Cal.), 65 Fed. 592; *Thorpe v. Wray*, 68 Ga. 359; *Little v. Munson*, 54 Ill. App. 437; *Pearce v. Needham*, 37 Ill. App. 90; *Ross v. Leggett*, 61 Mich. 445; 28 N. W. 695; 1 Am. St. Rep. 608; *Fellows v. Goodman*, 49 Mo. 62; *Craven v. Bloomingdale*, 64 N. Y. St. R. 262; 30 Misc. 650, *aff'd* 54 App. Div. (N. Y.) 266; 66 N. Y. St. R. 525; *Kolzen v. Broadway & S. Ave. R. Co.*, 48 N. Y. St. R. 656; 1 Misc. 148; 20 N. Y. Supp. 700; *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 95; *Lewis v. Clegg*, 120 N. C. 292; 26 S. E. 772; *Buchanan v. Goettmann* (C. P. Pa.), 29 Pitts. L. J. N. S. 302; *Balton v. Vel-lines*, 94 Va. 393; 26 S. E. 847; 3 Va. Law Reg. 120; *Parsons v. Harper*, 16

Gratt. (Va.) 64; *Grace v. Dempsey*, 75 Wis. 313; *Coddington v. Lloyd*, 8 A. & El. 449; *Warwick v. Frouke*, 12 M. & W. 507.

²¹ *Craven v. Bloomingdale*, 54 App. Div. (N. Y.) 266; 66 N. Y. Supp. 525, *aff'g* 64 N. Y. Supp. 262.

²² *Hendricks v. Haskins*, 114 Mich. 291; 72 N. W. 152; 4 Det. L. N. 511; 30 Chic. Leg. News, 81.

²³ *Kolzen v. Broadway & S. Ave. R. Co.*, 48 N. Y. St. R. 656; 1 Misc. 148; 20 N. Y. Supp. 700; *Pearce v. Needham*, 37 Ill. App. 90.

²⁴ *Lewis v. Clegg*, 120 N. C. 292; 26 S. E. 772.

²⁵ *Craven v. Bloomingdale*, 64 N. Y. St. R. 262; 30 Misc. 650, *aff'd* 54 App. Div. (N. Y.) 266; 66 N. Y. St. R. 525.

law which may be rebutted by evidence.²⁸ But where an arrest is made on suspicion and is deemed to be warranted by the circumstances, and is made in good faith, and there is no evidence showing any malice, ill-will or wanton disregard of rights, there is no ground for an award of punitive damages.²⁹ So an arrest of a passenger at the instance of a railroad conductor, though without probable cause, will not render the company liable for exemplary damages where it appears that the conductor acted in good faith, being honestly mistaken, and there is no evidence of any malice on his part or that he acted with an intention to injure or oppress such passenger.³⁰ But where the plaintiff who was examining watches in defendant's store was detained and searched in the presence of and surrounded by defendant's employees, on the suspicion of having taken a watch which the salesgirl said was missing, punitive damages were awarded to the plaintiff in an action for false imprisonment.³¹ And where a person accused an industrious young man of sober habits of stealing his bicycle, and refused to go with him to prominent citizens, by whom he could establish his movements on the evening in question, but summarily arrested him and then turned him over to a night watchman with instructions to hold him until the wheel was found, and such acts were done in the presence of a number of people, and the watchman also kept him exposed to the gaze of people passing by and refused to give him the opportunity of establishing his innocence by the people whom he wished to see, punitive damages were declared to be properly allowed.³² So, also, where a tenant who had been given notice to vacate the premises occupied by him was engaged in removing his furniture when the landlord appeared, and against the tenant's objection entered the house and used abusive and violent language and became so threatening in his actions that the tenant drew a pistol, whereupon the landlord procured his arrest on the charge of as-

²⁸ *Bolton v. Vellines*, 94 Va. 393; 26 S. E. 847; 3 Va. Law Reg. 120.

²⁹ *Newman v. New York*, L. E. & W. R. Co., 54 Hun (N. Y.), 335; 27 N. Y. St. R. 135; 7 N. Y. Supp. 560.

³⁰ *Clalborne v. Chesapeake & Ohio R. R. Co.*, 46 W. Va. 363; 33 S. E. 262; 14 Am. & Eng. R. Cas. N. S.

217. See *Cone v. Central R. Co.*, 62 N. J. L. 99; 40 Atl. 780; 12 Am. & Eng. R. Cas. N. S. 278; 4 Am. Neg. Rep. 659.

³¹ *Stevens v. O'Neill*, 51 App. Div. (N. Y.) 364; 64 N. Y. St. R. 663.

³² *Hight v. Naylor*, 86 Ill. App. 508.

sault with a dangerous weapon, compensatory and punitive damages were given.³¹ But where the plaintiff seeks to recover exemplary damages in an action for false arrest and imprisonment, alleging in his complaint that the defendant acted maliciously and without probable cause, the latter may, under a general denial, show all the facts and circumstances connected with the arrest, for the purpose of preventing an award of such damages.³²

§ 454. **Mitigation of damages.**—If the arrest and imprisonment of a person is in good faith and under such circumstances and facts as would warrant a reasonable man in the belief that there was probable cause for making the arrest, such facts may be considered by the jury in mitigation of exemplary damages but not of actual damages.³³ But though there may exist probable cause for the arrest of a person on a specific charge, yet this will not justify the detention of the arrested person on a substituted charge.³⁴ Where, however, there is information which points to a person's guilt upon which information another acts, but before procuring the arrest of such person he lays the whole matter before a magistrate who advises the issuance of a warrant, and the arrested person simply repudiates the charge but does not attempt to explain the suspicious circumstances,

³¹ *Parker v. McGlin*, 52 La. Ann. 1514; 27 So. 946.

³² *Richardson v. Huston*, 10 S. D. 484; 74 N. W. 234.

³³ *Mitchell v. Malone*, 77 Ga. 301; *Newton v. Locklin*, 77 Ill. 103; *Carey v. Sheets*, 60 Ind. 17; *Painter v. Ives*, 4 Neb. 122; *Garnier v. Squires* (Kan. 1900), 62 Pac. 1005; *Comer v. Knowles*, 17 Kan. 441; *Roberts v. Hackney* (Ky. 1900), 59 S. W. 328, mod'g order 22 Ky. Law R. 975; 58 S. W. 810; *Stricker v. Penn. R. Co.*, 60 N. J. L. 230; 37 Atl. 776; 7 Am. & Eng. R. Cas. N. S. 758; *Renck v. McGregor*, 32 N. J. L. 70; *Bradner v. Faulkner*, 98 N. Y. 515; *Kutner v. Fargo*, 34 App. Div. (N. Y.) 317; 54 N. Y. Supp. 332; *Newman v. New*

York, L. E. & W. R. Co., 54 Hun (N. Y.), 335; 27 N. Y. St. R. 135; 7 N. Y. Supp. 560; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Grace v. Dempsey*, 75 Wis. 313; *Landrum v. Wells* (Tex. C. A.), 26 S. W. 1001; 43 N. W. 1127. The question of the existence of probable cause which would authorize the arrest of a person without a warrant is held to be one of law for the court. *Diers v. Mallon*, 46 Neb. 121; 64 N. W. 722.

³⁴ *Francis v. Tilyon*, 26 App. Div. (N. Y.) 340; 49 N. Y. Supp. 799. In this case a person was arrested on the charge of grand larceny and subsequently detained on the charge of vagrancy.

such facts are sufficient to show probable cause.³⁵ But instructions given to the defendant by his employer to procure the arrest of the plaintiff are not admissible in mitigation of damages.³⁶ In such actions the defendant may, as bearing upon the question of malice and for the purpose of preventing an award of exemplary damages, introduce in evidence for the consideration of the jury, the affidavit, warrant and proof of arrest under the assumed authority of a void warrant.³⁷ And where a person is arrested on suspicion of disloyalty and an act of assassination, the officer responsible for the arrest may show a military order, in mitigation of damages for false imprisonment, though it may not justify him in his act.³⁸ Again, where an officer arrested a person on the charge of aiding and abetting deserters from the army and the arrest was without a warrant, but made under the orders of his commanding officer, he was, in an action against him for false imprisonment, allowed to show in support of his belief for making the arrest and in mitigation of damages, that the arrested person had been engaged in procuring men to enlist and then to desert after they had obtained their bounty, though such facts were not known to him at the time of the arrested person's release from imprisonment.³⁹

§ 455. Evidence—Generally.—In an action to recover for false arrest and imprisonment, the fact that an account of the arrest was published in the newspapers is admissible in evidence as bearing on the question of damages.⁴⁰ And the plaintiff in such an action may testify to the fact that the person making the arrest under the direction of the defendant promised him in response to a request by the plaintiff that he would notify his wife of his arrest, but that she failed to come and see him, and that none of his friends came until the following morning.⁴¹ But the

³⁵ *Kutner v. Fargo*, 34 App. Div. (N. Y.) 317; 54 N. Y. Supp. 332.

³⁶ *Josselyn v. McAllister*, 22 Mich. 300.

³⁷ *Woodall v. McMillan*, 38 Ala. 622.

³⁸ *Carpenter v. Parker*, 23 Iowa, 450.

³⁹ *Beckwith v. Bean*, 98 U. S. 266;

1 *Russell & Winslow's U. S. Supreme Court Reports, Syllabus Digest*, 303.

⁴⁰ *Filer v. Smith*, 96 Mich. 347; 55 N. W. 999; 35 Am. St. Rep. 603; 37 Cent. L. J. 237; *Scott v. Flowers*, 60 Neb. 676; 84 N. W. 81.

⁴¹ *San Antonio & A. P. R. Co. v. Griffin*, 20 Tex. Civ. App. 91; 48 S. W. 542.

fact that a village trustee against whom an action for false imprisonment and malicious prosecution had been brought for procuring the arrest of the plaintiff for riding upon the sidewalk, in violation of an ordinance, had on a previous occasion told an officer to watch the plaintiff and two other women, and in case he found them riding upon the sidewalk to arrest them, is not admissible as showing malice in the absence of evidence that such order was given for any other purpose than to procure the enforcement of the ordinance.⁴² Evidence as to the plaintiff's previous good character is not admissible in an action for false imprisonment where no attempt has been made to assail it,⁴³ but otherwise where the defendant in mitigation of damages has introduced evidence to show that the public strongly suspected him of the crime for which he was arrested.⁴⁴ Nor can the defendant, where no justification is pleaded, in such an action introduce in evidence an unsigned commitment under which the plaintiff was imprisoned.⁴⁵ Again, the burden of proving that an arrest was procured by the defendant and that there was want of probable cause rests upon the plaintiff.⁴⁶ But evidence of facts and circumstances which raise a reasonable presumption that the defendant ordered or directed the false arrest and imprisonment of the plaintiff establishes a *prima facie* case for him.⁴⁷ And where it has been shown that defendant acting through his agent procured the arrest and imprisonment of the plaintiff and that he was subsequently discharged, the burden of proof is on the defendant to show a justification for his act.⁴⁸

§ 456. Pleading.—In an action to recover for false imprisonment, the plaintiff must allege in his complaint that the imprisonment was illegal or was procured without a warrant.⁴⁹ Un-

⁴² *Fuller v. Redding*, 13 App. Div. (N. Y.) 61; 43 N. Y. Supp. 96.

⁴³ *Diers v. Mallon*, 46 Neb. 121; 64 N. W. 722.

⁴⁴ *American Express Co. v. Patterson*, 73 Ind. 430.

⁴⁵ *Yost v. Tracy*, 13 Utah, 431; 45 Pac. 348. See *Russell v. Shuster*, 8 W. & S. 308.

⁴⁶ *Limbeck v. Gerry*, 15 Misc. (N.

Y.) 663; 39 N. Y. Supp. 95; *Warren v. Dennett*, 17 Misc. (N. Y.) 86; 39 N. Y. Supp. 830.

⁴⁷ *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 95.

⁴⁸ *Mexican C. R. Co. v. Gehr*, 66 Ill. App. 173; 12 Nat. Corp. Rep. 651; 1 Chic. L. J. Wkly. 419.

⁴⁹ *Cousins v. Swords*, 14 App. Div. (N. Y.) 338; 43 N. Y. Supp. 907.

der the New York Code,⁵⁰ which provides that in an action to recover for personal injuries two or more causes of action may be joined, there may be a joinder of a cause of action for false imprisonment with one for malicious prosecution.⁵¹ But though such causes of action may be joined in the same complaint, they cannot be maintained on the same state of facts.⁵²

⁵⁰ N. Y. Code Civ. Proc. sec. 484, subd. 2. | Y.) 554; 70 N. Y. St. R. 760; 36 N. Y. Supp. 1.

⁵¹ Thorp v. Carvalho, 14 Misc. (N. | ⁵² Warren v. Dennett, 17 Misc. (N. Y.) 86; 39 N. Y. Supp. 830.

CHAPTER XX.

ALIENATION OF AFFECTIONS—CRIMINAL CONVERSATION.

§ 457. Alienation of affections— Criminal conversation— Measure of damages for.	459. Exemplary damages. 460. Evidence in mitigation. 461. Advice by parent to son to leave wife. 462. Evidence—Generally. 463. Pleading.
458. Right of wife to recover for alienation of affections of husband.	

§ 457. Alienation of affections—Criminal conversation—Measure of damages for.—One who by his intentional conduct prejudices a wife against her husband, and alienates her affections from him, is liable to the husband for the damages which he suffers as the result of such act.¹ And where the wife is seduced in such a case, the husband has a right of action based on his loss of consortium.² While loss of consortium is the main ground for the assessment of damages, it is, however, not the only ground.³ So the alienation of her affections while not the gist of the action, may be considered in aggravation of the damages.⁴ So in an action for alienation of affections and criminal conversation, the husband may recover for the loss which he has sustained of the services of his wife, including her conjugal society, aid, assistance, comfort and affection, and the mortification, mental anguish and disgrace resulting from defendant's act, the damages being dependent in each case upon the extent of the injury sustained by the husband, to be determined in the discretion of the jury, whose verdict will not be disturbed unless the amount awarded appear to have been the result of passion, prejudice or corruption.⁵ And though

¹ Hartpence v. Rodgers, 143 Mo. 623; 45 S. W. 650; Metcalf v. Roberts, 23 Ont. Rep. 130.

² Evans v. O'Connor, 174 Mass. 287; 54 N. E. 557. See Evans v. Evans, 68 Law J. Prob. 70 (1899); Prob. 195; 81 Law T. (N. S.) 60.

³ Evans v. Evans, 68 Law J. Prob. 70 (1899); Prob. 195; 81 Law T. (N. S.) 60.

⁴ Evans v. O'Connor, 174 Mass. 287; 54 N. E. 557.

⁵ Long v. Booe (Ala.), 17 So. 716; Prettyman v. Williamson, 1 Penn.

no damages to a specific amount are proved, the plaintiff in such an action is entitled to recover substantial damages.⁶ So it is proper for the judge in instructing the jury to call their attention to the several ways in which plaintiff may suffer damages as a result of his wife's seduction, leaving it to them to determine whether from all the evidence he did suffer in any of the ways specified, and if so, to what extent.⁷ But an instruction to the jury in an action by a husband for the seduction of his wife, that the real and substantial damages are for the loss of the society of the wife, and the alienation of her affections, together with "all other proper considerations," which are applicable to the circumstances of each case, was held to be error where the amount awarded was large.⁸ Although the jury in estimating the damages in this class of actions may consider the elements above mentioned, they are also to consider that the husband's right to the services, conjugal society, affection, aid and assistance of his wife, is burdened with the obligation on his part to support, clothe, cherish and care for her.⁹ Again, in an action to recover for a wife's seduction, evidence is admissi-

(Del.) 224; 39 Atl. 731; Yundt v. Hartrunft, 41 Ill. 9; Puth v. Zimbleman, 99 Iowa, 641; 68 N. W. 895; Johnston v. Disbrow, 47 Mich. 59; Hartpence v. Rodgers, 143 Mo. 623; 45 S. W. 650; Smith v. Myers, 52 Neb. 70; 71 N. W. 1006; Smith v. Masten, 15 Wend. (N. Y.) 270; Wilton v. Webster, 7 C. & P. 198; Duberly v. Gunning, 4 Term R. 657. See following cases as to amounts awarded for alienation of affections and criminal conversation: \$1,500 held not excessive, Puth v. Zimbleman, 99 Iowa, 641; 68 N. W. 895; \$4,375 not excessive, Dorman v. Seabee (Ky.), 52 S. W. 809; \$5,250 not excessive where husband and wife had previously lived happily, and her reputation had always been good prior to the time she came under defendant's influence, Hartpence v. Rogers, 143 Mo. 623; 45 S. W. 650; \$3,000 not excessive,

Smith v. Myers, 52 Neb. 70; 71 Neb. 1006; \$15,000 not excessive, relations prior to acquaintance with defendant, cordial, friendly and affectionate—plaintiff a lawyer and prosecuting attorney, and his wife a school-teacher receiving good wages, Speck v. Gray, 14 Wash. 589; 45 Pac. 143; \$5,000 held excessive where plaintiff consented to sexual intercourse between plaintiff and his wife, Peek v. Traylor, 17 Ky. L. Rep. 1312; 34 S. W. 705.

⁶ Hart v. Shorey, Rep. Jud. Queb. 12 C. S. 84.

⁷ Matheis v. Mazet, 164 Pa. St. 580; 30 Atl. 434; 25 Pitts. L. J. N. S. 169.

⁸ Hoggins v. Coad, 58 Ill. App. 58.

⁹ Prettyman v. Williamson, 1 Penn. (Del.) 224; 39 Atl. 731; Puth v. Zimbleman, 99 Iowa, 641; 68 N. W. 895; Rudd v. Rounds, 64 Vt. 432; 25 Atl. 438.

ble of facts which aggravate the injury, and consequently go to enhance the damages. So the happiness which existed in the domestic relations of the husband and wife prior to her seduction, and her previous virtuous behavior and unblemished reputation and character, together with any special advantages accruing to the husband by reason of the relations of husband and wife, are facts which the jury may consider.¹⁰ But where the plaintiff claims damages for a venereal disease, which he has contracted as a result of defendant's intercourse with his wife, he must specially allege damages from such cause.¹¹

§ 458. Right of wife to recover for alienation of affections of husband.—The common-law disability which prevented a wife from maintaining an action in her own name and consequently from suing any one for alienating the affections of her husband, has as a general rule been removed by statute, so that to-day under the enabling acts, which permit her in most of the states to sue as a feme sole, she may recover damages against a third person for the alienation of her husband's affections and consequent loss of society, aid, and support.¹²

¹⁰ See *Milford v. Berkely*, 1 Burr. 609; *Duke of Norfolk v. Germain*, 12 How. St. Tr. 927.

¹¹ *Dowdell v. King*, 97 Ala. 635; 12 So. 405.

¹² *Betsar v. Betsar*, 87 Ill. App. 399; *Dietzman v. Mullin* (Ky. 1900), 57 S. W. 247; *Lockwood v. Lockwood*, 67 Minn. 476; 70 N. W. 784; *Nichols v. Nichols*, 134 Mo. 187; 35 S. W. 577; *Clark v. Hill*, 69 Mo. App. 541; *Romaine v. Decker*, 11 App. Div. (N. Y.) 20; 43 N. Y. Supp. 79; *Gerner v. Gerner*, 185 Pa. St. 233; 39 Atl. 884; 40 L. R. A. 549; 42 W. N. C. 49; *Brown v. Brown*, 121 N. C. 8; 38 L. R. A. 242; 27 S. E. 998; *Beach v. Brown*, 20 Wash. 266; 43 L. R. A. 114; 55 Pac. 46. But see *Crocker v. Crocker*, 98 Fed. 702, construing the Massachusetts statute. *Smith v. Smith*, 98 Tenn. 101; 38 S. W. 439; *Lellis v. Lambert*, 24 Ont. App. 653.

See in this connection also, *Mehroff v. Mehroff*, 26 Fed. 13; *Foot v. Card*, 58 Conn. 4; 6 L. R. A. 829; *Haynes v. Nowlin*, 129 Ind. 581; 14 L. R. A. 787; *Price v. Price*, 91 Iowa, 693; 29 L. R. A. 150; *Warren v. Warren*, 89 Mich. 123; 14 L. R. A. 545; *Seaver v. Adams*, 66 N. H. 142; 19 Atl. 776; *Bennett v. Bennett*, 116 N. Y. 584; 6 L. R. A. 553; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397. See following cases as to amount awarded in actions by wife for alienation of husband's affections: Action against parents of husband—conduct wilful and malicious—health of wife impaired by the separation—\$15,000 not excessive. *Lockwood v. Lockwood*, 67 Minn. 476; 70 N. W. 784, —\$5,000 not excessive. *Nichols v. Nichols*, 147 Mo. 387; 48 S. W. 947. Action against brother of wife—no evidence showing he advised or

In an action against another woman for alienating the affections of the plaintiff's husband, there must have been on the part of the defendant some wrongful or wilful intent to engage his affections and thereby seduce him from his duty and fidelity to the plaintiff, and there will be no fault imputed to the defendant in law because she may have been attractive, or pleased with his admiration.¹³ And where owing to the wilful and malicious conduct of another, a husband is induced to abandon his wife, she may recover damages as a compensation for the loss of his society, protection and aid, such damages not being merely limited to the injury she has sustained up to the time of the suit.¹⁴ And her recovery of such damages should not be affected by the fact that she procured a separation from him after he had deserted her, where the action for the separation was not prosecuted by her because she desired to live apart from him, but rather because she could not learn of his whereabouts and hoped to induce him to return.¹⁵ But where by an agreement of separation in consideration of a certain sum paid by the husband and accepted by the wife, she relinquishes her claim against him for support, she cannot in an action for alienation of affections recover for the loss of support and maintenance.¹⁶ The gist of the action is said to be the loss of consortium and not the loss of assistance, and it is held that it is not sufficient that the relations of the husband with the defendant were improper and that he remained away from his family, but there must also have been on the part of the defendant some active interference.¹⁷ But in another case where the evidence showed that there had been illicit intercourse between the husband and the defendant, though there was no proof showing that such relations were the result of the seduction of the husband by the defendant, it was held that such

sought to induce plaintiff's wife to leave him—\$5,000 excessive. *Bathke v. Krassin* (Minn.), 80 N. W. 950. Husband did not provide for his family and wife had stated she would support him no longer—\$2,000 excessive. *Van Olinda v. Hall*, 88 Hun (N. Y.), 452; 34 N. Y. Supp. 777.

¹³ *Whitman v. Egbert*, 27 App. Div. (N. Y.) 374. See *Buchanan v. Foster*,

23 App. Div. (N. Y.) 542; 48 N. Y. Supp. 732.

¹⁴ *Nichols v. Nichols*, 147 Mo. 387; 48 S. W. 947; *Wilson v. Coulter*, 29 App. Div. (N. Y.) 85; 51 N. Y. Supp. 804.

¹⁵ *Wilson v. Coulter*, 29 App. Div. (N. Y.) 85; 51 N. Y. Supp. 804.

¹⁶ *Metcalf v. Tiffany*, 106 Mich. 504; 64 N. W. 479; 2 Det. L. N. 530.

¹⁷ *Buchanan v. Foster*, 23 App. Div. (N. Y.) 542; 48 N. Y. Supp. 732.

evidence would sustain a finding that the defendant was responsible for the desertion and nonsupport of the plaintiff by her husband and liable in damages therefor.¹⁸

§ 459. Exemplary damages.—Exemplary damages may be given against one who wilfully and maliciously alienates the affections of another's wife, or who seduces her.¹⁹ Or for the alienation of a husband's affections, where done wantonly and maliciously.²⁰ But in an action for the alienation of a wife's affections, it was decided that an instruction to the jury was not erroneous because it failed to state, in connection with an instruction as to exemplary damages, that the jury must find that the act of the defendant was wanton, malicious or from an improper motive, in order to authorize the recovery of such damages, where the only evidence bearing upon this was the statement of the defendant that his motive was to take the plaintiff's wife for himself, and that the sooner he could get rid of the husband the sooner he could get the wife, and the jury found that the act of the defendant in persuading plaintiff's wife to abandon him was intentional.²¹ Alienating the affections of a husband or wife is declared to be a wrong done to the person within the meaning of the Colorado act, which permits of the recovery of exemplary damages in such cases.²²

§ 460. Evidence in mitigation.—Evidence of misconduct on the part of the husband in his relations and duties towards his wife is admissible in mitigation of damages.²³ So the jury may consider evidence showing that their relations were unhappy, that his treatment of her was cruel and unkind, or that there was a lack of affection between them.²⁴ So where statements

¹⁸ *Romaine v. Decker*, 11 App. Div. (N. Y.) 20; 43 N. Y. Supp. 79.

¹⁹ *Prettyman v. Williamson*, 1 Penn. (Del.) 224; 39 Atl. 731; *Johnson v. Disbrow*, 47 Mich. 59; *Hartpence v. Rogers*, 143 Mo. 623; 45 S. W. 650; *Johnson v. Allen*, 100 N. C. 131; *Cornelius v. Hambay*, 150 Pa. St. 359; 24 Atl. 515; 22 Pitts. L. J. N. S. 476.

²⁰ *Waldron v. Waldron* (C. C. N. D. Ill.), 45 Fed. 314.

²¹ *Hartpence v. Rogers*, 143 Mo. 623; 45 S. W. 650.

²² *Williams v. Williams*, 20 Colo. 51; 37 Pac. 614.

²³ *Cross v. Grant*, 32 N. H. 675; 13 Am. St. Rep. 607. See *Schorn v. Berry*, 63 Hun (N. Y.), 110; 43 N. Y. St. R. 508.

²⁴ *Prettyman v. Williamson*, 1 Penn. (Del.) 224; 39 Atl. 731; *Coleman v. White*, 43 Ind. 429; *Hadley v. Hey-*

have been made by the wife, prior to the alleged seduction, as to cruel treatment of her by her husband, evidence of such statements is admissible for the purpose of mitigating the damages.²⁵ But evidence of domestic trouble occurring years before the time of the alleged seduction is not admissible, being too remote.²⁶ Again, evidence is admissible that the husband is living apart from his wife,²⁷ for if they were separated before the wife committed adultery with the defendant, such fact would be a good reason why damages against the defendant should be assessed at a lower rate.²⁸ But such facts, however, only go in mitigation of damages. So though there may be a written agreement between the husband and wife, in which she agrees to release her marital rights with her husband, in consideration of a certain amount, such agreement is no defense to an action for the alienation of the husband's affections.²⁹ Again, the defendant may show in mitigation of damages that the relations of the plaintiff with other women at times subsequent to the marriage, and before the trial, have been of a criminal character.³⁰ So where a husband has brought an action against his wife's father for the alienation of the wife's affections, evidence is admissible that the husband was a frequenter of brothels and boasted of his criminal connection with lewd women, and that he was an habitual drunkard.³¹ The jury may also consider in mitigation of damages, the bad character of the wife or any specific acts of unchastity which she has been shown to have committed.³² But

wood, 121 Mass. 236; *Palmer v. Cook*, 7 Grya (Mass.), 418; *Harter v. Crill*, 33 Barb. (N. Y.) 283; *Jones v. Thompson*, 6 C. & P. 415; *Calcroft v. Harborough*, 4 C. & P. 499; *Trelawney v. Coleman*, 2 Stark. 191; *Bromley v. Wallace*, 4 Esp. 237.

²⁵ *Palmer v. Crook*, 7 Gray (Mass.), 418; *Rudd v. Rounds*, 64 Vt. 432; 25 Atl. 438.

²⁶ *Dorman v. Sebree* (Ky.), 52 S. W. 809, where evidence of domestic trouble which occurred eighteen years before the time of the injury was held inadmissible.

²⁷ *Prettyman v. Williamson*, 1 Penn. (Del.) 224; 39 Atl. 731.

²⁸ *Evans v. Evans*, 68 Law J. Prob. 70; (1899) Prob. 195; 81 Law T. (U. S.) 60.

²⁹ *Betser v. Betser*, 87 Ill. App. 399, aff'd 58 N. E. 249. But see *Buckel v. Suss*, 28 Abb. N. C. 21; 44 N. Y. St. R. 571.

³⁰ *Shattuck v. Hammond*, 46 Vt. 466; 14 Am. Rep. 631. See *Norton v. Warner*, 9 Conn. 172; *Smith v. Masten*, 15 Wend. (N. Y.) 270.

³¹ *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

³² *Norton v. Warner*, 9 Conn. 172; *Harrison v. Price*, 22 Ind. 165; *Conway v. Nichol*, 34 Iowa, 533; *Winter v. Henn*, 4 C. & P. 494.

where such evidence has been given in behalf of the defendant, the plaintiff may show in rebuttal the general reputation for chastity of his wife.³² And though immoral conduct on the part of the wife of the plaintiff may mitigate the damages recoverable by him for her seduction, yet if it appears that her immoral conduct took place before marriage and was confined exclusively to her intimacy with the defendant, who induced the plaintiff to marry her on his recommendation that she was a good girl, and the plaintiff married her, believing her to be pure and virtuous, such conduct should not be considered in mitigation of damages.³⁴ And if there has been, in respect to the wrongful act of the wife with the defendant, any loose or negligent conduct on the part of the husband, not amounting to consent, such conduct may be considered by the jury.³⁵ But though a husband may, after knowledge of the infidelity of his wife cohabit with her, such fact is not a bar to an action against the one who seduced her.³⁶ And the fact that the wife consented to an illicit intercourse with the defendant is no defense to an action for her seduction,³⁷ but otherwise if the intercourse with the defendant was the result of her own licentiousness.³⁸ And the defendant may show by letters from the wife to him, or by other evidence, that the first advances were made by the wife, such evidence tending to mitigate the damages.³⁹

§ 461. **Advice by parent to son to leave wife.**—In an action against a parent for advising his son to separate from his wife, it is decided that though the advice was wilful, yet it is not thereby necessarily malicious so as to render the parent liable in damages for the abandonment if the parent was moved by proper motives for his son's welfare and happiness,⁴⁰ but otherwise if

³² *Browning v. Jones*, 52 Ill. App. 597.

³⁴ *Stumm v. Hummell*, 39 Iowa, 478. See *Conway v. Nichol*, 34 Iowa, 533.

³⁵ *Prettyman v. Williamson*, 1 Penn. (Del.) 224; 30 Atl. 731.

³⁶ *Smith v. Meyers*, 51 Neb. 857; 71 N. W. 1006. See *Sikes v. Tippins*, 85 Ga. 231; *Stumm v. Hummell*, 39 Iowa, 483.

³⁷ *Moore v. Hammons (Ind.)*, 21 N. E. 1111.

³⁸ *Hoggins v. Coad*, 58 Ill. App. 58.

³⁹ *Elsam v. Fawcett*, 2 Esp. 562.

⁴⁰ *Tucker v. Tucker*, 74 Miss. 93; 32 L. R. A. 623; 19 So. 955; 43 Cent. L. J. 118; *Brown v. Brown*, 124 N. C. 19; 32 S. E. 320; *Gerner v. Gerner*, 185 Pa. St. 233; 40 L. R. A. 549; 39 Atl. 884; 42 W. N. C. 49.

the act of the parent was unjustifiable,⁴¹ as where the parent had not properly investigated the facts or acted recklessly or from dishonest purposes, since in such cases the law will presume malice.⁴² In an action of this character it is proper to show in mitigation of damages that the son was married while he was intoxicated and that no affection ever existed on his part towards her.⁴³

§ 462. Evidence—Generally.—In an action for alienation of affections, evidence is admissible as to the wealth of the defendants.⁴⁴ And a female plaintiff in an action for alienating the affections of her husband may give evidence of the cost to her of living.⁴⁵ And she may also show that by reason of the conveyance of his property to the defendant, she has not been able to recover anything on account of alimony and costs due to her by reason of a judgment of separation in her favor.⁴⁶ And as bearing on the question of damages, letters written by the plaintiff's wife to the husband prior to the time of the alleged alienation of her affections are admissible in evidence.⁴⁷ So also in an action by the wife for alienation of her husband's affections letters written by him to her before and after he became acquainted with the defendant are admissible for the purpose of showing his feelings towards her before defendant intervened and subsequent thereto.⁴⁸ As are expressions of remorse by him in interviews with her after the intimacy.⁴⁹ And for the purpose

⁴¹ *Gerner v. Gerner*, 185 Pa. St. 233; 40 L. R. A. 549; 39 Atl. 884; 42 W. N. C. 49.

⁴² *Brown v. Brown*, 124 N. C. 19; 32 S. E. 320.

⁴³ *Bassett v. Bassett*, 20 Ill. App. 543.

⁴⁴ *Peters v. Lake*, 66 Ill. 206; *Nichols v. Nichols*, 147 Mo. 387; 48 S. W. 947; *Waldron v. Waldron*, 45 Fed. 315. But see *Bailey v. Bailey*, 94 Iowa, 598; 63 N. W. 341; *Derham v. Derham* (Mich.), 83 N. W. 1005; 7 Det. L. N. 430. In these last two cases which were actions by wife for alienation of husband's affections such evidence was held inadmissible.

⁴⁵ *Bowersox v. Bowersox*, 115 Mich. 24; 72 N. W. 986; 4 Det. L. N. 742.

⁴⁶ *Wilson v. Coulter*, 20 App. Div. (N. Y.) 85; 51 N. Y. Supp. 804.

⁴⁷ *Homer v. Yance*, 93 Wis. 352; 67 N. W. 720. Such letters were held admissible notwithstanding that the Wis. Rev. Stat. sec. 4072, provided that confidential communications between a husband and wife during their marriage should not be disclosed.

⁴⁸ *Ash v. Prunier*, 105 Fed. 722; 44 C. C. A. 675.

⁴⁹ *Ash v. Prunier*, 105 Fed. 722; 44 C. C. A. 675.

of showing loss of affection, a husband who has discovered his wife in the company of the defendant may give proof of statements made by her at such time as to the state of her affection for her husband and for the defendant.⁵⁰ But evidence of statements made by the wife of the plaintiff subsequent to the improper relations between her and the defendant, which the latter admits and which tend to show that her mind was the dominating one, are inadmissible for any purpose.⁵¹ Where, however, a wife sues the parents of her husband for the alienation of his affections, evidence that he had stated that he had decided to leave his wife is admissible as part of the *res gestæ* to show an accomplished fact resulting from defendant's influence over him.⁵² Again, as bearing upon the question of damages in an action by a woman for alienation of affections, it is proper to show that prior to the husband leaving home she had improper relations with another of which her husband had knowledge, though it does not appear that he left because of such relations.⁵³ In an action by a husband or wife for alienation of affections, the burden of proving the allegations in reference thereto is upon the plaintiff.⁵⁴ And where she seeks to recover for the loss of his society, affections and companionship, she must show that the defendants have, by means of their tortious acts, enticed him away from her and thus caused the loss for which she claims a recovery.⁵⁵

§ 463. **Pleading.**—The declaration in an action for the alienation of the affections of a husband or wife should allege the loss of consortium; the alienation of the affections is merely to be considered in aggravation of damages and is not a substantive cause of action,⁵⁶ and the declaration should allege the facts which constitute the wrong and not conclusions.⁵⁷

⁵⁰ *Rose v. Mitchell*, 21 R. I. 270; 21 R. I. (part 2) 60; 43 Atl. 67; As to evidence of affection, see also *Eagon v. Eagon*, 60 Kan. 597; 57 Pac. 942; 49 Cent. L. J. 288.

⁵¹ *Vaughn v. Clarkson*, 19 R. I. 497; 36 Atl. 1135; 34 Atl. 989.

⁵² *Lockwood v. Lockwood*, 67 Minn. 476; 70 N. W. 784.

⁵³ *Wolf v. Frank*, 92 Md. 138; 48 Atl. 132; 52 L. R. A. 102.

⁵⁴ *Myers v. Reynolds*, 3 Ohio Leg. News, 127; 3 Ohio N. P. 186.

⁵⁵ *Eldredge v. Eldredge*, 79 Hun (N. Y.), 511; 61 N. Y. St. R. 540.

⁵⁶ *Neville v. Gile* (Mass.), 54 N. E. 841.

⁵⁷ *Mead v. Hoskins*, 6 Ohio N. P. 522; 8 Ohio S. & C. P. Dec. 342.

But it is decided that it is a sufficient allegation of fact to sustain an action for alienation of affections where the complaint alleges that the defendants wrongfully enticed, influenced and induced plaintiff's husband to leave her.⁵⁸ But in another case a petition which stated that the defendants conspired with the malicious intent of injuring plaintiff and of destroying his peace and happiness and to injure and deprive him of the comfort, society and services of his wife, and that they induced her to leave and separate from him, was held to be demurrable as stating conclusions.⁵⁹ And where a complaint alleged that the defendant lived in immoral relations with the plaintiff's husband, having knowledge of the marriage between plaintiff and her husband, and that the defendant had assumed the husband's surname, and that such assumption and false impersonation of the plaintiff prejudiced her in the community and scandalized and injured her in name and fame as a lawful wife, by reason of which she was damaged in a specified amount, was held not to set forth a cause of action.⁶⁰

⁵⁸ *Nichols v. Nichols*, 134 Mo. 187; P. 522; 8 Ohio S. & C. P. Dec. 35 S. W. 577.

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⁵⁹ *Mead v. Hoskins*, 6 Ohio N. ⁶⁰ *Hodecker v. Stricker*, 39 N. Y. Supp. 515.

CHAPTER XXI.

SEDUCTION.

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| <p>§ 464. Seduction—Action by woman to recover for.</p> <p>465. Seduction—Abortion by physician—Liable for entire damages—Case.</p> <p>466. Action by woman—Mitigation of damages.</p> | <p>467. Action by parent.</p> <p>468. Action by parent—Mitigation of damages.</p> <p>469. Action by parent—Barred by marriage subsequent to seduction and before confinement.</p> |
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§ 464. Seduction—Action by woman to recover for.—In those jurisdictions where a female is entitled to recover damages for her own seduction, it is not necessary to a recovery that there should have been a promise of marriage,¹ but where such a promise has been made, it is said that the breach thereof may be proved in aggravation of damages.² Nor is it necessary that the woman should at all times in the past have lead a virtuous life. It might occur that at some time in the past she may have led an unchaste life but that she had reformed and that at the time of the alleged seduction her conduct was that of a virtuous and moral woman, and where such facts appear in evidence her seduction should be visited with damages to such an amount as the jury believe the defendant ought to pay.³ But to entitle her to recovery in such a case, it must appear that there was a reformation.⁴ In estimating the damages in an action for seduction, the jury may consider the consequences naturally resulting from the defendant's wrongful act. So upon the question as to whether a verdict for \$5,000 was excessive, it was held that it

¹ *Milliken v. Long*, 188 Pa. St. 411; 238; 3 L. R. A. 529; 21 Pac. 129; 41 Atl. 540; *Franklin v. McCorkle*, 18 Lea (Tenn.), 609. *Gemmell v. Brown* (Ind. App.), 56 N. E. 691.

² *Franklin v. McCorkle*, 18 Lea (Tenn.), 609. ⁴ *Patterson v. Hayden*, 17 Oreg. 238; 3 L. R. A. 529; 21 Pac. 129.

³ *Patterson v. Hayden*, 17 Oreg.

was not excessive where it appeared that the defendant was a married man fifty-two years of age, and the plaintiff an orphan aged seventeen at the time of the seduction, and that the defendant had procured two abortions to be performed upon her, as a result of which her health had been greatly injured and she was prevented from labor, and had suffered much pain and anguish and injury to her reputation.⁵ So where pregnancy ensues, resulting in childbirth and sickness, such elements may be considered,⁶ and the suffering and anguish of mind in connection with childbirth are also elements for which recovery may be had.⁷ So, also, the jury may consider the effect the seduction has had upon her standing in the community, and that she has lost her social standing, and evidence is admissible of the treatment accorded her by her individual acquaintances before and after the seduction.⁸ Again, the motive of the defendant may be an element to be considered in estimating the damages in an action for seduction, as an aggravation of the wrongful act, and in this connection and as bearing on his motive, evidence of his arts, persuasions and promises is admissible,⁹ and if the defendant has given publicity to the seduction, such fact may be a ground for additional damages.¹⁰ In an action of this nature exemplary damages may be recovered,¹¹ and evidence is admissible as to the financial standing of the defendant.¹²

⁵ *Gunder v. Tibbits*, 153 Ind. 591; 55 N. E. 762.

⁶ *McCoy v. Trucks*, 121 Ind. 292; 23 N. E. 93. See *Egan v. Murray*, 80 Iowa, 180; 45 N. W. 563, where it was held that a verdict in an action for seduction for \$1,500, was not excessive where it appeared that the plaintiff had given birth to an illegitimate child.

⁷ *Gemmill v. Brown* (Ind. App.), 56 N. E. 691; *Simons v. Busby*, 119 Ind. 13.

⁸ *Hawn v. Banghart*, 76 Iowa, 683; 39 N. W. 251. See *Gunder v. Tibbits*, 153 Ind. 591; 55 N. E. 762.

⁹ *Stevenson v. Belknap*, 6 Iowa, 97.

¹⁰ *Simons v. Busby* (Ind.), 21 N. E. 451.

¹¹ *Ball v. Bruce*, 21 Ill. 161; *Stevenson v. Belknap*, 6 Iowa, 97; *Stout v. Prall*, 1 N. J. L. 79; *Lawyer v. Fritcher*, 130 N. Y. 239; 14 L. R. A. 700; 41 N. Y. St. R. 268; 29 N. E. 267; 45 Alb. L. J. 72; *Kerns v. Hagenbuckle*, 28 J. & S. (N. Y.) 228; 42 N. Y. St. R. 669.

¹² *Shewalter v. Bergman*, 123 Ind. 155; 23 N. E. 686; *Gemmill v. Brown* (Ind. App.), 56 N. E. 691. See *Dehler v. State*, *Bierck*, 22 Ind. App. 383; 53 N. E. 850. This case was a bastardy proceeding, and for the purpose of ascertaining the proper amount to assess against the defendant, evidence of his financial condition and prospects in life was admitted.

§ 465. Seduction—Abortion by physician—Liable for entire damages—Case.—Where in an action by a woman for seduction, it appears that a physician, acting in conspiracy with her seducer, performed abortions upon the plaintiff for the purpose of concealing the illicit intercourse, and that the physician represented that in order to save her life the abortions were necessary, the latter will be liable for the entire damages of the plaintiff, since the continued course of conduct of the seducer constituted an entire wrong which will not be apportioned among the wrongdoers, and the fact that the physician did not know that the illicit intercourse was the result of plaintiff's seduction will not relieve him from liability.¹³

§ 466. Action by woman—Mitigation of damages.—The character of a woman prior to the time of her seduction and specific acts of lewdness on her part may be shown in mitigation of damages in an action by her for seduction.¹⁴ But the defendant in such an action cannot show that the plaintiff's reputation was bad after the seduction,¹⁵ nor can his damages be lessened by the fact that subsequent to the seduction the plaintiff continued to meet his advances.¹⁶

§ 467. Action by parent.—The parent's right to recover for the seduction of a minor daughter is technically based at common law upon the loss of services, and where no such law exists the action cannot be maintained.¹⁷ In Tennessee, however, it is not necessary for either the pleading or the proof to show that there has been a loss of her services to entitle a father to recover damages.¹⁸ And in Michigan also a similar rule prevails, it being only necessary in this state to show the parental

¹³ *Gunder v. Tibbits* (Ind.), 55 N. E. 762.

¹⁴ *Gemmill v. Brown* (Ind. App.), 56 N. E. 691.

¹⁵ *Shewalter v. Bergman*, 123 Ind. 155; 23 N. E. 686. See sec. 464, herein.

¹⁶ *Stoudt v. Shepherd* (Mich.), 41 N. W. 696.

¹⁷ *Humble v. Shoemaker*, 70 Iowa, 223; *Greenwood v. Greenwood*, 28

Md. 369; *Kennedy v. Shea*, 110 Mass. 147; *Mulvehall v. Millward*, 11 N. Y. 343; *Martin v. Payne*, 9 Johns. (N. Y.) 387; *Grinnell v. Wells*, 7 M. & G. 1033, and other cases cited in this section. But see *Franklin v. McCorkle*, 16 Lea. (Tenn.) 609.

¹⁸ *Franklin v. McCorkle*, 16 Lea. (Tenn.) 609.

or other relation by nature or wardship to permit a recovery.¹⁹ But in those jurisdictions where the parent's action is based on loss of services, it is necessary to show that the relation of master and servant exists between the parent and daughter to authorize a recovery,²⁰ and if it appears that such relation does not exist, as in the case of a child being bound out as an apprentice, there can be no recovery of damages by the father for the daughter's seduction.²¹ But slight evidence, however, is sufficient to establish such relation,²² and though the action may be founded on loss of services, it is immaterial whether the services rendered by her for him were paid for or not.²³ So, also, though the daughter is temporarily employed elsewhere, a loss of services will be presumed in favor of the father, who has not parted with his right to the services of a minor daughter.²⁴ And the fact that the daughter was not in the father's actual service, at the time of her illness and death, but was at the defendant's, will not prevent the father from recovering for loss of her services on account of the seduction.²⁵ But it has been decided that the defendant may show that the plaintiff is not legally entitled to the services of the girl for whose seduction he is suing to recover damages, by proof of the fact that his marriage with the woman who is the mother of the seduced girl was void.²⁶ To

¹⁹ *Stoudt v. Shepherd* (Mich.), 61 N. W. 696.

²⁰ *Barbour v. Stephenson* (C. C. D. Ky.), 32 Fed. 66.

²¹ *Dain v. Wycoff*, 7 N. Y. 191; *Postlewaite v. Parkes*, 3 Burr. 1879.

²² *Lamb v. Taylor*, 67 Md. 85; 8 Atl. 760; 7 Cent. 377; *Davidson v. Goodall*, 18 N. H. 427; *Gray v. Durland*, 51 N. Y. 424; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79.

²³ *Lamb v. Taylor*, 67 Md. 85; 8 Atl. 760; 7 Cent. 377.

²⁴ *Gilley v. Gilley*, 79 Me. 292; 9 Atl. 623; 4 N. Eng. Rep. 495; *Greenwood v. Greenwood*, 28 Md. 369; *Mulvehall v. Millward*, 11 N. Y. 343; *Clarke v. Fitch*, 2 Wend. (N. Y.) 459; *Lamb v. Taylor*, 67 Md. 85; 8 Atl. 760; 7

Cent. 377. Under the Minnesota Gen. Stat. 1894, sec. 5163, providing that an action for the seduction of a daughter may be prosecuted by the father, though the daughter is not living with the father at the time she is seduced, and there is no loss of services, the plaintiff, in such an action, is not obliged to show that his daughter's ruin was accomplished by seductive acts to enable him to recover other than his actual money loss. *Hein v. Holdridge* (Minn.), 81 N. W. 522.

²⁵ *Lawyer v. Fritcher*, 54 Hun (N. Y.), 586; 28 N. Y. St. R. 221; 7 N. Y. Supp. 900.

²⁶ *Howland v. Howland*, 114 Mass. 517; 19 Am. Rep. 381.

entitle a parent to recover damages for the seduction of a minor daughter, there must be some proof of actual damage, but the slightest proof of damage will be sufficient.²⁷ And the damages which a father may recover in case of the seduction of a minor daughter are not limited to a recovery for the loss of her services, and for expenses incurred, but may include compensation for what he as a father has felt and suffered for the wrong and injury received for his daughter's ruin.²⁸ So the disgrace sustained by the plaintiff and his family, as a result of her seduction, is an element to be considered.²⁹ So, also, there may be a recovery for expense necessarily incurred as the natural and direct result of the seduction.³⁰ So again, the jury may consider in aggravation of the damages that the defendant procured an abortion to be performed upon the seduced girl.³¹ And in certain cases exemplary damages may be given in the discretion of the jury.³² Mere proof of criminal intercourse is not, however, sufficient to justify an allowance of such damages.³³ And they should

²⁷ *Lawyer v. Fritcher*, 54 Hun (N. Y.), 586; 28 N. Y. St. 221; 7 N. Y. Supp. 909. See in this connection as to what is sufficient to show a loss or damage necessary to sustain the action, *Lencker v. Stellen*, 89 Ill. 545; *Blagge v. Halsey*, 127 Mass. 191; *Abraham v. Kidney*, 104 Mass. 222; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *White v. Nellis*, 31 Barb. (N. Y.), 279.

²⁸ *Barbour v. Stevenson* (C. C. D. Ky.), 32 Fed. 66; *Herring v. Jester*, 2 Houst. (Del.) 66; *Pruitt v. Cox*, 21 Ind. 15; *Hatch v. Fuller*, 131 Mass. 574; *Fox v. Stevens*, 13 Minn. 272; *Morgan v. Ross*, 74 Mo. 318; *Coon v. Moffitt*, 3 N. J. L. 436; *Lunt v. Philbrick*, 59 N. H. 59; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Phelin v. Klenderdine*, 20 Pa. St. 354; *Rolling v. Chambers*, 51 Vt. 592; *Riddle v. McGinnis*, 22 W. Va. 253; *Lavery v. Crooke*, 52 Wis. 612; 38 Am. Rep. 768; *Irwin v. Dearman*, 11 East. 23.

²⁹ *Herring v. Jester*, 2 Houst. (Del.) 66; *Mighell v. Stone*, 74 Ill.

App. 129, aff'd 175 Ill. 261; 51 N. E. 906; *Felkner v. Scarlet*, 29 Ind. 154; *Smith v. Young*, 26 Mo. App. 575; *Lunt v. Philbrick*, 59 N. H. 59; *Coon v. Moffitt*, 3 N. J. L. 436; *Parker v. Monteith*, 7 Oreg. 277.

³⁰ *Simpson v. Grayson*, 54 Ark. 404; 16 S. W. 4; *Humble v. Shoemaker*, 70 Iowa, 223; *Hogan v. Cregan*, 6 Robt. (N. Y.) 138.

³¹ *White v. Murtland*, 71 Ill. 250; *Klopfer v. Bromme*, 26 Wis. 372. See *Gunder v. Tibbits*, 153 Ind. 591; 55 N. E. 762.

³² *Mighell v. Stone*, 74 Ill. App. 129, aff'd 175 Ill. 261; 51 N. E. 906; *Russell v. Chambers*, 31 Minn. 54; *Kerns v. Hagenbuckle*, 28 J. & S. (N. Y.) 228; 42 N. Y. St. R. 669; *Lawyer v. Fritcher*, 130 N. Y. 239; *Knight v. Wilcox*, 18 Barb. (N. Y.) 212; *Badgely v. Decker*, 44 Barb. (N. Y.) 577; *Lavery v. Crooke*, 52 Wis. 612; *Irwin v. Dearman*, 11 East. 23.

³³ *Hogan v. Cregan*, 6 Robt. (N. Y.) 138.

not be awarded in an action for seduction except the action be brought by the parent of the seduced girl or by the girl herself.⁸⁴

§ 468. **Action by parent—Mitigation of damages.**—In an action to recover for the seduction of a minor daughter, the fact that she has been guilty of youthful indiscretions in the past will not prevent a recovery of the damages sustained, where it appears that she had reformed, and at the time of the alleged seduction was living a virtuous life and enjoyed the esteem and regard of her acquaintances.⁸⁵ And a parent's damages will not be limited to a recovery for loss of expenses because of previous acts of unchastity on her part.⁸⁶ But the defendant may, for the purpose of mitigating the damages, show that the daughter's unchaste conduct in the past has been a matter of common knowledge, and may introduce evidence showing specific acts of illicit intercourse between her and others.⁸⁷ And where her unchaste conduct has been so notorious that nothing could be added to the sufferings of the parent, or to the danger of corrupting the family's morals by the seduction, no recovery can be had for such elements.⁸⁸ And the defendant may show, for the purpose of mitigating damages, acts and conduct on the part of the plaintiff which amount to negligence or a careless indifference.⁸⁹ In a case in Rhode Island, the defendant endeavored to show by various facts a reckless or careless indifference on the part of a father in respect to his daughters, which could be considered in mitigation of damages in an action for seduction. The evidence which the court held was inadmissible, as not tending to show such indifference, was that the father, who was a farm

⁸⁴ *Liye v. Eizenlerd*, 32 N. Y. 229.

⁸⁵ *Milliken v. Long*, 188 Pa. St. 411; 41 Atl. 540.

⁸⁶ *Simpson v. Grayson*, 54 Ark. 404; 16 S. W. 4.

⁸⁷ *Simpson v. Grayson*, 54 Ark. 404; 16 S. W. 4; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Smith v. Milburn*, 17 Iowa, 30; *Dalman v. Koning*, 54 Mich. 320; *Stoudt v. Shepherd* (Mich.), 41 N. W. 696; *Fletcher v. Randall*, Anth. N. P. (N. Y.) 267;

Reed v. Williams, 5 Sneed (Tenn.), 580; *Parker v. Coture*, 63 Vt. 155; *Carpenter v. Wall*, 11 Ad. & E. 803; *Verry v. Watkins*, 7 C. & P. 308.

⁸⁸ *Simpson v. Grayson*, 54 Ark. 404; 16 S. W. 4.

⁸⁹ *Richardson v. Fouts*, 11 Ind. 466; *Zerfing v. Mourer*, 2 Greene (Ia.), 520; *Graham v. Smith*, 1 Edm. Sel. Cas. (N. Y.) 267; *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Sherwood v. Tetman*, 55 Pa. St. 77.

is without other means of support than that furnished by her son, and who by his death is injured in her means of support, may recover under such a statute, giving a right in such cases to a parent.³ So where a statute provides that in case a liquor dealer violates his bond by selling liquors to a minor, "any person or persons aggrieved" may sue on his bond, a mother may maintain an action.⁴ And under a statute giving a right of action to a parent against a liquor dealer and his bondsmen for loss of services of a minor son due to his death as the result of the sale to him of intoxicating liquors, the action may be prosecuted in the name of the party entitled to damages, the intervention of an administrator of the estate of the deceased not being necessary.⁵ Again, a married woman injured in any of the ways stated in the statute by the sale of liquors to her son may recover in her own name, though her husband, the father of the son, is living, where the statutes of the state permit her to sue as a feme sole.⁶ And where the liquor dealer's bond is required by statute to be conditioned that he will not sell liquors to any person after having received notice in writing from the wife of such person not to sell to him, and in case subsequent sales are made, the right is conferred upon the person "aggrieved" by the violation of the bond to sue thereon, a married woman who has given the notice required may recover on the bond where a subsequent sale is made, though she has not been injured thereby in person or property.⁷ And again, where the statute in such a case gives a married woman the right to maintain an action in her own name, such right is not lost by her subsequently obtaining a divorce.⁸ And the fact that a widow who sues under such

³ *Depuy v. Cook*, 90 Hun (N. Y.), 43; N. Y. Laws, 1873, chap. 646.

⁴ *Peavy v. Goss*, 90 Tex. 89; 37 S. W. 317; Tex. Act. 23d Leg. chap. 121, p. 177.

⁵ *Fitzgerald v. Donohoe*, 48 Neb. 352; 67 N. W. 880; Neb. Comp. Stat. chap. 50.

⁶ *McMaster v. Dyer*, 44 W. Va. 644; 29 S. E. 1016.

⁷ *Fay v. Williams* (Tex. Civ. App.), 41 S. W. 497; Tex. Gen. Laws, 1893, pp. 177-181.

⁸ *Nordin v. Kjos*, 13 S. D. 497; 83 N. W. 573; S. D. Laws, 1897, chap. 72, which requires liquor dealers to give bonds and provides that "it shall be lawful for any married woman or any other person at her request to institute and maintain a suit on any such bond mentioned in this act for all damages sustained by her or by her children on account of such traffic and the money when collected shall be paid over for the use of herself and her children."

an act procured liquor for her husband and drank with him on some occasions does not bar her from the right to maintain the action.⁹ In Nebraska in such an action on a bond, a married woman may sue in her own name, or she may join her children, and the damages when collected are to be paid over to her for the maintenance of herself and children.¹⁰ So, also, in Illinois a widow and minor children, who were wholly dependent on deceased for support, may sue jointly.¹¹ But in an action to recover for the breach of liquor dealer's bond by the sale of intoxicating liquors to a minor son, the wife cannot maintain the action by joining her husband as plaintiff pro forma, as the recovery in such an action is community property.¹² In New York it is declared that a posthumous child is within the provisions of the law giving a right of action to every husband, wife, child or other person.¹³ And in Nebraska a poor person dependent for support upon a relative whose death was due to the sale of intoxicating liquors to him, may maintain an action against the vendors of such liquors in his own name and for his own benefit.¹⁴ Again, in Pennsylvania the intoxicated person himself may recover under a statute which provides that "any one aggrieved may recover full damages."¹⁵ In Illinois though a father may be legally entitled to his son's wages, yet such fact gives him no right to recovery under the act of that state for the intoxication of a son if he is not living with his family and his means of support are not affected.¹⁶

§ 471. Measure and elements of damages—Generally.—The amount of damages recoverable under the civil damage acts for the unlawful sale of intoxicating liquors, is a question to be determined by the jury under the instruction of the

⁹ *Kliment v. Corcoran*, 51 Neb. 142; 70 N. W. 910. Y. Supp. 963; N. Y. Laws, 1873, chap. 646.

¹⁰ *Warden v. McConnell* (Neb.), 36 N. W. 278. ¹⁴ *Fitzgerald v. Donohoe*, 48 Neb. 852; 67 N. W. 880. See Neb. Comp. Stat. 1895, chap. 67.

¹¹ *Helmut v. Bell* (Ill.), 37 N. E. 230. ¹⁵ *Littel v. Young*, 5 Pa. Super. Ct. 205; 41 W. N. C. 100; Pa. act, May 8, 1854.

¹² *Wartelsky v. McGee* (Tex. Civ. App.), 30 S. W. 69. ¹⁶ *Lossman v. Knights*, 77 Ill. App. 670.

¹³ *Quinlen v. Welch*, 69 Hun (N. Y.), 584; 53 N. Y. St. R. 256; 23 N. Y. Supp. 670.

court.¹⁷ And the verdict of the jury in such an action will not be set aside as excessive, unless so erroneous as to indicate that it was the result of passion, prejudice, ignorance or corruption.¹⁸ Under the statutes in some of the states, money paid for intoxicating liquors sold in violation of the law may be recovered from the person selling such liquors.¹⁹ And recovery may be had for expenses of medical attendance in an action to recover damages under such a statute.²⁰ So, also, where a husband abuses his wife so as to cause illness, while he is intoxicated as a result of liquors sold to him in violation of the law, recovery may be had by the wife for the illness so caused.²¹ And, where, owing to the negligence of a minor while intoxicated, a horse

¹⁷ *Miller v. Gleason*, 18 Ohio C. C. 374; 10 Ohio C. D. 20.

¹⁸ *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485. See the following cases where amount of verdicts in various cases has been considered: Intoxication of plaintiff's husband resulting in death, whose support during life was worth from \$200 to \$300 per year—\$1,000 not excessive. *Brown v. Butler*, 66 Ill. App. 86. As result of drink reduced from prosperous business man to a sot—property exhausted and business ruined—wife abused and loss of support because husband's means therefor squandered—sales not made by defendant alone but by several—\$1,000 not excessive. *Bunyan v. Loftus*, 90 Iowa, 122; 57 N. W. 685. Husband killed while intoxicated—age thirty-five—good wages as a mechanic which had been devoted to support of wife and four children—wife and children left destitute—\$850 not excessive. *Schiek v. Sanders*, 53 Neb. 664; 74 N. W. 39. Causing intemperance of husband—wife deprived of husband's former earning capacity of four dollars per day—loss will continue for some time—\$1,000, not excessive. *Bennett v. Levi*, 46 N. Y. St. R. 754; 19 N. Y. Supp. 226. Loss of good

and comfortable support by death of son while intoxicated—mother in poor health, age sixty-three, and having no other means of support—\$1,325, not excessive. *Du Puy v. Cook*, 90 Hun (N. Y.), 43; 70 N. Y. St. R. 397; 35 N. Y. Supp. 632. Death of husband while intoxicated—aged thirty-eight—strong and robust, earning one dollar and a half to three dollars per day—paying for a home—family comfortably supported—verdict to wife for \$275, inadequate. *Johnson v. Gram*, 72 Ill. App. 676.

¹⁹ *Sellers v. Arie*, 99 Iowa, 515; 68 N. W. 814; *Barrett v. Delano* (Me.), 14 Atl. 288; *Kilburn v. Coe*, 48 How. Pr. (N. Y.) 144. In *Kohn v. Melcher* (C. C. S. D. Iowa), 43 Fed. 641; 10 L. R. A. 439, however, it is held that money paid by a pharmacist for intoxicating liquors cannot be recovered under the Iowa Code, § 1550, which gives a right of action for the recovery of money paid for liquors sold in violation of the prohibitory liquor law.

²⁰ *Thomas v. Dansby*, 74 Mich. 389; *Aldrich v. Sager*, 9 Hun (N. Y.), 587.

²¹ *Kear v. Garrison*, 13 Ohio C. C. 447; 7 Ohio Dec. 515.

was killed and the carriage injured, the owner of such horse and carriage was permitted to recover for such loss from the person unlawfully selling the liquor to the minor.²² Again, where a horse belonging to plaintiff was killed by her husband while intoxicated, it was decided that in an action under the civil damage act she could recover the value of the horse.²³ So, also, where as the result of the sale of intoxicating liquors to a person, he permitted the garden to go to waste, it was held that the person selling such liquors could not escape liability in an action by the wife, because she might have employed some one else to market such produce.²⁴ Recovery, however, cannot be had in an action under such a statute for money which was taken from the owner's pockets while intoxicated, since the proximate cause of the loss is not the sale of liquor but the intervening wrongful act of a third person.²⁵ So, also, damages for an assault committed by a person while intoxicated are too remote to be recovered, where the assault is voluntary and incited by the persons assaulted.²⁶ And the contingent liability of a father for his son's support under the poor laws of a state because of injuries sustained, due to the unlawful sales of liquor to such minor, is too remote to permit a recovery for the unlawful sale.²⁷ But where the support of an adult son as a poor person under the statute was voluntarily assumed by the father, it was decided that the latter, in an action under the civil damage act, might recover the sum which it would be reasonably necessary for him to expend in the support of such son based on his own and his son's expectation of life.²⁸ And in an action against a saloon keeper to recover for damages sustained as a result of the disposal of property by the plaintiff while intoxicated from liquors furnished by defendant, there can be no recovery in the absence

²² *Flower v. Witkowsky* (Mich.), 14 West. 44; 37 N. W. 364; *Bertholf v. O'Reilly*, 8 Hun (N. Y.), 16, aff'd 74 N. Y. 516.

²³ *Morenus v. Crawford*, 51 Hun (N. Y.), 89.

²⁴ *Maloney v. Dalley*, 67 Ill. App. 427.

²⁵ *Gage v. Harvey*, 66 Ark. 68; 43 L. R. A. 143; 48 S. W. 898.

²⁶ *Swinfln v. Lowry*, 37 Minn. 345; 34 N. W. 22.

²⁷ *Veon v. Creston*, 138 Pa. St. 48; 9 L. R. A. 814; 27 W. N. C. 57; 48 Phila. Leg. Int. 35; 21 Pitts. L. J. N. S. 154.

²⁸ *Clinton v. Laning*, 61 Mich. 355.

of any evidence as to the value of such property or an admission in reference thereto.²⁹

§ 472. **Death.**—The general rule is that where a statute gives a person who has been injured in his or her means of support by reason of the intoxication of another, a right to recover damages therefor against the person who by giving or selling the intoxicating liquors has caused the intoxication in whole or in part, the person so injured may also recover where the intoxication causes the death of such person.³⁰ So under such a statute a wife may recover for the death of her husband under such circumstances,³¹ and a woman for the death of her son,³² and a minor for the death of his father.³³ But in order to authorize a recovery it must appear that the plaintiff has suffered in his or her means of support, and that the death was caused by the sales of liquor shown.³⁴ But though necessary to show a loss of support,

²⁹ *Roberts v. Hopper*, 55 Neb. 599; 76 N. W. 21.

³⁰ *Cruse v. Aden*, 127 Ill. 231; 3 L. R. A. 327; 20 N. E. 73; *Flynn v. Fogarty*, 106 Ill. 263; *Emory v. Addis*, 71 Ill. 273; *Johnson v. Gram*, 72 Ill. App. 676; *Brown v. Butler*, 66 Ill. App. 86; *Marschall v. Langhran*, 47 Ill. App. 29; *Westphal v. Austin*, 39 Ill. App. 230; *Reath v. State*, *Johnson*, 16 Ind. App. 146; 44 N. E. 808; *Rafferty v. Buckman*, 46 Iowa, 195; *Doty v. Postal*, 87 Mich. 143; 49 N. W. 534; *Lafler v. Fisher* (Mich.), 79 N. W. 934; 6 Det. L. N. 358; *Grau v. Houston*, 45 Neb. 813; 64 N. W. 245; *Mead v. Stratton*, 87 N. Y. 493; *Quain v. Russell*, 8 Hun (N. Y.), 319; *Lan-son v. Eggleston*, 28 App. Div. (N. Y.) 52; 52 N. Y. Supp. 181; *Du Puy v. Cook*, 90 Hun (N. Y.), 43; 70 N. Y. St. R. 397; 35 N. Y. Supp. 632. But see *Brookmire v. Monaghan*, 15 Hun (N. Y.), 16; *Barrett v. Dolan*, 130 Mass. 366; *Davis v. Justice*, 31 Ohio St. 359.

³¹ *Johnson v. Gram*, 72 Ill. App. 676; *Doty v. Postal*, 87 Mich. 143; 49 N. W. 534; *Grau v. Houston*, 45 Neb.

813; 64 N. W. 245; *Mead v. Stratton*, 87 N. Y. 493; *Davis v. Standish*, 26 Hun (N. Y.), 608.

³² *Du Puy v. Cook*, 90 Hun (N. Y.), 43; 70 N. Y. St. R. 397; 35 N. Y. Supp. 632.

³³ *Westphal v. Austin*, 39 Ill. App. 230.

³⁴ *Meyer v. Butterbrodt*, 146 Ill. 131; 34 N. E. 152, aff'g 43 Ill. App. 312; *Westphal v. Austin*, 39 Ill. App. 230; *Davis v. Standish*, 26 Hun (N. Y.), 608. Where the evidence showed that a person became intoxicated by reason of liquors sold to him, and that when in such condition he fell a distance of about thirteen feet to the frozen ground, while going up an outside stairway to his home, that he was taken up in an unconscious condition and lived for five days after the injury, which was pronounced by the medical attendants as concussion of the brain or a clot of blood on the brain, it was held that such evidence was sufficient to sustain a finding that the proximate cause of his death was the fall. *Marschall v. Langhran*, 47 Ill. App. 29.

it is not necessary to give an accurate detailed statement of the amount contributed by the deceased to the support of the plaintiff, it being sufficient to show that some contribution was made by the deceased.³⁵ So, though the plaintiff in such an action may have an income, yet if the deceased contributed to any extent to his support, there may be a recovery,³⁶ and the fact that the person for whose death the action is brought, received liquor elsewhere will not relieve one who, by his sales of liquor to the deceased, contributed to his death.³⁷ Again, though a person may in certain cases recover damages for the death of a person as a result of intoxicating liquors furnished to him by another, yet the jury in estimating the damages therefor should only consider the loss which the plaintiff has sustained as a direct and necessary result of the death, and no recovery should be allowed for any loss which is not directly traceable thereto as the proximate result thereof. So in such an action for the death of a husband, evidence should not be admitted of the loss of the homestead as a result of the husband's death, because of the foreclosure of a mortgage upon it which existed during the life of the husband, and which the widow had no means to pay, since it is a mere conjecture whether the husband would have redeemed the homestead had he lived, and its loss cannot be traced as the proximate result of the death.³⁸ The recovery of damages for the death of a person, under these acts is not confined to those cases where the intoxicated person himself dies, but extends to those cases where one is injured in his or her means of support by the death of a person due to the act of another while intoxicated from liquors unlawfully furnished him.³⁹

³⁵ *Laffer v. Fisher* (Mich.), 79 N. W. 934; 6 Det. L. N. 358. Action to recover under 3 How. (Mich.) Ann. Stat. sec. 2233e 3.

³⁶ *Reath v. State*, Johnson, 16 Ind. App. 146; 44 N. E. 808. This case was an action brought by a father to recover for his son's death under a statute giving a right of action to one injured in his "means of support" by reason of intoxication due to liquors furnished by another, and it was held that recovery was not pre-

vented because of the fact that the father had an income of \$55 per month independent of the son's earnings.

³⁷ *Lawson v. Eggleston*, 28 App. Div. (N. Y.) 52; 52 N. Y. Supp. 181.

³⁸ *Karan v. Pease*, 45 Ill. App. 382.

³⁹ *Brockway v. Patterson*, 72 Mich. 122; 1 L. R. A. 708; 40 N. W. 192; *Fortier v. Moore*, 67 N. H. 460; 36 Atl. 369; *New v. McKechnie*, 95 N. Y. 632. See *Belding v. Johnson* (Ga.), 11 L. R. A. 53; 12 S. E. 304.

§ 473. **Loss of support.**—Where as the result of the intoxication of a woman's husband she is injured in her means of support she may recover either jointly or severally against the persons, who by the sale of the liquor to the husband, caused the intoxication.⁴⁰ And the damages recoverable are not limited to the mere sum which was paid for the liquors and which would otherwise have been devoted to the support of the wife, but they include such damages as proximately result from the sale of the liquors, such as the loss of the husband's position which thus injures the wife in her means of support.⁴¹ So in this connection evidence is admissible in behalf of the plaintiff that her husband has, as the result of the sale to him by the defendant of intoxicating liquors, been reduced from a prosperous business man to financial insolvency and that his mental condition borders upon a state of imbecility.⁴² It is not necessary, however, to entitle a wife to recover, that she has been deprived of the bare necessities of life, but she may be injured in her means of support where the ability of the husband to furnish her with the comforts of life has been lessened or destroyed, and in such a case may recover.⁴³ And though a husband has become a drunkard and as a result has ceased to support his wife, yet this will not prevent a recovery from one, who by subsequent sales of liquor to the husband, causes the loss to continue.⁴⁴ And again, though all the damages sustained by a wife are not traceable to the sales made to the husband by the defendant, yet where such sales produced the intoxication which was the beginning of a continuous debauch, lasting several days or weeks, damages may be recovered from the defendant for all the injuries which she has sustained during the entire period.⁴⁵ But loss of support due to the imprisonment of the husband because of a crime committed by him while under the influence of liquor and his con-

⁴⁰ *Stanley v. Leahy*, 87 Ill. App. 465.

⁴¹ *Kolling v. Bennett*, 18 Ohio Cir. Ct. R. 425; 10 Ohio C. D. 81. See *Loeaman v. Knights*, 77 Ill. App. 670, an action by parent for sales of liquor to minor son.

⁴² *Kliment v. Corcoran*, 51 Neb. 142; 70 N. W. 910.

⁴³ *Maloney v. Dailey*, 67 Ill. App. 427. See *De Puy v. Cook*, 90 Hun (N. Y.), 43; *Mulford v. Clewell*, 21 Ohio St. 191.

⁴⁴ *Lloyd v. Kelly*, 48 Ill. App. 554; *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372.

⁴⁵ *Johnson v. Johnson* (Mich.), 58 N. W. 1115.

sequent inability to work are declared not to be a proximate result of the sale of liquor to him for which recovery may be had.⁴⁶ In New York, however, where a man while intoxicated shot and killed another for which crime he was convicted and sent to state prison for life, thus depriving the wife of her means of support, it was held that the wife was entitled to maintain an action for loss of support.⁴⁷ Again, if the husband is injured while intoxicated, the wife may recover for loss of support due to such injuries, though the intoxication was merely a contributory cause and not the sole or principal cause of the injury.⁴⁸ So where the defendant sold liquor to the plaintiff's husband while he was intoxicated and the latter while returning with his wife in a sleigh was so injured as to be paralyzed and unable to work, and the wife was also injured, it was decided that damages therefor were recoverable by the wife from the liquor dealer.⁴⁹ And in such a case it is not necessary that the evidence show that the husband was, at the time he was injured, so intoxicated that his reasoning, judgment and memory were in such an impaired condition that he was not aware of the natural and reasonable consequences of his acts.⁵⁰ Again, in an action by a mother to recover damages for the sale of intoxicating liquors to her son, as a result of which she has been injured in her means of support, she may show her situation in life, her dependence on him for support, the amount which he earned prior to the time he became addicted to the use of liquor, and any decrease in his earnings subsequent to such time or loss of employment, traceable to such habits.⁵¹ And in an action by a parent to recover for loss of support as the result of the intoxication of an adult son, it is necessary to show that the parent is poor and has no other adequate means of support.⁵²

⁴⁶ *Bradford v. Boley*, 167 Pa. St. 506; 31 Atl. 751; 25 Pitts. L. J. N. S. 396; 36 W. N. C. 238.

⁴⁷ *Beers v. Walhizer*, 43 Hun (N. Y.), 254; 4 N. Y. St. R. 377; 26 Wkly. Dig. 29.

⁴⁸ *McClellan v. Hein*, 56 Neb. 600; 77 N. W. 120.

⁴⁹ *Mulcahey v. Givens*, 115 Ind. 286; 17 N. E. 798; 15 West. 309.

⁵⁰ *Tipton v. Schuler*, 87 Ill. App. 517.

⁵¹ *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438; 3 Det. L. N. 880. See *Weitz v. Ewen*, 50 Iowa, 570; *Dunlavey v. Watson*, 38 Iowa, 398; *Jockers v. Borgman*, 29 Kan. 109; *Wrightman v. Devere*, 33 Wis. 570.

⁵² *Stevens v. Cheney*, 36 Hun (N. Y.), 1. See *Volans v. Owen*, 74 N. Y. 526.

§ 474. **Injury to feelings—Mental suffering.**—In an act in Michigan,⁵³ it was provided that where, as a result of liquor furnished by one person to another, certain persons were injured in person, property, means of support “or otherwise,” a recovery might be had for such injury from the one furnishing the liquor by means of which the injury occurred. Under such an act it is decided in this state, that a wife may recover for the shame and mortification which she suffers as a result of the publication in a newspaper of her husband’s connection with and participation in a saloon row.⁵⁴ So, also, for the mental suffering which she experiences resulting from the disgrace and discomfort attendant upon her husband’s besotted condition.⁵⁵ And where the husband is convicted of drunkenness resulting proximately from the sale, she may recover for the disgrace and mortification resulting from such conviction.⁵⁶ But mental anguish suffered by an intoxicated person as a result of any injury sustained by him cannot be recovered.⁵⁷ And where a father has been an habitual drunkard for years, before the particular sale complained of, a daughter cannot recover for mental suffering resulting from her father’s intoxication.⁵⁸ Outside of those states where recovery for mental suffering or anguish is allowed by the wording of the statute, either expressly or by a general term, such as in the Michigan act, and the recovery is expressly allowed for injury to person, means of support or property, the general rule seems to be that mental suffering alone is not sufficient to authorize a recovery of damages under the statute.⁵⁹

§ 475. **Exemplary damages — Generally.**—In one of the earlier cases in Illinois in which the right of a person, suing under the civil damage act, to recover exemplary damages was considered, it was decided that the mere sale of intoxicating liquors and resulting damages would justify an award of exemplary

⁵³ Mich. Act, 1887.

⁵⁴ Lucker v. Liske, 111 Mich. 683; 70 N. W. 421; 3 Det. L. N. 850.

⁵⁵ Radley v. Seider (Mich.), 58 N. W. 366.

⁵⁶ Lucker v. Liske, 111 Mich. 683; 70 N. W. 421; 3 Det. L. N. 850.

⁵⁷ Sissing v. Beach (Mich.), 58 N. W. 364.

⁵⁸ Sissing v. Beach (Mich.), 58 N. W. 364.

⁵⁹ Freese v. Tripp, 70 Ill. 497; Calloway v. Laydon, 47 Iowa, 456; Mulford v. Clewell, 21 Ohio St. 191.

damages.⁶⁰ In a later case in this state, however, it was held that a wife suing a saloon keeper for personal injury and loss of support, as a result of the sale or gift of intoxicating liquors to her husband, could only recover such damages where the conduct of the defendant was wanton, and in wilful disregard of her rights. But it was also declared that the selling of liquor to a person who was an habitual drunkard by one who had knowledge of such fact was such a wilful violation of the statute as would justify an award of exemplary damages.⁶¹ And the sale of liquor to a man after requests and warnings of the wife to the defendant not to do so will render the latter liable for such damages, where the plaintiff has sustained actual injury in consequence thereof.⁶² So, again, in this state it is declared that the sale of liquors to one who is plainly intoxicated and who is subsequently killed by a railroad train, while in such condition, will justify an award of exemplary damages.⁶³ In Iowa they may be recovered from one who has wilfully violated the statute.⁶⁴ In Kansas the sale of liquors to a husband after notice from the wife not to sell her husband any intoxicating liquors will authorize the recovery of such damages.⁶⁵ And in Michigan, where actual damages have been sustained, exemplary damages may be recovered, they being given as a punishment of the wrongdoer.⁶⁶ Under the Michigan act of 1883,⁶⁷ however, such damages can only be recovered in cases of wilful wrong.⁶⁸ And the sale of liquors to a husband by the defendant after notice to him from the wife not to furnish any more liquors to the husband is such a wilful act as will justify an award of punitive damages.⁶⁹ So, also, the sale of liquors to a man by

⁶⁰ *Murphy v. Cunan*, 24 Ill. App. 475.

⁶¹ *Wolfe v. Johnson*, 45 Ill. App. 122.

⁶² *Wolfe v. Johnson*, 152 Ill. 280; 38 N. E. 886; *McMahon v. Sankey*, 133 Ill. 636; 24 N. E. 1027; *Hanewacker v. Ferman*, 47 Ill. App. 17.

⁶³ *Buck v. Maddock*, 67 Ill. App. 466, *aff'd* 167 Ill. 219; 47 N. E. 208.

⁶⁴ *Fox v. Wunderlick*, 64 Iowa, 187. See *Miller v. Hammers* (Iowa, 1895), 61 N. W. 1067.

⁶⁵ *Jockers v. Borgman*, 29 Kan. 100.

⁶⁶ *Peacock v. Oaks*, 85 Mich. 578; 48 N. W. 1082. See *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438; 3 Det. L. N. 880; *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 88.

⁶⁷ Mich. Stat. 1883, p. 215.

⁶⁸ *Rosecrants v. Shoemaker*, 60 Mich. 4; 26 N. W. 794; *Gaussly v. Perkins*, 30 Mich. 492; *Kreiter v. Nichols*, 28 Mich. 496.

⁶⁹ *Rouse v. Melsheimer*, 82 Mich.

one with knowledge that he was intoxicated, and who met his death while intoxicated, will authorize the recovery thereof in an action by the wife.⁷⁰ In New York the mere sale of liquor is not of itself sufficient to justify a recovery of exemplary damages by one who has been injured as the result of intoxication caused by such sale,⁷¹ but there must be some proof of aggravating circumstances with which the defendant was connected.⁷² So they are not recoverable against the lessor in such an action, in the absence of evidence showing participation in, or knowledge of, the aggravating circumstances.⁷³ But they may be recovered of one who sells liquor to another after he has become intoxicated, the sale to him while in such condition, being such an aggravating circumstance as will permit of their recovery.⁷⁴ In Ohio a wife may recover punitive damages from a saloon keeper who sells liquor to her husband after his name has been placed on the blacklist.⁷⁵ And in such an action, evidence is admissible in aggravation of damages of the continuance of the sale of liquor to the plaintiff's husband by defendant after notice of the action against him.⁷⁶ In West Virginia, in an action under such a statute, exemplary damages are not recoverable merely because of an illegal sale, unless it appear that the defendant acted maliciously or in wanton, deliberate and wilful disregard of the rights and known wishes of the plaintiff.⁷⁷

§ 476. Exemplary damages—General rule.—From a consideration of the cases noted in the preceding section it will be

172; 46 N. W. 372; *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 88.

⁷⁰ *Lafier v. Fisher* (Mich.), 79 N. W. 934; 6 Det. L. N. 358.

⁷¹ *Wilber v. Dwyer*, 69 Hun (N. Y.), 507; 52 N. Y. St. R. 625; 23 N. Y. Supp. 395.

⁷² *Reid v. Terwilliger*, 116 N. Y. 530; 27 N. Y. St. R. 563; 22 N. E. 1091, rev'g 42 Hun (N. Y.), 310; *Ketcham v. Fox*, 52 Hun (N. Y.), 284; 5 N. Y. Supp. 272; *Wilber v. Dwyer*, 69 Hun (N. Y.), 507; 52 N. Y. St. R. 625.

⁷³ *Ketcham v. Fox*, 52 Hun (N. Y.), 284; 5 N. Y. Supp. 272.

⁷⁴ *Wilber v. Dwyer*, 69 Hun (N. Y.), 507; 52 N. Y. St. R. 625; 23 N. Y. Supp. 395.

⁷⁵ *Kear v. Garrison*, 13 Ohio C. C. 447; 7 Ohio Dec. 515.

⁷⁶ *Miller v. Gleason*, 18 Ohio C. C. 374; 10 Ohio C. D. 20.

⁷⁷ *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485. In this case it is declared that exemplary damages are not given as a punishment in an action by a wife, but as a compensation for injury to her means of support and under certain circumstances for mental anguish.

seen that exemplary damages are recoverable under the civil damage acts, but that the mere fact of the sale of intoxicating liquors and resulting damage to another will not of itself authorize a recovery of such damages. To entitle the plaintiff to such an award, there must have been some circumstances of aggravation in connection with the defendant's conduct in making the sale, such as malice or a wanton, deliberate and wilful disregard of the plaintiff's rights. And a sale to one who is in an intoxicated condition, or after notice has been given to make no further sales, or after notice of the commencement of the action are acts showing such a wilful disregard of the rights of others as will justify an award of such damages.⁷⁸

§ 477. Sale by employee without defendant's knowledge no defense—Exemplary damages—Mitigation of.—In an action to recover damages for the unlawful sale of liquors, the defendant cannot escape liability because the sale was made by his bartender without his knowledge or authority and in violation of his express orders and instructions.⁷⁹ And in certain cases, though the sale may be made under such circumstances, exemplary damages may be recovered.⁸⁰ But though such damages are recoverable, yet it has been decided in Illinois that the defendant may show in mitigation thereof that the sale was made by a servant in violation of orders given by the defendant.⁸¹

§ 478. Evidence affecting damages—Generally.—In an action by a wife to recover damages under the civil damage act, evidence is admissible of the conviction of the plaintiff's husband for drunkenness, such evidence being admissible to show the nature and extent of the plaintiff's injury but not to establish drunkenness.⁸² And evidence is admissible in an action by a

⁷⁸ See cases cited in preceding section.

⁷⁹ *Smith v. Reynolds*, 8 Hun (N. Y.), 128.

⁸⁰ *Kear v. Garrison*, 13 Ohio C. C. 447; 7 Ohio Dec. 515. See *Krieter v. Nichols*, 28 Mich. 496.

⁸¹ *Fentz v. Meadows*, 72 Ill. 540; *Freeze v. Tripp*, 70 Ill. 496.

⁸² *Lucker v. Liske*, 111 Mich. 683; 70 N. W. 421; 3 Det. L. N. 850. See *Beers v. Walhizer*, 43 Hun (N. Y.), 254; 4 N. Y. St. R. 377; 26 Wkly. Dig. 29, as to evidence of conviction for crime. But see *Bradford v. Boley*, 167 Pa. St. 506; 31 Atl. 751; 25 Pitts. L. J. N. S. 396; 36 W. N. C. 238.

wife that her husband had, on previous occasions, drank at defendant's place, and had been on protracted sprees to defendant's knowledge.⁸³ And in an action to recover for the sale of intoxicating liquors to a person which resulted in his death, evidence is admissible of his industrious habits when sober, and of acts performed by him for the support of his wife, such evidence tending to show his ability and disposition to provide for his family.⁸⁴ So, also, as bearing on the question of the damages to be awarded in an action by a widow for loss of support, evidence may be given of her subsequent remarriage.⁸⁵ So again, in such an action the intemperate habits of deceased may be shown.⁸⁶ In Iowa, however, it is declared that the defendant cannot show, in mitigation of damages, that the deceased had been an habitual drunkard for years before his death, but rather that such evidence is admissible in behalf of the plaintiff for the purpose of showing that the sale of liquor by defendant to deceased was unlawful.⁸⁷ But where in an action by a wife to recover damages for the unlawful sale of liquor to her husband, she seeks to recover for money lost by her husband in gambling while intoxicated, evidence is admissible in behalf of the defendant that the husband was in the habit of gambling.⁸⁸ And in an action by a widow to recover for the damages sustained by the death of her husband as the result of his intoxication from sales by defendant, evidence is admissible of injuries sustained by the deceased previous to such sale, which impaired his ability to labor and which would probably shorten his life.⁸⁹ But the fact that property accumulated by the deceased during his lifetime, went to the plaintiffs upon his death, should not be considered by the jury in mitigation of damages, but it is declared that the fact of the deceased's ability to accumulate such

⁸³ *Lawson v. Eggleston*, 28 App. Div. (N. Y.) 52; 52 N. Y. Supp. 181.

⁸⁴ *Buck v. Maddock*, 167 Ill. 219; 47 N. E. 208, aff'g 67 Ill. App. 466.

⁸⁵ *Sharpley v. Brown*, 43 Hun (N. Y.), 374.

⁸⁶ *Brockway v. Patterson* (Mich.), 40 N. W. 192; *Uldrich v. Gilmore*, 35 Neb. 288; 53 N. W. 135. See also

Smith v. People, Williamson, 31 N. E. 425, aff'g 38 Ill. App. 638; *Gran v. Houston*, 45 Neb. 813; 64 N. W. 245.

⁸⁷ *Huff v. Aultman*, 69 Iowa, 71.

⁸⁸ *Gintz v. Bradley*, 53 Ill. App. 597.

⁸⁹ *Slaven v. Germain*, 64 Hun (N. Y.), 506; 46 N. Y. St. R. 514; 19 N. Y. Supp. 492.

property should rather go to enhance damages.⁹⁰ Again, in an action by a wife to recover for her husband's death while intoxicated from liquors sold by defendant, evidence is not admissible as to the number and ages of the surviving children, where the law gives them separate rights of action therefor.⁹¹ And where no claim is made for exemplary damages in an action by a minor brought by his mother as guardian, evidence that a judgment has already been recovered by the mother against the defendant for the same act is not admissible.⁹² In actions, however, to recover under a civil damage act for the death of a person and loss of support, mortality tables are generally admissible to show the expectation of life.⁹³

§ 479. Evidence showing unlawful sale.—In an action to recover damages for injuries sustained as the result of an alleged unlawful sale of liquors a preponderance of evidence showing the sale to be unlawful is sufficient.⁹⁴ So in an action by a wife who sues to recover for injury to her means of support as the result of her husband's intoxication from sales by defendant, evidence that the defendant made numerous sales of intoxicating liquors to her husband is sufficient where the evidence also shows that liquor was sold by the defendant a sufficient number of times to have materially aided in producing a condition of habitual intoxication on the part of the husband.⁹⁵ And under a complaint alleging unlawful sales by the defendant, evidence is admissible of sales made by employees of the defendant.⁹⁶ But in an action against a saloon keeper under such a statute, evidence is not admissible as part of the *res gestæ* of statements made by the intoxicated person after an injury as to where he obtained the liquor.⁹⁷

⁹⁰ *Houston v. Gran*, 38 Neb. 687; 57 N. W. 403.

⁹¹ *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 88; *Johnson v. Schultz* (Mich.), 41 N. W. 865. But see *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74; 11 S. W. 810.

⁹² *Secor v. Taylor*, 41 Hun (N. Y.), 123.

⁹³ *Sellers v. Foster*, 27 Neb. 118.

See *Betting v. Hobbet* (Ill.), 30 N. E. 1048.

⁹⁴ *Kolling v. Bennett*, 18 Ohio C. C. 425; 10 Ohio C. D. 81.

⁹⁵ *Siegle v. Rush*, 173 Ill. 559; 50 N. E. 1008, aff'g 72 Ill. App. 485.

⁹⁶ *Carrier v. Bernstein*, 104 Iowa, 572; 73 N. W. 1076.

⁹⁷ *Van Alstine v. Kaniecki*, 109 Mich. 318; 67 N. W. 502; 3 Det. L. N. 103.

§ 480. Sales by two or more persons—Recovery in case of.

—In actions under the civil damage acts it frequently appears that the injury to the plaintiff was the result of the sales by two or more persons. In such cases the rule, so far as it may be possible to deduce one from the few decisions upon this point, is that in order to entitle the plaintiff to recover against one of such persons, it must be shown that the sale by the defendant was a contributing cause of the injury to the plaintiff, one which tended to produce the injury sustained, and where such fact has been shown, the defendant will be liable for all damages sustained as the result of the several sales.⁹⁸ And in an action for loss of support, by death, an instruction to the jury that if defendants furnished "any quantity" whatever of liquor, to the deceased, they would be liable, was held not erroneous though it was declared that the idea of contribution was more finely drawn by such instruction than was proper.⁹⁹ For any injury which occurred prior to the time when defendant began selling liquor to the plaintiff's husband, there cannot, however, be any recovery.¹⁰⁰

§ 481. Plaintiff's knowledge and consent to sale may be defense.—It may be shown, in defense to an action under the statute, that the plaintiff consented to or acquiesced in the sale of the intoxicating liquor, as a result of which he has been injured in the manner designated in the statute.¹ So, in an action by a wife, it is error for the court to refuse to instruct the jury that if she consented to, or contributed to the use of the intoxicating liquors by her husband, there can be no recovery by her.² And where the statute provides for the recovery of a penalty as liquidated damages, by any person aggrieved, a father cannot recover such penalty for a sale of liquor to his

⁹⁸ Woolheather v. Risley, 38 Iowa, 486; Bryant v. Tidgewell, 133 Mass. 86; Ford v. Cheever (Mich.), 2 Det. L. N. 215; 63 N. W. 975; 27 Chic. Leg. News, 408; Ulrich v. Gilmore, 35 Neb. 288; 53 N. W. 135; Hutchinson v. Hubbard, 21 Neb. 83; Boyd v. Watt, 27 Ohio St. 259.

⁹⁹ Gran v. Houston, 45 Neb. 813; 64 N. W. 245.

¹⁰⁰ Ford v. Cheever (Mich.), 2 Det. L. N. 215; 63 N. W. 975; 27 Chic. Leg. News, 108.

¹ Reget v. Bell, 77 Ill. 593.

² Elliott v. Barry, 34 Hun (N. Y.), 129. See Engelken v. Hilger, 43 Iowa, 563.

minor son, where he consented to the sale.³ In a case in Nebraska, however, it is declared that though a wife may consent to, or acquiesce in the sale of liquor to her husband, yet this will be no defense to an action under the statute of that state brought by her in behalf of herself and children for loss of support.⁴

§ 482. Release of damages by wife no defense to action by children.—Where minor children are by statute given a right of action to recover damages for the sale of intoxicating liquors to their father independent of any similar right conferred upon the wife, a release by the latter of all damages from the sale of intoxicating liquors to her husband will be no defense to an action by the children.⁵

§ 483. Pleading.—To enable the plaintiff to recover damages for injury to her means of support sustained as the necessary consequence of the intoxication of her husband, such as would result from his inability to labor while intoxicated, it is sufficient to allege generally that she was injured in her means of support in consequence of the intoxication of her husband, but if she wishes to recover damages for any injury to her means of support which is not the necessary result, but the natural result of his intoxication, such as the reckless expenditure of his money when drunk, she must allege this in her declaration.⁶ In Michigan in an action to recover damages under the statute of that state, the plaintiff may properly allege the cause of action as a continuing one.⁷ In Iowa a cause of action arising under a statute giving a right of action to a wife, injured in her means of support as the result of the sale of intoxicating liquor to her husband, cannot be joined in a single pleading with a cause of action under a separate statutory provision which provides for the recovery of a penalty by any citizen in the county,

³ *Edgett v. Finn* (Tex. Civ. App.), 36 S. W. 830.

⁴ *Gran v. Houston*, 45 Neb. 813; 64 N. W. 245.

⁵ *Johnson v. McCann*, 61 Ill. App. 110.

⁶ *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485.

⁷ *Wood v. Lentz*, 116 Mich. 275; 74 N. W. 462; 30 Chic. Leg. News, 258; 4 Det. L. N. 285, action brought under Mich. Pub. Acts, 1887, act No. 313.

who shall be entitled to one half the amount collected in those cases, where a person has sold intoxicating liquor to one already intoxicated or in the habit of becoming so.⁸

§ 484. **Civil rights acts—Damages and penalties.**—Where the plaintiff, a colored female, was refused passage on a street car of defendant, the conductor refusing to stop, saying, "We don't take colored people in this car," and it was also proved that there was ample room for the plaintiff, and that she was provided with the usual passage tickets and was ready and willing to pay her fare, it was decided the case was not one for exemplary damages since there was no proof of special damage or of wanton or violent conduct on the part of defendant, and that if the plaintiff was wrongfully excluded from the car, such a violation of her rights entitled her to nominal damages which the law would presume in the absence of proof of actual damages.⁹ But the denial of such privilege when not on the ground of race or color does not subject the defendant to the statutory penalty.¹⁰

⁸ *Carrier v. Bernstein*, 104 Iowa, 572; 73 N. W. 1076.

⁹ *Pleasants v. North Beach & M. R. Co.*, 34 Cal. 586.

¹⁰ *Cully v. Baltimore & O. R. Co.*, 1 Hughes, 536; Fed. Cas. No. 3,466. As to allegations for denial of privileges of inn, see *Fruchey v. Eagleson*, 15 Ind. App. 88; 43 N. E. 146. As to allegation of wrongful discrimination on account of color and race, see *Redding v. South Carolina R. Co.*, 5 S. C. (5 Rich.) 67, decided 1873. As to discrimination by

reason of race, color and condition, see 10 Century Dig. columns 2133-2143, covering the following subjects: Sec. 714. "In general;" sec. 715. "Public conveyances;" sec. 716. "Marriage;" sec. 717. "Occupation and employment;" sec. 718. "Inns and Theatres;" sec. 719. "Residence;" sec. 720. "Competency as witness;" sec. 721. "Homestead;" sec. 722. "Punishment of crime;" sec. 723. "Public schools;" sec. 724. "Constitution of juries." See also 10 Century Dig. cols. 51-52, sec. 12.

TITLE V.

DAMAGES FOR CAUSING DEATH.

CHAPTER XXIII.

DAMAGES FOR CAUSING DEATH—GENERALLY.

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§ 485. Death by wrongful act, etc.—Preliminary re-
marks.—Prior to the enactment of what may be generally

designated as the death loss statutes, there were certain rules of law whereby personal rights of actions died with the person injured. We shall therefore briefly notice these legal principles or rules, the distinction between torts and contracts in connection therewith, the election of remedies, the common law, the death loss statutes generally, and the nature and construction thereof. It may also be stated here, that while these legislative enactments are perhaps an attempt to accomplish the same general purpose of affording a remedy against the person responsible for the wrongful or negligent killing of another, nevertheless they differ widely in their terms, many of them having evidently been enacted to meet certain conditions peculiar to the especial jurisdiction, or to remedy what may have been considered defects in pre-existing statutes, either of the same or other jurisdictions. Thus there exist statutes relating to death caused by the use of deadly weapons; by wilful or grossly negligent acts; by killing in a duel; death occasioned by railroad corporations, by defective highways, by negligence in operating mines, by negligence, etc., of certain common carriers; a remedy by indictment, an action in the name of the state to the use of specified persons and the general action for damages by designated legal representatives or beneficiaries. Again, certain of the statutes use specific terms as to the measure of recovery which are similar in a few states, while in the other jurisdictions no measure of damages is specified, and in still others some of the elements of damages are mentioned. A difficulty therefore exists in formulating or applying any general governing rule. We shall, however, classify as far as we deem warranted and possible, the statutes having similar provisions and those of a general and special or peculiar character, stating the rules applicable under each subdivision.

§ 486. *Actio personalis moritur cum persona*.—The rule that a personal right of action dies with the person¹ was applied by Blackstone to actions arising *ex delicto* for wrongs actually done or committed by the defendant as trespass, battery and slander, and he declares that such actions “never shall be revived either by or against the executors or other representa-

¹ Noy Max. 14; Broom's Leg. Max. (7th Am. Ed.) *906.

tives.”² At common law the rule *actio personalis* was held to be peculiarly applicable to actions in form *ex delicto*. “It being a general rule that an action founded in tort and in form *ex delicto* was considered as *actio personalis* and within” the maxim above given.³

§ 487. Actio personalis—Continued—Tort or contract—Election of remedies.—Actions on tort abate and those on contract survive as a general rule, on the death of the injured party unless there is a statutory provision to the contrary. In applying this rule, however, regard should be had rather to the substance than to the form of the action. And it is declared that if the damages are merely incident to the injury, that being personal and the proximate cause of the damages, the action dies, otherwise where the breach of the contract itself is the primary cause of the damage and the personal injuries are mere incidents of the breach.⁴ And even though a contractual relation

² 3 Black. Comm. (Cooley's ed. 1899) 302.

³ Broom's Leg. Max. (7th Am. ed.) *909, citing *Wheatley v. Lane*, 1 Wms. Saund. 216 n (1).

⁴ *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, case of passenger on street railroad holding that a personal representative of one whose death was caused by an injury received as such passenger could not maintain an action under Gen. Stat. Minn. 1894, sec. 5912, which applied alike to contract and tort, said suit not being in accordance with the provisions of sec. 5913. As to the rule *actio personalis* “it has been observed that this maxim is not applied in the old authorities to causes of actions on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person and die with the person, except where the remedy is given to the personal representative by the statute law.”

Broom's Leg. Max. (7th Am. ed.)

*909. Although there be an express contract to furnish a skillful, trained, competent nurse to a patient, and an action for tort for breach of duty might lie, yet an action can be maintained for the breach of contract. *Ward v. St. Vincent's Hospital*, 39 App. Div. (N. Y.) 824; 57 N. Y. Supp. 784; 6 Am. Neg. Rep. 164, rev'g 50 N. Y. Supp. 466; 23 Misc. (N. Y.) 91; 30 Chic. Leg. News, 258; 5 Det. L. N. (No. 4). Action for breach of contract for carriage and injury to passenger for damages prior to death survives to personal representatives. *Kelley v. Union Pac. R. Co.*, 16 Colo. 455; 27 Pac. 1058; 11 Ry. & Corp. L. J. 10. False representations as to real estate sold; action survives death of plaintiff under Cal. Civ. Code, sec. 954, providing for such survival to the personal representatives upon the owner's death of a thing in action arising out of the violation of a right to property. *Henderson v. Henshall*

exists, yet if the plaintiff's case depends as to a considerable portion thereof upon a breach of duty outside of and not a part of the contract, an action lies in tort, although said duty is dependent upon and connected with the contract.⁵

§ 488. Actio personalis—Tort or contract—Election of remedies—Continued.—It has been held in New York that an action against a common carrier may be brought in contract for an injury resulting in death, for the benefit of decedent's personal representatives.⁶ And a cause of action is held to survive to personal representatives of a husband, who has brought suit for a personal injury to his wife, *per quod servitium amisit*, the defendant being a carrier of passengers. It was said, however, that the action would have abated at common law on plaintiff's death, the action being grounded in tort.⁷ So, also, a cause of

(U. S. C. C. App. 9th Cir.), 54 Fed. 320. Action for damages for trespass on land survives to personal representatives of deceased owner. *Musick v. Kansas City S. & M. R. Co.*, 114 Mo. 309; 21 S. W. 491. That actions *ex contractu* do not survive, see *Vittum v. Gilman*, 48 N. H. 416.

⁵ *Church v. Ante-Kalsomine Co.*, 118 Mich. 219; 76 N. W. 383; 5 Det. L. N. 486. "Ordinarily the essence of a tort consists in the violation of some duty to an individual, which duty is a thing different from the mere contract obligation, and omission to perform a contract obligation is never a tort unless that omission is also an omission of a legal duty. That legal duty may arise from circumstances not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow to respect his rights of property and person and to refrain from invading them by force or fraud." *Anderson's Law Dict.* title "Tort," p. 1040, citing *Rich v. N. Y. Cent.*

& H. R. Rd. Co., 87 N. Y. 382, 390, 398, per Finch, J.

⁶ *Doedt v. Wiswall*, 15 How. Pr. (N. Y.) 125, *aff'd* 15 How. (N. Y.) 145; *Yertore v. Wiswall*, 16 How. Pr. (N. Y.) 8. But see *Hegerich v. Keddle*, 99 N. Y. 258, *rev'g* 32 Hun (N. Y.), 141; 5 Civ. Pro. (N. Y.) 228. As to survival and acts of 1847 and 1849, see *Baker v. Bailey*, 16 Barb. (N. Y.) 54; *Dickens v. N. Y. Cent. Rd.*, 28 Barb. (N. Y.) 41; *Safford v. Drew*, 3 Duer (N. Y.), 627; 12 N. Y. Leg. Obs. 150.

⁷ *Cregin v. Brooklyn Cross Town Rd. Co.*, 56 How. Pr. (N. Y.) 32, *aff'd* 75 N. Y. 192; 56 How. (N. Y.) 465, *aff'g* case cited in numerous cases. Action survived, however, under New York statutes as to survival of actions in case of wrongs to property rights, or interest of another. *Examine Sweet v. Metropolitan St. Ry. Co.*, 18 Misc. (N. Y.) 355; 41 N. Y. Supp. 549. That executrix might sue in contract for death consequent upon injury to her husband, who was a passenger on a railroad train. See *Bradshaw v. Lancashire & T. R. Co.*, 44 L. J. C. P. 148; L. R. 10

action may be brought upon contract though sounding in tort, the tort being waived, and such action survives against personal representatives.⁸ It is further held that the right to waive a tort, and sue on an implied contract is well settled.⁹ Again,

C. P. 189. See also *Winnegar v. Cent. Passgr. Ry. Co.*, 85 Ky. 547; *Potter v. Metropolitan Dist. Ry. Co.*, 80 L. T. N. S. 765; *Leggott v. Great North. Ry. Co.*, 45 L. J. Q. B. 557; 24 Wkly. R. 784; Q. B. D. 599; *City of Brussels*, 6 Ben. (U. S. Dist. N. Y.) 371. An action by a passenger on board a vessel for negligence, death or injury, is either in rem or in personam. *Desty's Shipp. & Admty.* (Pony. ed. 1879), sec. 273, citing *The Highland Light*, Chase Dec. 150; *The New World v. King*, 16 How. (U. S.) 469. That the recovery, however, should be under a statute, see *The Job T. Wilson* (U. S. D. C. D. Md.), 84 Fed. 204; *The Jane Grey* (U. S. D. C. D. Wash.), 95 Fed. 693; *The Willamette* (U. S. C. C. App. 9th Cir.), 18 C. C. A. 366; 46 U. S. App. 26; 31 L. R. A. 715; 70 Fed. 874, modified 18 C. C. A. 373; 44 U. S. App. 96; 31 L. R. A. 720; *The Glendale* (U. S. C. C. A. 4th Cir.), 42 U. S. App. 546; 81 Fed. 633, rev'g 77 Fed. 906; *The Transfer*, No. 4, & *The Car Float*, No. 16 (U. S. C. C. 2d Cir.), 61 Fed. 364; *Barton v. Brown*, 145 U. S. 335; 12 Sup. Ct. Rep. 949; 36 L. R. A. 727; 46 Alb. L. J. 66; *Rundell v. La Compagnie Gen. Trans.* (U. S. D. C. N. D. Ill.), 94 Fed. 366. This point, however, will be more fully considered in another part of this work.

⁸ *People v. Starkweather*, 3 J. & Sp. (N. Y.) 453.

⁹ *Central Gas & Elec. Fix. Co. v. Sheridan*, 49 N. Y. St. R. 639; 1 Misc. (N. Y.) 386, case of contract to furnish house with gas fixtures, and failure to complete purchase.

Demand for goods and refusal to return or pay for them and allegation for conversion of goods. *Rothschild v. Mack*, 115 N. Y. 1; 42 Hun (N. Y.), 72; 23 N. Y. St. R. 992; 21 N. E. 726, case of money obtained by fraud and tort waived. *Berly v. Taylor*, 5 Hill (N. Y.), 577, case where goods deposited and wrongfully sold, tort waived. *Boyle v. Staten Island & S. B. L. Co.*, 17 App. Div. (N. Y.) 624; 45 N. Y. Supp. 496, case where agent received securities to pay for property, but used securities of his own of less value for payment, tort waived. *Terry v. Munger*, 121 N. Y. 161; 30 N. Y. St. R. 746; 24 N. E. 272, aff'g 49 Hun (N. Y.), 560; 18 N. Y. St. R. 506; 2 N. Y. Supp. 348, case of wrongful conversion of personal property. *Doherty v. Shields*, 86 Hun (N. Y.), 303; 67 N. Y. St. R. 211, case of tortious conversion. *Abbott v. Blossom*, 66 Barb. 353, use of another's materials in repair of building. *Starr Cash-Car. Co. v. Reinhart*, 49 N. Y. St. R. 228; 2 Misc. (N. Y.) 116, case of conversion of cash; carriers. But tort cannot be waived by a real estate owner, and suit be brought against a trespasser on a contract for the value of the use of the premises. *McLane v. Kelly*, 72 Minn. 395; 75 N. W. 601. Examine also *People v. Gibbs*, 9 Wend. (N. Y.) 29. So an action against a telegraph company for breach of contract need not be ex delicto. *Carland v. West. Un. Tel. Co.*, 118 Mich. 369; 76 N. W. 762; 43 L. R. A. 280; 5 Det. L. N. 539. As to character or form of ac-

the wrongful ejection of a passenger who is rightfully on a train under a contract for his carriage to a certain point, constitutes a ground for an action for breach of the contract, or for an action *ex delicto* for tort or negligence of the carrier.¹⁰

§ 489. Same subject continued.—In a comparatively recent California case the plaintiff was employed by the board of state harbor commissioners as a night deck hand upon a tug-

tion for failure to transmit a telegram, etc., *ex delicto* or *ex contractu*, see *Joyce on Electric Law* (ed. 1900), sec. 1013. See *Florida C. & P. R. Co. v. Scarlett* (U. S. C. C. A. 5th Cir.), 33 C. C. A. 554; 63 U. S. App. 377; 91 Fed. 349, case of conversion of ties. Statute gave right where transaction was of the nature of tort and contract to waive the one and rely upon the other.

¹⁰ *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167; 70 N. W. 926; 7 Am. & Eng. R. Cas. N. S. 205; *Boster v. Chesapeake & O. R. Co.*, 36 W. Va. 318; 15 S. E. 158. So also where a passenger has been furnished an improper ticket, he may sue in tort for damages for ejection from train on refusal to pay fare demanded, his means being exhausted. *Poulin v. Canadian P. R. Co.* (U. S. C. C. E. D. Mich.), 47 Fed. 858; 11 Ry. & Corp. L. J. 39, and passenger wrongfully expelled may sue in tort or for breach of contract. *Pittsburg, C. C. & St. L. R. Co. v. Russ* (U. S. C. C. App. 7th Cir.), 6 C. C. A. 597; 57 Fed. 322. So also for injury caused by a breach of the carrier's duty owed to a passenger, action lies in tort or contract. *Louisville & N. R. Co. v. Hine* (Ala.), 25 So. 857. "The refusal of a common carrier to accept a passenger must be (citing *Lake Erie, etc., R. Co. v. Acres*, 108 Ind. 548; 9 N. E. 453), and his wrongful

ejection of a passenger with or without unnecessary force may be (citing *Central R., etc., Co. v. Roberts*, 91 Ga. 513; 18 S. E. 315, and other cases), the subject of an action in tort rather than in contract, and the right of election exists in any case of positive misfeasance to a passenger," (citing several cases) 2 *Shearman & Redf. on Neg.* (5th ed.), sec. 486. At common law the passenger's right of action for injury was confined solely to him, and the maxim *actio personalis* applied except, it is said, where the plaintiff sustained a direct loss himself as in case of a loss of service from injury to his servant. *Hutchinson on Carriers* (ed. 1891), sec. 777, citing *Carey v. Railroad*, 1 Cush. (Mass.) 475; *Kearney v. Railroad*, 9 Cush. (Mass.) 109; *Whitford v. Railroad*, 23 N. Y. 465; *Eden v. Railroad*, 14 B. Mon. (Ky.) 204; *Soule v. Railroad*, 24 Conn. 575; *Holland v. Railroad*, 144 Mass. 425; *Matthews v. Railroad*, 26 Mo. App. 75; *Hall v. Hollander*, 4 B. & C. 660, and other cases. Passenger's remedy is in contract or tort at his election. 2 *Harris on Dam. by Corp.* (ed. 1892) secs. 544, 545; 4 *Elliott on Railroads* (ed. 1897), secs. 1693, 1694, 1696; *Black's Law & Pract. in Accdt. Cas.* (ed. 1900) secs. 90; *Thomas on Neg.* (ed. 1895) p. 129, V; *Booth on Street Rys.* (ed. 1892) sec. 375.

boat belonging to the state and used by said board, and was injured, as alleged, by a fall, while in the performance of his duties as said employee. It was urged that the relation of master and servant was a contract relation, and that the action was to recover damages for a breach of duty under the contract. The court, however, declared the action to be one in tort and not upon contract. "The contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer—a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. Nor is the action grounded upon the contract but upon the duty springing from the relation created by it, viz: that of employer and employee, and under the old system of pleading was always classed as an action *ex delicto*."¹¹ And if a tort exists independently of the contract even though one of the consequences is a breach thereof, action may be brought in tort.¹² There are, it is said, three classes of cases in which actions for tort are founded: (1) an invasion of some legal right of person or property; (2) the violation of some duty toward the public which has resulted in some damage to the plaintiff, or, (3) an infraction of some private duty or obligation which has been productive of damage to the complaining party.¹³ So the election as to contract or tort applies not only to misfeasance or nonfeasance but tort also frequently lies where there is simply a nonperformance of contract.¹⁴

¹¹ *Denning v. State*, 123 Cal. 316; 5 Am. Neg. Rep. 289, 297. See also 1 *Wait's Act. & Def.* (ed. 1877) p. 135.

¹² *Stock v. Boston*, 149 Mass. 410; 21 N. E. 871. A claim for a conversion of securities by a member of a firm of stockbrokers who has died, may be sued on as a claim in tort against the estate of the deceased partner or as an action on implied contract against the survivor of the firm. *Matter of Pierson*, 19 App. Div. (N. Y.) 478; 46 N. Y. Supp. 557.

¹³ 1 *Wait's Acts & Def.* (ed. 1877)

p. 132, from which the above is substantially taken.

¹⁴ *Broom's Leg. Max.* (7th Am. ed.) *202. See also *Black's Law & Pract. in Accdt. Cases* (ed. 1900), sec. 90; 1 *Shear. & Redf. on Neg.* (5th ed.) sec. 220, cases cited, 1 *Stover's N. Y. Ann. Code* (5th ed.), p. 329a et seq.; *Blin v. Campbell*, 14 Johns. (N. Y.) 432; *McAllister v. Hammond*, 6 Cow. (N. Y.) 342; *Perceival v. Hickey*, 18 Johns. (N. Y.) 432. But it is held that for the negligent performance of a duty arising out of contract, tort does not lie.

§ 490. Death—Abatement and survival—Rights of action—Statutes—Generally.—Seven distinct propositions may be deduced from the decisions: (1) The maxim *actio personalis* applied to torts and not to actions on contract. Actions of tort which were annexed to the person died with the person in the absence of a statute to the contrary. (2) Actions of tort for injury to a man's person, reputation or feelings within the maxim *actio personalis* are distinct from those causes of action, whereby it is sought to recover for loss by the death itself, occasioned by a statutory wrong or omission as the proximate cause. (3) An action for a tort annexed to the person who is a party to a personal action and which dies with such party, has been distinguished from a case wherein the party alleged to be injured and the wrongdoer are still in existence and the injury arises to the plaintiff outside of and independent of that to the deceased, as where there is an injury to some relative right, such as a loss of service to a master, husband or parent. (4) Excluding from consideration any reference to death statutes, it may be stated generally that personal representatives stand not so much for the person as for the estate and assets of the deceased. (5) The statutes giving a cause of action in the civil courts for loss by death for and to designated parties, occasioned by specified wrongs are, in so far as the decisions are of any weight, limited in their construction and application to the terms of each particular statute. (6) An exception to the last proposition should exist in those cases where there are like or similarly worded statutes. (7) Within such an exception the weight of any extraterritorial decision would evidently be limited by the rule *stare decisis*.¹⁵

§ 491. Death—Effect of subsequent statute—Survival.—

Masters v. Stratton, 7 Hill (N. Y.), 101. See note 41 L. R. A. 807, under the following heads: Death; common-law right of action of parent for loss of services of child killed: (1) Rule that no action will lie; (a) different theories as to; (b) doctrine that private injury is merged in public wrong; (c) doctrine that human life is not a subject of civil

damages; (d) effect when death is not instantaneous; (2) the contrary rule; (3) the true rule; (4) rule when injury consists of a breach of contract.

¹⁵ The various decisions from which the above propositions are deduced appear throughout the sections herein, in which the subject of death losses are considered.

In Texas it is decided that the legislature was empowered to make a statute, providing for the nonabatement of rights of action by death of a person injured in health or reputation, applicable to existing causes of action and to provide that they should not abate thereafter by such death.¹⁶ So that an action for personal injuries received before the passage of said act survives the injured plaintiff's death,¹⁷ but a right of action which abated by death of the injured plaintiff prior to said enactment is not within its provisions.¹⁸

§ 492. Death before or after judgment, verdict, etc.—In a case in the United States supreme court the original plaintiff brought suit to recover for personal injuries received while a passenger on a railroad train. Upon petition of the railroad company, the suit was removed from the Ohio court into the United States circuit court. After removal the plaintiff died. At the time of his death the common-law rule as to the abatement of causes of action for personal injuries prevailed in Ohio. The injury resulting in such death was received in Indiana, and it was held that the action did not finally abate by reason of the death of the plaintiff before trial and judgment, but that it might be revived and prosecuted by his executor or administrator, duly appointed in Ohio by the proper court, and that the point whether the action could be revived in a Federal court was not

¹⁶ *Missouri, K. & T. R. Co. v. Settle*, 19 Tex. Civ. App. 357; 1 Jour. of App. 37; 47 S. W. 825; Act, Tex. May 4, 1895; Tex. Rev. Stat. 1895, art. 3353a. See also *City of Marshall v. McAllister*, 18 Tex. Civ. App. 159; 43 S. W. 1043; 3 Am. Neg. Rep. 743. "It appears that after the injuries were alleged to have been received and before said L. G. McAllister's death, the legislature of Texas passed an act (art. 3353a, Rev. St. 1895), providing that actions pending or thereafter brought for personal injuries not resulting in death should survive to and in favor of the heirs and legal representatives of the party injured upon his death. It is insisted

by counsel for the city that the said act is retroactive and unconstitutional and that its provisions should not govern in this case. This precise point was raised in the case of *Railway Co. v. Rogers* (Tex. Civ. App.), 39 S. W. 1112, and we there held that the action would survive. The question was fully considered when that case was under consideration and we now see no reason for changing the views there expressed." *Id.*, 745, per Rainey, J.

¹⁷ *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; 39 S. W. 1112.

¹⁸ *Fitzgerald v. Western Un. T. Co.*, 15 Tex. Civ. App. 143; 40 S. W. 421.

affected in this case, by the fact that the deceased received his injuries in Indiana.¹⁹ So in Minnesota an action for personal injuries caused by negligence does not abate by death of one of the parties after verdict rendered, but may be continued by or against personal representatives.²⁰ Nor does an action for damages through negligence of defendant's servants abate by death of the plaintiff after verdict.²¹ But it is also held that the common-law rule that a right of action for damages for personal injuries abates on plaintiff's death is not changed by the Code unless a verdict, report or decision has been rendered.²² Again, in Ohio, death of the plaintiff after judgment in his favor in an action to recover for personal injuries does not abate the suit where a new trial has been granted, but none is had.²³

§ 493. Death of wrongdoer—Common law and statutes.

—In its application the maxim *actio personalis* relates not only to the person injured, but also to the death of the wrongdoer, and with some exceptions the statutes which give a remedy for loss by death to certain representatives or beneficiaries of decedent have not changed the common-law rule as to defendants

¹⁹ *Baltimore & Ohio Rd. Co. v. Joy*, 173 U. S. 226; 19 Sup. Ct. Rep. 387; 43 L. Ed. 677; 5 Am. Neg. Rep. 760. The court considers Rev. Stat. Ohio, sec. 5144; 1 Rev. Stat. Ohio, 1890, p. 1491; Rev. Stat. Ind. secs. 282, 283; sec. 955, Rev. Stat. U. S. (Judiciary Act, U. S. Sept. 24, 1789, 1 Stat. 90, c. 20, sec. 21); Rev. Stat. U. S. sec. 721 (Judiciary Act U. S. 1789, 1 Stat. 92, ch. 20, sec. 34).

²⁰ *Cooper v. St. Paul City R. Co.* (Minn.), 56 N. W. 588, under Minn. Genl. Stat. 1878, ch. 66, sec. 41.

²¹ *Lyons v. Third Ave. Rd. Co.*, 7 Rob. (N. Y.) 605, under Code Proc. sec. 121 (Stov. Ann. Code Civ. Proc. sec. 755).

²² *Corbett v. Twenty-third St. R. Co.*, 114 N. Y. 579; 24 N. Y. St. R. 538; 21 N. E. 1033, under Stov. Ann. Code Civ. Proc. (1898) sec. 764. As to meaning of "decision," see

same case. Also *Adams v. Nellis*, 59 How. (N. Y.) 385, rev'd 24 Hun (N. Y.), 605. Parties may stipulate for nonabatement by plaintiff's death before final judgment. *Cox v. N. Y. Cent. Rd. Co.*, 63 N. Y. 414, rev'g 4 Hun (N. Y.), 176; 6 T. & C. 405. Stov. N. Y. Ann. Code Civ. Proc. (1888) sec. 763, is not applicable where final judgment has been entered. *Carr v. Risher*, 28 N. Y. St. R. 280. See further as to cases under secs. 763-765, *Smith v. Lynch*, 12 Civ. Proc. (N. Y.) 348; 8 N. Y. St. R. 341; *Kelsey v. Jewett*, 34 Hun (N. Y.), 11; *Pessini v. Wilkins*, 8 N. Y. St. R. 89; 54 N. Y. Supr. 146. See also cases noted *Stover's Ann. Code Civ. Proc.* (1888) pp. 765-767, secs. 763-765.

²³ *Ohio & P. Coal Co. v. Smith*, 52 Ohio St.—; 34 Ohio L. J. 94; 2 Ohio Leg. News, 718.

or the wrongdoer. To be more specific, it is clear that prior to "Lord Campbell's act,"²⁶ if a person by his wrongful act caused another's death, no action could be maintained against him, nor did that act prescribe any remedy against the personal representatives of the wrongdoer or tort-feasor. A distinction, however, existed and generally exists between a tort to the person, and a tort in respect to real or personal property.²⁵

§ 494. Death of wrongdoer—Continued—Abatement and survival of actions.—If death alone constitutes a cause of action, there being no injury to the estate or to the property of the deceased, such right of action abates by the wrongdoer's death.²⁶ So it is held in a Texas case that if no action is commenced during the lifetime of one killing another, the right of action does not survive the death of the one at fault.²⁷ It is also de-

²⁶ (1846) 9 and 10 Vict. ch. 93.

²⁵ "By the Statute 3 and 4, Will 4, ch. 42, sec. 2, . . . trespass and case will also lie against personal representatives for any wrong committed by any person deceased in his lifetime to another in respect of his property, real or personal," subject to a specified time limit, both as to the commission of the act and the bringing of an action. "Prior to this act, the remedy for a tort to the property of another, real or personal, by an action in form *ex delicto*, such as trespass, trover or case for waste . . . could not have been enforced against representatives of the tort-feasor . . . For a tort committed to the person it is clear then that at common law no action can be maintained against the personal representatives of the tort-feasor, nor does the Stat. 9 and 10 Vict. ch. 93, as amended 27 and 28 Vict. ch. 95, supply any remedy against the executors or administrators of the party, who by his 'wrongful act, neglect, or default,' has caused the death of another, for the first section of this act renders that person liable to an

action for damages 'who would have been liable if death had not ensued,' in which case, as already stated, the personal representatives of the tort-feasor would not have been liable." Broom's Leg. Max. (7th Am. ed.) *914, *915. Action for continuance of obstruction to ancient lights may be maintained against executors or administrators under 3 and 4 Wm. IV, chap. 42, sec. 2, providing for trespass on the case, etc. *Jenks v. Viscount Clifden* (1897), 1 Ch. 694; 76 Law Jour. Rep. 382; 66 L. J. Ch. N. S. 338.

²⁶ *Hegerich v. Keddle*, 99 N. Y. 258; 1 N. E. 787, rev'g 32 Hun (N. Y.), 141; 5 Civ. Pro. (N. Y.) 228. See *Price v. Price*, 11 Hun (N. Y.), 299, aff'd 75 N. Y. 244; *Pessini v. Wilkins*, 8 N. Y. St. R. 89; 54 Super. Ct. (N. Y.) 146; *Yertore v. Wiswall*, 16 How. Pr. (N. Y.) 8, and *Doedt v. Wiswall*, 15 How. (N. Y.) 128, held that the action could be continued against defendant's representatives, but the later decisions must be considered as the law.

²⁷ *Johnson v. Farmer*, 89 Tex. 610; 35 S. W. 1062, under Tex. Rev. Stats.

cided in Pennsylvania that an action by a widow for causing her husband's violent death abates upon the death of the defendant before judgment.²⁸ So in Ohio if the death be caused by another, and he die, the action abates.²⁹ In Colorado, an action for negligently or wilfully inflicted injury dies with the wrongdoer, and the words "trespass for injuries done to the person" in the statute of 1868, are held not to imply of necessity a trespass *vi et armis*.³⁰ Again, an action for personal injuries abates on defendant's death in Indiana, even though the injury is alleged to have arisen out of a breach of contract and recovery is also incidentally sought for injury to property.³¹ And the act of negligently running over a person by a driver is neither a trespass nor an assault so as to come within a statute excepting assault and battery with other actions from its provisions as to survival, but providing that actions for personal injury survive.³²

§ 495. Death—Civil action—Remedy purely statutory.—

Although one sustaining a personal injury might sue in tort to recover damages therefor, or might have his election as to an

arts. 3024, 3026, providing for survival in such cases only when action is commenced during life of person at fault. Action may be continued if defendant die pending suit and does not abate by death of either party to record, if any beneficiary survives. See Sayles' Civ. Stat. Tex. secs. 2906—2908; Tex. Rev. Stats. 1885, sec. 3353a.

²⁸ Weiss v. Hunsicker, 14 Pa. Co. Ct. 398; 3 Pa. Dist. R. 445. As to death after judgment or verdict, see section 492 herein.

²⁹ Russell v. Sunbury, 37 Ohio St. 372; 41 Am. Rep. 523. See Bates' Ann. Stat. Ohio, 1897, sec. 4975. As to killing, see Morehead v. Bittner, 20 Ky. L. Rep. 1986; 50 S. W. 857, under Ky. Stat. 1894, p. 176, sec. 10, which provides that on death of person injuring, actions for "assault" cease or die.

³⁰ Letson v. Brown, 11 Colo. App. 11; 52 Pac. 287, under Colo. Rev. Stats. 1868, p. 632, which provides for survival to and against executors and administrators of all actions at law except actions on the case for slander or libel or trespass for injuries to the person, and actions to recover real estate. See Colo. Civ. Code, sec. 15. See also Munal v. Brown (U. S. C. C. D. Colo.), 70 Fed. 967.

³¹ Feary v. Hamilton, 140 Ind. 45; 39 N. E. 516, under Ind. Rev. Stat. 1894, sec. 283, which provides for abatement by death of either party in actions arising out of injury to the person. See also Hamilton v. Brown, 125 Ind. 176; Hess v. Lowery, 122 Ind. 225; 7 L. R. A. 900.

³² Perkins v. Stein, 15 Ky. L. Rep. 203; 22 S. W. 649.

action for tort or contract in certain cases, nevertheless, whatever remedy exists by way of a civil action, for the benefit of the relatives, beneficiaries or estate of decedent, for loss by death of a human being, is purely statutory, it being well settled that under the common law, no civil right of action existed in such case.²²

²² *Higgins v. Butcher*, Yelverton, 89; 1 *Browne & G.* 205, husband for wife. *Baker v. Bolton*, 1 Campb. 493, husband for wife. "In a civil court the death of a human being could not be complained of as an injury." *Id.*, per Lord Ellenborough. *Osborn v. Gillett*, L. R. 8 Exch. 88, per Pigott, J., master for servant. See *Canadian, etc., R. Co. v. Robinson*, 14 Can. Sup. Ct. 105. Preamble to Lord Campbell's act (1846), 9 and 10 Vict. ch. 93, reads, "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of any person." *Little Rock & F. S. Ry. Co. v. Barker*, 33 Ark. 350, parent for minor. *Davis v. St. Louis, I. M. & S. Ry. Co.*, 53 Ark. 117; 13 S. W. 801, parent for minor. *Kramer v. Market St. Rd. Co.*, 25 Cal. 234, parent for minor. *Hindry v. Holt*, 24 Colo. 464, orphan child for uncle. *Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265, rule applied to indirect loss as insurer for insured's death. *Womack v. Central R. R. Co.*, 80 Ga. 132; 5 S. E. 63, husband for wife. *Bell v. Wooten*, 53 Ga. 684, father for death of son from negligence of surgeon. *Selma R. Co. v. Lacey*, 49 Ga. 106; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Long v. Morrison*, 14 Ind. 596; *Indiana, P. & C. R. Co. v. Keely*, 23 Ind. 183; *Burns v. Grand Rapids & I. R. Co. (Ind.)*, 15 N. E. 230, *actio personalis*; *Jackson v. Pittsburgh, C. C. & St. L. R. Co. (Ind.)*; 39 N. E. 663, parent for child. *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412; 1 Repr. 896; 14 Am. & Eng. R. Cas. N. S. 692; *Malott v. Shimer*, 153 Ind. 35; 1 Repr. 1234; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774; 54 N. E. 101; *Eureka v. Merrifield (Kan.)*, 37 Pac. 113; *Covington St. Ry. Co. v. Packer*, 9 Bush (Ky.), 455, parent for minor. *Eden v. Lexington, etc., R. R. Co.*, 14 B. Mon. (Ky.) 204, husband for wife. *Judd v. Chesapeake & O. Ry. Co. (Ky. Ct. App. 1897)*, 1 Am. Neg. Rep. 254, 255, statutory action for death of employee. "The case at bar is purely a statutory right not existing under the common law," per the court. *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700; 18 Ky. L. Rep. 379; 34 S. W. 236; 34 L. R. A. 788; 3 Am. & Eng. R. Cas. N. S. 309, statutory action for loss of wife's society on account of injuries resulting in death is more advantageous than common-law action for loss of her society. *Hermann v. New Orleans & C. R. R. Co.*, 11 La. Ann. 51, widow for minor. *Hubgh v. New Orleans & C. R. R. Co.*, 6 La. Ann. 495, wife for husband. *Nickerson v. Harriman*, 38 Me. 277, parent for minor. *Lyons v. Woodward*, 49 Me. 29, wife for husband. *Carey v. Berkshire R. R. Co. (wife for husband)*, and *Skinner v. Housatonic R. Co.*, 1 Cush. (Mass.) 475, parent for child. *Kearney v. Boston, etc., R. R. Co.*, 9 Cush.

§ 496. Nature of statutory remedy for losses by death or where death ensues—Generally.—The discussion of the nature of the remedies given by the various statutes for loss by death of a human being involves also the construction of such statutes.

(Mass.) 108, by executor or administrator. Mass. Act (Mass. Colonial Laws [ed. 1660] Boston, 1889, p. 126), however gave a remedy as early as 1648 for loss of life from defective ways and bridges. *Hyatt v. Adams*, 16 Mich. 180, husband for wife. *Scheffler v. Minneapolis, etc., Ry. Co.*, 32 Minn. 125, parent for minor. *Natchez, J. & C. R. Co. v. Cook*, 63 Miss. 38, parent for minor. *Wyatt v. Williams*, 43 N. H. 102, wife for husband. *Myers v. Holborn*, 58 N. J. L. (29 Vr.) 193; *Grosso v. Delaware, etc., R. R. Co.*, 50 N. J. L. (21 Vr.) 317, husband for wife. *Corbett v. Twenty-Third St. R. Co.*, 114 N. Y. 579; 24 N. Y. St. R. 538; 21 N. E. 1033, holding that the rule of common law that action to recover damages for personal injury abates on death of plaintiff is not changed by sec. 764, N. Y. Code Civ. Pro., unless a verdict, report or decision has been rendered upon the issues, and explaining "decision" in that section. *Hegerich v. Keddle*, 99 N. Y. 258; 52 Am. Rep. 25, rev'g 32 Hun (N. Y.), 141; *S. C. 5 Civ. Pro. (N. Y.)* 228, *actio personalis*. *Debevoise v. N. Y. L. E. & W. R. R. Co.*, 98 N. Y. 377, purely statutory and does not exist at common law. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; 3 Bos. (N. Y.) 67, statutes create a new cause of action in favor of representatives of deceased. *Dickens v. N. Y. Cent. R. R. Co.*, 23 N. Y. 158; *Zabriskie v. Smith*, 13 N. Y. 322; *Crowley v. Panama R. R. Co.*, 30 Barb. (N. Y.) 99; *Green v. Hudson River R. R. Co.*, 28 Barb. (N. Y.) 9, *aff'd* 31 Barb. (N. Y.) 260, *aff'd* 2 Keyes,

294; 2 Abb. App. 277, husband for wife's immediate death. *People v. Gibbs*, 9 Wend. (N. Y.) 29, cause of action *ex delicto* does not survive though by statute an action of *assumpsit* be given against the wrongdoer. *Wellman v. Sun Print. & Pub. Assn.*, 66 Hun (N. Y.), 331; 50 N. Y. St. R. 254, case of libel of wife, that miscarriage produced her death—held a personal wrong which died with her. *Worley v. Cin. R. R. Co.*, 1 Handy (Cin. Sup. Ct.), 481, husband for wife. *Russell v. Sunbury*, 37 Ohio St. 372; 41 Am. Rep. 523, *actio personalis* applies. *Lake Shore & M. S. R. Co. v. Orvis (C. C.)*, 1 Ohio Dec. 492, father for son, no action at common law. *Penn. R. R. Co. v. Adams*, 55 Pa. St. 499; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109; 48 S. W. 778, wife for husband, does not survive unless statute in states where death occasioned, as well as in state where brought. *Fitzgerald v. West. U. T. Co.*, 15 Tex. Civ. App. 143; 40 S. W. 421, holding that action against telegraph company for failure to deliver message is personal and abated with death of plaintiff prior to act. *Tex. May 4, 1895. Sherman v. Johnson*, 58 Vt. 40, parent for son. *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294, *actio personalis* rule. *Brown v. Chicago & N. W. Ry. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, 257, per Marshall, J. See further *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 756, "no deliberate well-considered decision to the contrary is to be found," per

There is certainly a distinction between the following cases: (1) Where a right of action survives the death, such rights having existed before such death, but no action having been commenced prior thereto. (2) Where an action for the injury to the person has been commenced during the lifetime of the injured and it survives his death. (3) Where the action is commenced after death to recover for loss thereby, the injury having been instantaneous therewith or at least instantaneous in the sense of there being no appreciable period of time between the two. (4) Where the action is penal or by way of indictment for the benefit of designated persons. (5) Where the action is special. (6) Where employer's liability, miners' acts, dueling acts and other particular statutes are involved. (7) Where the construction of enactments relating to recovery for death losses are involved in the same case with that of other statutes, and finally, (8) where the nature of the remedy is dependent upon the express wording of the particular statute, with its amendments.

§ 497. Nature of statutory remedy—Continued—Decisions,

Hunt, J.; *The Harrisburg*, 119 U. S. 199; *Dennick v. Central R. R. Co.*, 103 U. S. 11; *Webber v. St. Paul City Ry. Co.* (U. S. C. C. A. Minn.), 97 Fed. 140, a general proposition that actions on torts abate on death of injured party in the absence of a statute giving a right of action. *Matz v. Chicago & A. R. Co.* (C. C. W. D. Mo.), 85 Fed. 180, decides that where a statute gives a right of action in case of instant death, the right is not defeated because there was no suffering or injury for which a personal action could have been brought at common law. *Gerling v. Balt. & O. R. Co.*, 151 U. S. 673; 14 Sup. Ct. Rep. 533; 38 L. Ed. 311, holds that death of the plaintiff abates a cause of action in West Virginia brought for personal injuries and notwithstanding the statute giving after death a right of action to personal representatives. *Sullivan v.*

Union P. R. Co., 1 McCrary (U. S. C. C.), 301, parent for child. But examine contra, *Cross v. Guthrey*, 2 Root (Conn.), 90. See *Augusta Factory v. Davis*, 87 Ga. 648; *Perry v. Ga. R. & B. Co.*, 85 Ga. 193; 11 S. E. 605, loss of services of minor. *McDowell v. Ga. R. Co.*, 60 Ga. 320, father for daughter. *Chick v. Southwestern R. Co.*, 57 Ga. 357, loss of minor. In *Shields v. Yonge*, 15 Ga. 349, suit was sustained by a father for loss of service of minor through his death. Examine *Stanley v. Bircher*, 78 Mo. 245; *James v. Christy*, 18 Mo. 162, loss of services of minor son. *Ford v. Monroe*, 20 Wend. 210, loss of services of minor until twenty-one years old and for wife's sickness consequent upon negligent killing of son. See notes 37 Am. Rep. 716, 719; 3 Chic. Law Jour. N. S. 149. Examine 41 L. R. A. 807.

etc.—In New York it is declared that the right to damages for injuries causing death does not depend upon the right to support from the deceased.³⁴ In Louisiana the statutory right of action is attached to the person and is not transmissible as a property right.³⁵ In Massachusetts the act is penal,³⁶ although a civil action may also be maintained.³⁷ In Maryland under the survival statute relating to actions for personal injuries, the right to recover is held to depend upon the nature of the action and not upon the character of the damages claimed.³⁸ In a Federal court case it is decided that the right of action for recovery for loss of life by negligence of a railroad company, etc., is not property upon which administration can be obtained by a foreign administrator in Kentucky.³⁹ In New York it is held that in an action for death, the cause of action is the death and not the injury, and that the action is governed by the law in force at the time of death.⁴⁰ And under the Ohio statute it is decided that the right to revive an action is a right inhering in the action which accompanies it into the Federal court in removal.⁴¹

§ 498. Nature of statutory remedy—Continued—Whether remedy new and independent.—In England, "Lord Campbell's act" permitting the recovery for the benefit of the family of damages for death of a human being caused by wrongful act, neglect or default of another in cases where, if death had not ensued, the injured party would have been entitled to maintain an action for damages in respect thereof, and the preamble to which specifies that no claim at law was then maintainable in such cases has evidently been considered as conferring a totally new cause of action resting on a new and different principle and not operating merely as a transfer of an old right of action.⁴² Un-

³⁴ *Palmer v. N. Y. Cent. R. R. Co.*, 5 N. Y. St. R. 436; 26 Wkly. Dig. 26.

³⁵ *Huberwald v. Orleans R. Co.*, 50 La. Ann. 477; 23 So. 474.

³⁶ *Adams v. Fitchburg R. Co.* 67 Vt. 76; 30 Atl. 687.

³⁷ See Mass. Pub. St. c. 112 (as amended 1894, § 7).

³⁸ *Ott v. Kaufman (Md.)*, 11 Atl. 580.

³⁹ *Marvin v. Maysville St. R. & T. Co.* (U. S. C. C. D. Ky.), 49 Fed. 436.

⁴⁰ *Smith v. Metropolitan St. Ry. Co.*, 15 Misc. (N. Y.) 158; 35 N. Y. Supp. 1062.

⁴¹ *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226; 19 Sup. Ct. Rep. 387; 43 L. Ed. 677; 5 Am. Neg. Rep. 760, under Ohio Rev. Stat. sec. 5144.

⁴² *Seward v. The Vera Cruz*, 10

der this statute the executor or administrator of the deceased was entitled to sue for the benefit of his surviving family, but only as above noted in cases where the injured party could have maintained the action. Now, while the enactment gave a remedy which did not exist prior to its passage, yet the courts might well consider that the right of the executor or administrator to bring suit rested alone upon the injured party's right to recover and did not exist as an independent right in the named representatives. In this sense it was perhaps not unduly extending legal argument to hold that the injured party's cause of action was transmitted upon his decease to his representatives for the benefit of his family under the terms of the statute. This reasoning would assume force in determining to what extent the acts of the injured party in releasing his right of action or in obtaining damages through a civil action would affect the right of his executor or administrator to recover damages for the benefit of the family of the deceased, and so it has been asserted that the right of the representative of the deceased to maintain an action is not absolute in the former, and independent of the fact whether or not the injured party has received compensation in his lifetime, and therefore that the representative is merely substituted as to the right of action in that place which the injured party would have had, had he survived, and that only a new principle as to the assessment of damages is conferred and no new right of action created.⁴⁸ From this standpoint statutes which are worded the same, or substantially the same as the English act, might come within the same reasoning, and if the argument is sound, then it may fairly be extended as involving logically the following points: (1) Can damages be recovered for pain and suffering of the deceased from the injury causing death, and if the statute does not create a new cause of action for the loss by death but operates to continue the action began by the injured party, ought it not to include in the recovery all that the injured party would have been entitled to recover had

App. Cas. 59, per Lord Blackburn; *Blake v. Midland Ry. Co.*, 18 Q. B. 93; 16 Jur. 562; 21 L. J. Q. B. 233, per Coleridge, J.

⁴⁸ See *Read v. Great Eastern Ry. Co.*, L. R., 3 Q. B. 558, per Blackburn, J. See *Griffiths v. Earl of Dudley*, 9 Q. B. D. 57.

he lived?" (2) What is the meaning of pecuniary loss?" (3) What right have the named representatives to sue for loss by death for the benefit of the designated beneficiaries in addition to the personal representative's right to continue, under survival statutes, the action brought by the injured party during his lifetime? (4) What is the effect of instantaneous death so far as the right of action is concerned? (5) From what time does the limitation of the right of action commence?"

§ 499. Nature of statutory remedy—Whether same is new and independent—Continued.—It is held in Indiana that the statute of that state creates a new and independent cause of ac-

⁴⁴ That damages are confined to loss by the death, and are not allowable for pain and suffering of the injured person prior to his death, see *Blake v. Midland Ry. Co.*, 18 Q. B. 93, per Coleridge, J.; *Dwyer v. Chicago St. P. M. & O. R. Co.* (Iowa), 51 N. W. 244, under Iowa Code, sec. 2525; *Cheatham v. Red River Line* (U. S. D. C. E. D. La.), 56 Fed. 248, under La. Civ. Code. art. 2315; *Holland v. Brown*, 35 Fed. 23, under Comp. Laws, Oregon, 1887, sec. 371; *Wilcox v. Wilmington City Ry. Co.* (Del. Super. 1899), 44 Atl. 686, under Rev. Code, p. 676; *Louisville & N. R. Co. v. Sander*, 19 Ky. L. Rep. 1941; 44 S. W. 644; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 469, contra, as to survival of suit, *Missouri, K. & T. R. Co. v. Settle*, 19 Tex. Civ. App. 357; 47 S. W. 825, contra, as to pain and suffering prior to death, *Murphy v. Railroad*, 29 Conn. 496. Examine *Bowler v. Lane*, 3 Met. (Ky.) 311; *Railroad v. Prince*, 2 Heisk. (Tenn.) 580. See Ky. Genl. Stat. ch. 57, sec. 1; La. Civ. Code, art. 2315 and chapters on measure of damages herein. See *Murphy v. N. Y. Cent. R. R. Co.*, 88 N. Y. 445; 14 Wkly. Dig. 150; *Givens v. Kentucky Cent. R. Co.*, 89 Ky. 231; 12 S. W. 257. This ques-

tion is fully considered elsewhere herein.

⁴⁵ That the recovery is confined to the pecuniary loss, see *Morgan v. Southern P. Co.*, 95 Cal. 510; 17 L. R. A. 71; 29 Am. St. Rep. 143; 30 Pac. 603; 54 Am. & Eng. R. Cas. 101; *Lapsley v. Union P. R. Co.* (U. S. C. C. N. D. Iowa), 50 Fed. 172, aff'd 51 Fed. 174; *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536, under Colo. Gen. Stat. sec. 1032; *Lazelle v. Newfane*, 70 Vt. 440; 41 Atl. 511, under Vt. Stat. sec. 2452; *Graham v. Consolidated Traction Co.* (N. J. Sup. 1899), 44 Atl. 964, under act March 3, 1848; 1 Gen. Stat. p. 1188; *McKay v. New England Dredging Co.*, 92 Me. 454; 43 Atl. 29, under Me. Act, 1891, ch. 124; *Hughey v. Sullivan* (U. S. C. C. S. D. Ohio), 36 Ohio L. J. 247. The question, however, of pecuniary loss is more fully considered elsewhere herein.

⁴⁶ This last point would apply where it is held or declared that the statute presenting the time limit for suing is independent of the statute of limitations and confined to the statutory remedy in cases of loss by death. See *The Harrisburg*, 119 U. S. 199, per Waite, C. J.

tion to the representatives of the deceased for the benefit of those designated therein.⁴⁷ So in New York it is declared that the Code does not simply provide a new remedy but creates a new right and a new liability, and that the statutory provisions are part of the substantive law of the state.⁴⁸ And substantially the same language is used in a Wisconsin case⁴⁹ where the court considers at some length the distinction between the survival enactment and the death loss statute, declaring that they refer to entirely distinct losses recoverable in different rights and that the former creates no new liability but prevents the lapsing by death of an old one, while the latter creates a new right in the surviving relatives to compensation for their loss arising from the death.⁵⁰

⁴⁷ *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412; 1 Repr. 896; 14 Am. & Eng. Cas. N. S. 692, under *Horner's Rev. Stat.* 1897, sec. 284.

⁴⁸ *O'Reilly v. Utah, Nev. & Cal. Stage Co.*, 87 Hun, 457; 34 N. Y. Supp. 358; 68 N. Y. St. R. 432. See *Whitford v. Panama R. Co.*, 23 N. Y. 465; 3 Bos. (N. Y.) 67, where it is said that the statute creates a new cause of action in favor of representatives of the deceased. *Quinn v. Moore*, 15 N. Y. 435, per Comstock, J., *Littlewood v. Mayor, etc.*, 89 N. Y. 24, per Rappaljo, J.; *S. C.*, 14 Wkly. Dig. 400, affg 47 Super. Ct. 547.

⁴⁹ "The death loss act of the English statute, 9 and 10 Vict. ch. 93, commonly called 'Lord Campbell's Act,' and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law for the benefit of a certain designated class of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent the continuation of whose life would have been bene-

ficial to them. . . . The action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives, but it is rather a new action by secs. 4255, 4256 (Rev. Stat. Wis. 1898), which can be brought not for the benefit of the estate but solely for the benefit of the beneficiaries named in the statute." *Brown v. Chicago & N. W. Ry. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, 257, per Marshall, J., rehearing denied 44 L. R. A. 585; 78 N. W. 771. See also *Topping v. Town of St. Lawrence*, 86 Wis. 526; 57 N. Y. 365, per Orton, J.

⁵⁰ The value of the following justifies its insertion at length: "The law of this state conferring upon surviving relatives the right to recover their pecuniary loss caused by the wrongful taking off by death of a husband, wife, child, father or mother has existed for forty years, while the law reviving the right in favor of the personal representatives of a deceased person to his claim for damages to his person was

So it is also held that the remedy is purely statutory under the Illinois act and not a survival of decedent's cause of action.³¹ In

not enacted till 1887. But independent of that circumstance, as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights; the one in the right of the deceased for the loss occasioned to him; the other is the right of the surviving relatives for the loss to them. Both are dependent on the injury but only one dependent on the death with surviving relatives to take under the statute. The language of one provision is that 'actions for personal injuries shall survive' and of the other 'in case of the death of a person by the wrongful act of another.' Under certain circumstances named the wrongdoer 'shall be liable to an action for damages notwithstanding the death of the person injured, if the death be caused in this state.' The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the wrongdoer while dependent on the condition named is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute,

—the right of the surviving relatives to compensation for the loss which falls upon them." And criticising *Holton v. Daly*, 106 Ill. 131, the court continues: "That learned court reasons that there is but one ground of liability,—the wrongful act; and as all claims for damages grow out of the one wrong, it is unreasonable to say the legislature intended there shall be two causes of action based upon it; that the more reasonable view is that the act making causes of action for personal injuries survive should be considered as referring to a special class of actions not included in those named in the general provision giving a right of action to surviving relatives; that without that construction there would be a repugnance between the two provisions. The fallacy of that reasoning is easily apparent. Thus in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased, or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct. . . . The views of the Illinois court accord with the judgment of the supreme court of Kansas. *McCarthy v. Railroad Co.*, 18 Kan. 46; *City of Eureka v. Merrifield*, 53 Kan. 794; 37 Pac. 113; *Martin v. Railway*

³¹ *Malott v. Shimer*, 153 Ind. 35; 1 Repr. 1234; 15 Am. & Eng. R. Cas. N. S. 774; 54 N. E. 101; 6 Am. Neg. Rep. 263. See *Holton v. Daly*, 106 Ill. 131; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Chicago v. Major*, 18 Ill. 349.

Pennsylvania it is declared that one section of the statute of 1851 gives to a common-law action the quality of survivorship,

Co., 49 Pac. 605. It is significant that the former treats the act for the survivorship of the right to recover damages to the deceased for the benefit of his estate as a special provision, and that for the benefit of the surviving relatives as a general act, and that giving them a literal interpretation they are repugnant to each other in part; while the latter reverses the situation, treating the act of the claim for damages to the deceased as general, and that for the benefit of surviving relatives as special, the latter being intended to take away the right of survivorship for the benefit of the estate which would otherwise be given by a literal reading of the former provision. The fallacy of both processes of reasoning grows out of a failure to observe the distinction between the wrong and the resulting loss; that though there be but one wrongful act and one physical injury, there may be several persons that suffer distinct losses, some of which are actionable at common law, and some actionable, dependent on the statute. Justice Brewer, who was a member of the Kansas court at the time the first decision there was rendered, and concurred in it, referred to the subject when he was later called upon to consider the matter as a member of the Federal bench in the case of *Hulbert v. City of Topeka*, reported in 34 Fed. 510, said, substantially, that he doubted the correctness of his former opinion, and followed it only in deference to the settled judicial policy of Kansas, the cause being one that arose there; that the basis of recovery under the two provisions of law under consideration, the one for the benefit of

the estate of the decedent and the other for the benefit of his surviving relatives are entirely distinct, the former being based on survivorship of the claim of the deceased, taking no note of the pecuniary loss to relatives, and the other on the survivorship of relatives mentioned in the statute, taking no note of damages to the decedent; that the latter proceed, regardless of whether the death was instantaneous or followed after months of pain and suffering, being damages to relatives by death to be measured by their pecuniary loss caused thereby, while the former is for loss that would otherwise be a permanent injury to the estate itself. For further illustration of the distinction, the following in Mr. Justice Wilson's opinion in *Needham v. Railway Co.*, 38 Vt. 294, is quoted by Justice Brewer: 'The principles on which the intestate's cause of action rested at common law are the same irrespective of the cause of his death.' It 'died with his person but is revived by the statute in favor of his administrator.' It includes 'nothing more than his intestate's cause of action. The statute simply revives but does not enlarge the common-law right of the intestate.' The provision for surviving relatives 'introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate.' 'Such damages to the widow and next of kin begin where the damages of the intestate ended, viz: with his death.' " *Brown v. Chicago & N. W. Ry. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 608; 5 Am. Neg. Rep. 255, 258-261, per

while the act of 1855 creates a new cause of action.⁵³ But in Tennessee it is said that the Code sections create no new cause of action but merely allow the survival of the actions of decedents.⁵⁴ This is also substantially true in Missouri.⁵⁴ And in Kansas the law of 1889, authorizing an action by the widow for the death of her husband, where no personal representative has been appointed, is held to merely change the remedy and to create no new cause of action nor impose any limitation on an existing one being merely supplementary to the Civil Code, section 422.⁵⁵ So the Dakota statute is held to be a survival statute which presupposes the party deceased to have been once entitled to maintain the action.⁵⁶ In an Iowa case the statute has been held not to create a new cause of action, but simply to remove the bar which death created at the common law.⁵⁷ In a Connecticut case the court considers the survival act of 1848 and the death statute of 1853, relating to death caused by the negligence, etc., of

Marshall, J., rehearing denied 44 L. R. A. 585; 78 N. W. 771; 13 Am. & Eng. R. Cas. N. S. 603. The court, Marshall, J., also considers *Read v. Railway Co.*, L. R. 3 Q. B. 1; *Blake v. Railway Co.*, 10 Eng. Law & Eq. 443; *Leg v. Britton*, 64 Vt. 652; 24 Atl. 1016; *Lubrano v. Atlantic Mills (R. I.)*, 32 Atl. 205, and says of the latter case, "Here again there is a confusion between rights and remedies. To say that section 4255 of our (Wis.) statutes gives a remedy for the one that at common law lapsed with the death of the decedent, is to say that it gives a new remedy for a pre-existing right. But there was no such pre-existing right of the surviving relatives to recover their loss caused by the wrongful death. The right or cause of action itself is new and the remedy to enforce it as well." The court also cites as in harmony with its opinion, *Hurst v. Railway Co.*, 84 Mich. 539; 48 N. W. 44. See *Mulcahey v. Wheel Co.*, 145 Mass. 281; *Kennedy v. Sugar Refinery*, 125 Mass. 90.

⁵³ *McCafferty v. Pennsylvania R. Co. (Pa.)*, 44 Atl. 435, under Act April 15, 1851, sec. 18 and act April 26, 1855.

⁵⁴ *Whaley v. Catlett (Tenn.)*, 53 S. W. 131, under Shannon's Code, secs. 4025-4027, the case was brought by an infant for procuring the murder of her father and mother—death being instantaneous.

⁵⁵ *Gray v. McDonald (Mo.)*, 16 S. W. 398.

⁵⁶ *Atchison, T. & S. F. R. Co. v. Napole (Kan.)*, 40 Pac. 669, under Laws, 1889, ch. 131; Kan. Civ. Code, sec. 422.

⁵⁷ *Belding v. Black Hills & Ft. P. R. Co. (Wis.)*, 53 N. W. 750; 52 Am. & Eng. R. Cas. 624, under Dak. Comp. Laws, sec. 5498, case where death was instantaneous. See *Belding v. Black Hills, etc.*, R. Co., 3 S. D. 369; 53 N. W. 750.

⁵⁸ *Sherman v. Stage Co.*, 24 Iowa, 515. Examine *Connors v. Railway Co.*, 71 Iowa, 490.

railroad corporations, states that they are embodied in the statutes of 1888, including all injuries resulting in death and says, "From these statutes it is evident that three things have been effected: first, the cause of action which existed in the deceased person is kept alive. The rule of law that all personal actions died with the person has been set aside as to these cases." The other two things effected relate to the limitation of damages and distribution of the sum recovered.²⁸

²⁸ *Budd v. Meriden Elect. Rd. Co.*, 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 341 per Andrews, Ch. J.

Opinions of text writers. Mr. Black says, "Some of the cases hold and the weight of authority seems to be on the side, viz: that the statute gives a new right of action and not a substituted right of action." *Blacks' Law & Pract. in Acctd. Cases* (ed. 1900), sec. 103, citing *Littlewood v. Mayor, etc.*, of N. Y., 89 N. Y. 24, 27 (14 Wkly. Dig. 400); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (this case, aff'd 3 Bosw. [N. Y.] 67); *Smith v. Louisville, etc., R. R. Co.*, 75 Ala. 449; *Munro v. Pac. Coast, etc., Co.*, 84 Cal. 515; *Adams v. Northern Ry. Co.*, 95 Fed. 938, and other cases. Mr. Harris considers the action arising from death as "wholly a statutory remedy," differing from that where a right of action accrues to the injured party and which is commenced during his lifetime, dependent upon statute for survival in case of his death, the former remedy being "afforded by another and different statute," requiring a different state of the case and different procedure. 1 *Harris on Dam. by Corp.* (ed. 1892) sec. 336, p. 397. Mr. Hutchinson reviews the question at length, considering the various elements involved, but states no definite conclusion. *Hutchinson on Carriers* (2d ed.), sec. 789. Mr.

Sedgwick quoting from a New York and an English case, says the statute contemplates the damages resulting from the death to the statutory beneficiaries not for injuries to the deceased from the wrongful act, etc., and also that life by the common law was not property. 2 *Sedg. on Dam.* (8th ed.) sec. 572, p. 201, sec. 573, quoting as to the first proposition from *Mulford v. Panama R. Co.*, 23 N. Y. 465, 469; *Blake v. Midland Ry. Co.*, 18 Q. B. 93, per Coleridge, J. Mr. Sutherland declares that "a personal injury by the defendant's wrongful act, neglect or default is the basis of his liability, but only because it produces death, and the liability is only for the damages which result from the death to those for whose use and benefit the statutory action is given. It is a new cause of action because there is an element in it additional to that which constituted the cause of action in favor of the person injured, viz: death must ensue in consequence of an injury to him. It is a different cause of action also, because only the damages which ensue from the death are recoverable." 3 *Sutherland on Damages* (2d ed.), sec. 1260, p. 2707, citing *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; *Pym v. Great Northern Ry. Co.*, 2 B. & S. 759; *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599; *Holton v. Daly*, 106 Ill. 131; *Andrews v. Hartford, etc., R. Co.*, 34

§ 500. Same subject—Conclusion.—It is clearly evident from an examination and comparison not only of what is said by the text-writers, but also of the decisions and of the several statutes upon which those decisions are based, that there can be no determining rule applicable to all cases, for the reason that the binding weight of any decision based upon a statutory enactment must be limited to the state where rendered, except to the extent that such extraterritorial determinations may be of value where statutes with their amendments are at least substantially alike, and provided no contrary binding decision exists in the state where such extraterritorial rulings or declarations of courts are urged as of determining force. Again, the decisions upon this point must rest upon the wording of particular statutes and also upon the fact whether the statutory enactment stands alone, as one which may be denominated purely a death statute, or embodies, as it seems to do in Connecticut, both a survival enactment and a statutory remedy for loss by death. It would seem, however, that the better opinion favors the view that statutes of the character of Lord Campbell's act create a new right of action, a new and independent legal liability. As to other statutory enactments which have combined or merged either originally or by amendments both what may be denominated as death loss acts, and also what are strictly known as survival or nonabatement statutes, a different rule would probably govern so far as the question of a transfer or survival of the cause of action is concerned.

§ 501. Construction of statutes—General principles.—Inasmuch as the right to recover damages under both survival and death loss statutes frequently depends upon the construction

Conn. 57, and other cases. Mr. Tiffany asserts that Lord Campbell's act creates a new cause of action and that expressions in opinions to the effect that the statute gives a substituted and not a new right of action present an untenable position. Tiffany on Death by Wrongful Act (ed. 1893), secs. 23, 124, citing Blake v. Midland Ry. Co., 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562, per Coleridge, J.;

Seward v. The Vera Cruz, 10 App. Cas. 59, per Lord Blackburn; Hamilton v. Jones, 125 Ind. 178; 25 N. E. 192; Hurlburt v. City of Topeka, 34 Fed. 510; Mason v. Union Pac. Ry. Co. (Utah), 24 Pac. 796; Hecht v. Ohio & M. Ry. Co. (Ind.), 32 N. E. 302, per Olds, J.; Griffiths v. Earl of Dudley, 9 Q. B. D. 357, per Field, J., and other cases.

of such statutes, the following general principles are important, although an extended consideration of the questions relating to statutory construction is not strictly within the purpose or scope of this treatise. It may be generally stated as to statutes "against an injury, mischief or grievance" that they impliedly give "a remedy; for the party injured may, if no remedy be expressly given, have an action upon the statute."⁵⁰ And it is also held that if a statute or ordinance create both the right and remedy, such remedy is exclusive, but that where a common-law right exists, the remedy under the statute or ordinance is cumulative.⁵¹ Again, if a statute gives a remedy, a remedy under a former statute is held not to be abridged or changed thereby where no such intention is indicated by the later act, upon the same principle that the common-law remedy is held not to be superseded by a statute giving a remedy in a like case.⁵² If a statute purports to modify or abrogate a well established rule of common law, it should not, if reasonable effect can be otherwise given to the words used, be extended beyond their plain import.⁵³ It is held in New York that there should be a strict construction of statutes changing the common law and this is the general rule.⁵⁴ And penal statutes or those imposing

⁵⁰ Broom's Leg. Max. (7th Am. ed.) *194.

⁵¹ Summit Co. v. Gustaveson, 18 Utah, 351; 54 Pac. 977. See Monterey Co. v. Abbott, 77 Cal. 541.

⁵² Colorado Milling & El. Co. v. Mitchell, 26 Colo. 284; 58 Pac. 28, aff'g 12 Colo. App. 277; 55 Pac. 736. See Ryalls v. Mechanics Mills, 150 Mass. 190; 5 L. R. A. 667.

⁵³ Felix v. Griffiths, 56 Ohio St. 39; 37 Ohio L. J. 139; 45 N. E. 1092. Examine Brooke v. Turner, 95 Va. 696; 2 Va. L. Reg. 85; 30 S. E. 55; Hardy v. Brooklyn, 7 Abb. N. C. (N. Y.) 403. See cases under next note.

⁵⁴ Fitzgerald v. Quann, 109 N. Y. 441; 15 Civ. Proc. 139; 16 N. Y. St. R. 395; 17 N. E. 354, aff'g 33 Hun (N. Y.), 652, which rev'd Gerald (Fitzgerald) v. Quann, 10 Abb. N. C.

31; 1 Civ. Proc. 273; 62 How. (N. Y.) 331. See Souter v. Sea Witch, 1 Cal. 162; Kohn v. Collison (Del.), 27 Atl. 834; Williams v. Vanderbilt, 145 Ill. 238; 34 N. E. 476; (but contra to last case, see Pinkerton v. Le Beau [S. D.], 54 N. W. 97); Gibson v. Jenney, 15 Mass. 205; Wilbur v. Crane, 13 Pick. (Mass.) 290; Sibley v. Smith, 2 Mich. 486; People v. Palmer, 109 N. Y. 110; 28 Wkly. Dig. 432; 15 N. Y. St. R. 78; 16 N. E. 529, rev'g 46 Hun (N. Y.), 479; 11 N. Y. St. R. 817; 27 Wkly. Dig. 401; Rue v. Alter, 5 Denio, 119; McQueen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 7; McCluskey v. Cromwell, 11 N. Y. 593; Esterly's Appeal, 54 Pa. St. 192; Hearn v. Erwin, 3 Cold. (Tenn.) 599; Shaw v. R. R. Co., 101 U. S. 557; Brown v. Barry, 3 Dall. (U. S.) 365.

a penalty must not be strictly construed.⁶⁴ But it is also decided that remedial statutes should receive a liberal rather than a strict construction,⁶⁵ with a view to the intended beneficial purpose.⁶⁶ A statute should, however, be given some effect differing from the status of the law as it existed without it.⁶⁷ So the object, spirit and purpose of a statute should be considered,⁶⁸ and its purpose is determined by its natural and reasonable effect.⁶⁹ Again, statutes are to be construed together and are in *pari materia*, when they relate to the same general subject-matter, or to the same thing.⁷⁰ And statutes in *pari ma-*

⁶⁴ *Thurn v. Alta Teleg. Co.*, 15 Cal. 472; *Allen's Teleg. Cas.* 146, 148 per Baldwin, J.; *Daggett v. State*, 4 Conn. 61; *Rawson v. State*, 19 Conn. 292; *United States v. Athens*, 35 Ga. 344; *Cushing v. Dill*, 2 Scam. (Ill.) 461; *State v. Indiana & I. S. R. Co. (Ind.)*, 18 L. R. A. 502; 32 N. E. 817, holding also that the rule is not violated where a common sense view of the statute as a whole is taken so as to effect the legislative purpose if permitted by a reasonable construction, *State v. Hogriever*, 152 Ind. 652; 53 N. E. 921; 45 L. R. A. 504, holding also that the rule should not be unreasonably applied so as to defeat the sovereign will when that is expressed with ordinary certainty. *Western Un. Teleg. v. Harding*, 103 Ind. 505; 1 Am. Elec. Cas. 814, 818, per Mitchell, C. J.; *State v. Lowell*, 23 Iowa, 304; *Melody v. Reab*, 4 Mass. 473; *Pike v. Jenkins*, 12 N. H. 255; *Chase v. N. Y. Cent. R. R. Co.*, 26 N. Y. 523; *Sprague v. Birdsall*, 2 Cow. (N. Y.) 419; *Jones v. Estes*, 2 Johns. (N. Y.) 379; *Hall v. State*, 20 Ohio, 7; *Kirby v. West. Un. Teleg. Co. (S. D.)*, 37 N. W. 202; *United States v. Ellis (U. S. D. C. W. D. Ark.)*, 51 Fed. 808, holding also that construction must be fair and reasonable and not forced. *United States v. Wiltberger*, 5 Wheat. (U. S.) 76; *United States v. Hartwell*, 6 Wall.

(U. S.) 385; *Joyce on Elec. Law* (ed. 1900), sec. 179.

⁶⁵ *McIntosh v. Johnson*, 51 Neb. 33; 70 N. W. 522; *Kohn v. Collison (Del.)*, 27 Atl. 834.

⁶⁶ *Hudler v. Golden*, 36 N. Y. 446, and a liberal construction should be given to statutes intended for the public good. *Tallman v. Syracuse & N. Y. Rd. Co.*, Keyes, 128; 4 Abb. Dec. 351.

⁶⁷ *Quackenbush v. United States*, 33 Ct. Cl. 355.

⁶⁸ *People, Wood v. Lacombe*, 99 N. Y. 43; 1 N. E. 599, aff'g 34 Hun (N. Y.), 401; *Pearson v. Elmer*, 5 Redf. (N. Y.) 181.

⁶⁹ *Collins v. New Hampshire*, 171 U. S. 30; 18 Sup. Ct. Rep. 768.

⁷⁰ *State v. Gerhart*, 145 Ind. 439; 44 N. E. 469; 33 L. R. A. 313. See *Michenor v. Harrison*, 116 Ind. 300; *State v. Sloss*, 83 Ala. 93; *People v. Raymond*, 18 Colo. 242; 19 L. R. A. 649; *Ex parte O'Donovan*, 24 Fla. 281; *Hunt v. Chicago, H. & B. R. Co.*, 121 Ill. 644; *Re Hall*, 38 Kan. 670; *Richardson v. Richardson*, La. Ann. 641; *Merrill v. Crossman*, 68 Me. 412; *Simpkins v. Ward*, 45 Mich. 559; *State, Brown v. Klein*, 116 Mo. 259; *Gartner v. Cohen*, 51 N. J. L. 125; *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167; 26 N. Y. St. R. 364; 22 N. E. 381; 5 L. R. A. 546; *Wortham v. Basket*, 99 N. C. 70;

teria are to be construed together as if parts of the same act.⁷¹ The intention governs in the construction of a statute and this intention must be gathered from the whole statute and sometimes from statutes in *pari materia*.⁷² So every word of a legislative enactment is presumed to have some force and effect.⁷³ And the act must also be construed in its entirety so as to give effect to every part without violating the intention of the legislature.⁷⁴ And it is held that the intention governs though contrary to the letter of the statute.⁷⁵ Again, that one of two constructions will be presumed to have been intended which is within the power of the legislature.⁷⁶ And if the meaning of a statute is too plain to admit of construction, the maxim *noscitur a sociis* has no application,⁷⁷ for the language of an unambiguous statute should not be departed from in construing it.⁷⁸ It may also be

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; 28 L. Ed. 1137; Ryan v. Carter, 93 U. S. 78; 23 L. Ed. 807.

⁷¹ People v. Asten, 6 Daly, 18; 49 How. (N. Y.) 405, *aff'd* 62 N. Y. 623. See Powers v. Shepard, 48 N. Y. 540, *aff'g* 49 Barb. (N. Y.) 418; 35 How. (N. Y.) 53; McCarter v. Orphan Asylum of N. Y., 9 Cow. 437.

⁷² People, Onondaga Co. Sav. Bk. v. Butler, 147 N. Y. 164; 69 N. Y. St. R. 410; 41 N. E. 416, *rev'g* 85 Hun (N. Y.), 616; State, Jones v. Mack, 23 Nev. 359; 47 Pac. 763; Barnard v. Gall, 43 La. Ann. 959; 10 So. 5.

⁷³ Brown v. Turner, 174 Mass. 150; 54 N. E. 510. See Cincinnati v. Guck-enberger, 60 Ohio St. 353; 42 Ohio L. J. 79; 54 N. E. 376; Cincinnati v. Conner, 55 Ohio St. 82; 36 Ohio L. J. 25; 44 N. E. 582.

⁷⁴ Johnson v. Schlosser, 146 Ind. 509; 45 N. E. 702; 36 L. R. A. 59. Every clause will if possible be given effect. McIntosh v. Johnson, 51 Neb. 33; 70 N. W. 552, must be construed so as to give force and effect to legislative intent. Shonwiler v. Stewart, 104 Iowa, 67; 73 N. W. 479, must be so construed that one section will not destroy but support and explain the

other. Bernier v. Bernier, 147 U. S. 242; 13 Sup. Ct. Rep. 214; 37 L. Ed. 752. See further Washington Twp. v. Coler (U. S. C. C. A. 8th C.), 2 C. C. A. 272; 4 U. S. App. 622; 51 Fed. 362.

⁷⁵ Hooper v. Creager, 84 Md. 195; 35 Atl. 967, 1103; 35 L. R. A. 202, rehearing denied 84 Md. 258; 36 Atl. 359; 35 L. R. A. 210.

⁷⁶ Martin v. North Salem L. Co., 97 Va. 349; 1 Va. S. C. 442; 33 S. E. 600; Martin v. South Salem L. Co., 94 Va. 28; 2 Va. L. Reg. 743; 26 S. E. 591; 6 Am. & Eng. Corp. Cas. N. S. 312; S. C., 97 Va. 349; 33 S. E. 600; 1 Va. S. C. Rep. 442.

⁷⁷ Brown v. Chicago & N. W. R. Co., 102 Wis. 137; 78 N. W. 771; 44 L. R. A. 585, denying rehearing 77 N. W. 748; 44 L. R. A. 579; 5 Am. Neg. Rep. 255; 13 Am. & Eng. R. Cas. N. S. 603. See also McGowan v. Metropolitan L. Ins. Co., 60 N. J. L. 198; 38 Atl. 671; Choctaw, O. & G. R. Co. v. Alexander, 7 Okla. 591; 54 Pac. 421, *aff'g* 7 Okla. 579; 52 Pac. 944.

⁷⁸ Matter of Miller, 110 N. Y. 216, 222; 18 N. Y. St. R. 226; 18 N. E. 139, *aff'g* 47 Hun (N. Y.), 394; 14 N. Y. St. R. 529; 28 Wkly. Dig. 47. See

stated that a statute is constitutional unless clearly otherwise,⁷⁹ and every intendment and presumption favors its constitutionality even to the exclusion of a reasonable doubt,⁸⁰ so that one of two constructions which will bring a statute in harmony with the constitution should be adopted.⁸¹ Again, a statute may be valid in part and unconstitutional in part if the parts are separable, and sufficiently operative provisions remain,⁸² and the in-

People v. Supervisors of Green Co., 13 Abb. N. C. 421; 66 How. Pr. (N. Y.) 830; *Johnson v. Hudson R. Rd. Co.*, 49 N. Y. 455, rev'g 2 Sweeny (N. Y.), 298.

⁷⁹ *Cummings v. Hyatt*, 54 Neb. 635; 74 N. W. 411; *Malloy v. Fayetteville*, 122 N. C. 480; 29 S. E. 880. See *Perkins v. Philadelphia*, 156 Pa. 554; 33 Wkly. N. Cas. 41; 24 Pitts. L. J. N. S. 85; 44 Am. & Eng. Corp. Cas. 325; 27 Atl. 356.

⁸⁰ *Com. Armstrong v. E. H. Taylor Jr. Co.*, 101 Ky. 325; 19 Ky. L. Rep. 552; 41 S. W. 11, rev'g 38 S. W. 10; *Perkins v. Philadelphia*, 156 Pa. 554; 33 Wkly. N. Cas. 41; 24 Pitts. L. J. N. S. 85; 44 Am. & Eng. Corp. Cas. 325; 27 Atl. 356; *De Walt v. Bartley*, 146 Pa. 529; 30 Wkly. N. C. 121; 24-Atl. 185; 15 L. R. A. 771, aff'g 1 Pa. Dist. Rep. 199, 202, 220; *People. Woodyatt v. Thompson*, 155 Ill. 451; 40 N. E. 307; *Kerrigan v. Force*, 68 N. Y. 381, aff'g 9 Hun (N. Y.), 185; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; 16 S. W. 1045; *Holton v. State*, 28 Fla. 303; 9 So. 716. And its unconstitutionality must be shown beyond a reasonable doubt. *Denver v. Knowles*, 17 Colo. 204; 30 Pac. 1041; 17 L. R. A. 135. In case of reasonable doubt courts will hold a statute constitutional. *People, Woodyatt v. Thompson*, 155 Ill. 451; 40 N. E. 307. The rule, however, is held to be one of comity only with regard to reasonable intendment favoring constitutionality, and does not apply where

statute is contrary to manifest intention of the constitution. *Perkins v. Philadelphia*, 156 Pa. 554; 24 Pitts. L. J. N. S. 85; 33 Wkly. N. C. 41; 27 Atl. 356; 44 Am. & Eng. Corp. Cas. 325.

⁸¹ *New York & L. I. B. Co. v. Smith*, 148 N. Y. 540; 42 N. E. 1088, aff'g 90 Hun (N. Y.), 312; *People v. Rosenberg*, 136 N. Y. 410; 53 N. Y. St. R. 1; 34 N. E. 285, rev'g 67 Hun (N. Y.), 52; 51 N. Y. St. R. 189; 22 N. Y. Supp. 56.

⁸² *State v. Street*, 117 Ala. 203; 23 So. 807; *Leep v. St. Louis, I. & M. S. R. Co.*, 58 Ark. 407; 23 L. R. A. 264; 57 Am. & Eng. R. Cas. 1; 25 S. W. 75; *Anderson v. Byrnes*, 122 Cal. 272; 54 Pac. 821; *Jacksonville, T. & K. W. R. Co. v. Adams*, 33 Fla. 608; 15 So. 257; 24 L. R. A. 272; *English v. State*, 31 Fla. 340, 356; 12 So. 689; *State, Lamar v. Dillon*, 32 Fla. 545; 14 So. 383; 22 L. R. A. 124; 44 Am. & Eng. Corp. Cas. 134; *People, Deueen v. Simmons*, 176 Ill. 165; 31 Chic. L. News, 75; 3 Chic. L. J. Wkly. 506; *State v. Gerhardt* 145 Ind. 439; 44 N. E. 469; 33 L. R. A. 313; *Manistee & N. E. R. Co. v. Commrs. of Rds.*, 118 Mich. 349; 5 Det. L. News, 507; 76 N. W. 633; *State, Crow v. Fireman's Fund Ins. Co.*, 152 Mo. 1; 52 S. W. 395; 45 L. R. A. 363; *State v. Bockstruck*, 136 Mo. 335; 38 S. W. 317; *State, Aull v. Field*, 119 Mo. 593; 24 S. W. 752; *State, Wilmot v. Buckley*, 60 Ohio St. 273; 42 Ohio L. J. 35; 54 N. E.

valid part may be rejected.⁸³ But the invalid section may sustain such a material relation to the other sections or be so dependent thereon as to invalidate all,⁸⁴ and it is held that an unconstitutional provision in an act, while not constituting the basis of a right, is of effect in ascertaining the meaning of that part which is valid.⁸⁵

§ 502. Construction of statutes, etc.—Survival and death loss.—The Texas survival act relating to personal injuries not resulting in death is held not unconstitutional as applied to one who was injured before its passage but died thereafter.⁸⁶ Nor is the Georgia act of 1889 unconstitutional as applicable to actions pending at the time of its passage.⁸⁷ As to the effect of constitutional provisions, it is held in Kentucky that the right granted by the statute to designated persons to bring an action where a husband or father is killed by the wanton or malicious use of firearms, or by any weapon, is not taken away by the constitution, which provides that the personal representatives shall bring suit where death results from an injury inflicted by negligence or wrongful act.⁸⁸ And the general statute of that state

272; *Re Assessment & C. of Taxes* (S. D.), 54 N. W. 818; *Trimble v. Com.*, 96 Va. 818; 1 Va. S. C. Rep. 29; 5 Va. L. Reg. 92; 31 Chic. L. News, 361; *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. Ed. 294; *Cantini v. Tillman* (U. S. C. C. D. S. C.), 54 Fed. 969; 47 Alb. L. J. 430.

⁸³ *People, Akin v. Kipley*, 171 Ill. 44; 49 N. E. 229; *State v. Newell*, 140 Mo. 282; 41 S. W. 751; *State, Comstock v. Stewart*, 52 Neb. 243; 71 N. W. 998; *State, Wheeler v. Stuht*, 52 Neb. 209; 71 N. W. 941; *Eureka v. Wilson*, 15 Utah, 67; 48 Pac. 150.

⁸⁴ *Cheyenne v. Swan* (Wy.), 51 Pac. 209; 40 L. R. A. 195. See *Dur- yee v. Mayor*, New York, 76 N. Y. 477; *State, Scott v. Bowen*, 54 Neb. 211; 74 N. W. 615; *People, Deneen v. Martin*, 178 Ill. 611; 53 N. E. 309; *State, Gray v. Dover*, 62 N. J. L. 40;

49 Atl. 640, aff'd 42 Atl. 674; *West- ern U. T. Co. v. Poe* (U. S. C. C. D. Ohio), 61 Fed. 449; *State v. Godwin*, 123 N. C. 697; 31 S. E. 221.

⁸⁵ *Sipe v. People, Milliken*, 20 Colo. 127; 56 Pac. 571.

⁸⁶ *Marshall v. McAllister*, 18 Tex. Civ. App. 159; 43 S. W. 1043; 3 Am. Neg. Rep. 743, under Tex. Rev. Stat. 1895, art 3353a, following *Houston & T. C. R. Co. v. Rogers* (Tex. Civ. App.), 39 S. W. 1112. See also *Missouri, K. & T. P. Co. v. Settle*, 19 Tex. Civ. App. 357; 1 Jour. App. 37; 47 S. W. 825.

⁸⁷ *Pritchard v. Savannah St. & R. R. Co.*, 87 Ga. 294; 13 S. E. 493; 14 L. R. A. 721; Ga. Act of Novem- ber 12, 1889, amdg. Ga. Code, sec. 2967.

⁸⁸ *McClure v. Alexander*, 15 Ky. L. Rep. 732; 24 S. W. 619; Ky. Gen. Stat. ch. 1, sec. 6; Ky. Const. sec. 241.

permitting the widow to recover for the wrongful death of her husband, where there are no children, is not repealed as inconsistent therewith, by the constitutional provision giving the personal representative a right of action.⁸⁹ Nor does the constitutional provision of that state allowing the recovery of damages for death negligently caused, deprive any person of property without due process of law in violation of the Federal constitution, although the relative entitled to recover has no legal pecuniary claim on the deceased.⁹⁰ Again, the New York constitution providing against legislative limitation of the amount recoverable for injuries resulting in death, and that the right of action shall never be abrogated, is not retroactive but is prospective and does not apply to causes of action theretofore accruing, although if the injury occurred before, and the death after, the constitution went into effect, the provision applies.⁹¹ So in North Carolina the act of 1897, providing that the negligence of a fellow servant shall not be a defense in actions against a railroad company for death or injury of an employee, is held not to apply where the employee was injured before its enactment.⁹² As to the effect of an amended or repealing statute, it is held that the Alabama Code of 1886 embodies the act of 1872, "to prevent homicides," and although it drops the title and provides for the recovery of such damages as the jury may assess, it is unchanged in purpose

⁸⁹ *Edmonson v. Kentucky C. R. Co.*, 10 Ky. L. Rep. 459; 28 S. W. 789; Ky. Gen. Stat. ch. 57, sec. 3; Const. Ky. sec. 241.

⁹⁰ *Owensboro & N. R. Co. v. Barclay*, 19 Ky. L. Rep. 997; 43 S. W. 177; Ky. Const. sec. 241; U. S. Const. 14th Amdt. See *Illinois C. R. Co. v. Barron*, 5 Wall. (72 U. S.) 90; 18 L. Ed. 591. And the Ohio Act, April 2, 1890, governing railroad's liability for injury to employees and which applies to all railroad corporations within the state and to all of a common class of their employees, does not violate a constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. *Pierce v. Van Dusen* (U. S. C. C. A. 6th,

C.), 24 U. S. C. C. A. 280; 47 U. S. App. 339; 78 Fed. 693.

⁹¹ *Weber v. Third Ave. R. R. Co.*, 15 App. Div. (N. Y.) 512; 42 N. Y. Supp. 789; 76 N. Y. St. R. 789; art. 1, sec. 18, Const. N. Y. 1895; *Smith v. Metropolitan St. Ry. Co.*, 15 Misc. (N. Y.) 158; 35 N. Y. Supp. 1062; *Isola v. Webber*, 147 N. Y. 329; 69 N. Y. St. R. 691; 41 N. E. 704, rev'g 13 Misc. (N. Y.) 97; 68 N. Y. St. R. 32; 34 N. Y. Supp. 77, rearg. denied 148 N. Y. 736; art. 1, sec. 18, Const. N. Y. 1895; *O'Reilly v. Utah, Nev. & Cal. Stage Co.*, 87 Hun (N. Y.), 406; 68 N. Y. St. R. 432; 34 N. Y. Supp. 358; art. 1, sec. 18, Const. as am'd 1874.

⁹² *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544; 26 S. E. 922.

although the prior act provided for the assessment of such sum as the jury deem just.⁸⁰ Again, it is decided in Pennsylvania that the survival act in case of actions for injuries to the person has not been expressly or impliedly repealed or modified by subsequent legislation.⁸¹ And in Washington it is held that the statutory right of action in the heirs or personal representatives is not inconsistent with and does not repeal another section of the same Code which gives a parent a remedy for the death or injury of a child.⁸² Again, as we have elsewhere stated, the nonabatement or survival statute of Connecticut as to personal injuries and death, and the enactment giving a remedy for loss of life by a railroad company's negligence, etc., are brought together in the statutes of 1888 of that state which includes all injuries resulting in death.⁸³

§ 503. Construction of survival and death loss statutes, etc.—Continued.—Another question which has necessitated the construction of these statutes relates to the effect of enactments where the death loss act provides a remedy and other statutes are of necessity involved. To illustrate: It is held in South Carolina that the death loss act of 1859 does not apply to a case under the act of 1874, which gives a right of action against the county where one is injured by a defective highway or bridge.⁸⁴ And in another case it is decided that an administratrix continuing an action under a survival statute cannot re-

⁸⁰ *Richmond & D. R. Co. v. Freeman* (Ala.), 11 So. 800; Ala. Act February 5, 1872, embodied in Code, 1886, sec. 2589.

⁸¹ *Maher v. Philadelphia Trac. Co.*, 181 Pa. 391; 40 Wkly. N. C. 477; 37 Atl. 571; 3 Am. Neg. Rep. 85; Pa. act, April 15, 1851, sec. 18; art. 3, sec. 21, Const. Pa.; case was decided May, 1897, citing *Birch v. Railroad Co.*, 165 Pa. St. 339; 30 Atl. 826.

⁸² *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400; 30 Pac. 714; 54 Am. & Eng. R. Cas. 45; Wash. Code, 1881, secs. 8, 9. Sec. 8 was later in passage.

⁸³ *Budd v. Meridan Elec. Rd. Co.*,

69 Conn. 272; 37 Atl. 633; 3 Am. Neg. Rep. 335, 341, per Andrews, Ch. J.; Acts 1848, ch. 5, secs. 1, 2; Acts 1853, ch. 74, sec. 8; Genl. Stats. 1888, sec. 1006.

⁸⁴ *All v. Burnwell Co.* (S. C.), 7 S. E. 58; Gen. Stat. S. C. sec. 2183, enacted 1859; Gen. Stat. S. C. sec. 1087, enacted 1874. See also *Racho v. Detroit* (Mich.), 51 N. W. 360, under How. Mich. Stat. secs. 8313, 8314, and Mich. Pub. acts 1887, No. 264. Examine *Bowes v. City of Boston* (Mass.), 29 N. E. 633, under Mass. Pub. St. ch. 52, sec. 17, and Pub. St. ch. 165, sec. 1.

cover damages under an act creating a new right of action limited to cases of death caused by violence or negligence and also limiting the exercise of the right to persons other than the one acting as administratrix.⁹⁸ So in an Illinois decision an action under the death loss act is held not within the statute relating to damages for injuries to the person,⁹⁹ and it is decided in a Federal case that the state of West Virginia, which gives a right of action after death to the personal representatives, does not impliedly save an action for damages for personal injuries which abates by death of the plaintiff.¹⁰⁰ Again, where a statute provided that a cause of action for negligent injuries should survive, and the death loss act provided for an action for the benefit of the heirs to the extent of the pecuniary injury resulting from the death, it was held that an action for the benefit of the estate for death from the injuries and also an action for the pecuniary loss to the heirs was not given.¹ This question of the effect upon the remedy or right of action of death loss enactments and survival, and other personal injury statutes, has also been passed upon in other states and is involved as to the construction of such legislative acts with other matters which are elsewhere considered fully herein, in so far as they are germane to the subject of damages, and the rights of action therefor.²

⁹⁸ *McCafferty v. Pennsylvania R. Co.* (Pa. 1899), 44 Atl. 435.

⁹⁹ *Lake Shore v. M. S. R. Co. v. Dylinski*, 67 Ill. App. 114; 2 Chic. L. J. Wkly. 77, under death loss act, Ill. Rev. Stat. ch. 70, and personal injury act, ch. 83, sec. 14. Examine *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; 9 N. E. 263; 6 West. 673; *Holton v. Daly*, 106 Ill. 181; 19 Ill. App. 591.

¹⁰⁰ *Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673; 14 Sup. Ct. Rep. 533; 38 L. Ed. 311. Examine *Hurlburt v. City of Topeka*, 34 Fed. 510; *Martin v. Missouri P. Ry. Co.*, 58 Kan. 475; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576; 3 Am. Neg. Rep. 165, under Kan. Civ. Code, secs. 420, 425; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *City of*

Eureka v. Merrifield, 53 Kan. 794; 37 Pac. 113.

¹ *Sweetland v. Chicago & Grand Trunk Ry. Co.*, 117 Mich. 329; 43 L. R. A. 568.

² See *Brown v. Chicago & N. W. Ry. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; rehearing denied 44 L. R. A. 585; 78 N. W. 771; 13 Am. & Eng. R. Cas. N. S. 603; *Davis v. St. Louis, I. M. & S. Ry. Co.*, 53 Ark. 117; 13 S. W. 801; *Hartigan v. Southern Pac. Ry. Co.*, 86 Cal. 142; 24 Pac. 851; *Mayhew v. Burns*, 103 Ind. 328; *Louisville, etc., R. Co. v. McElwain*, 98 Ky. 700; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259; 55 S. W. 563; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; 2 So. 537; *Littlewood v. Mayer*, 89 N. Y. 24;

Upon the point whether the statutes of the character under consideration should receive a liberal or strict construction, the authorities are not in harmony. As we have stated elsewhere, statutes in derogation of the common law, and likewise penal statutes, should be strictly construed, while it is also held that remedial statutes should be liberally construed. The construction therefore, of any enactment must depend upon the view which the courts of that state take of its character. Thus while the Massachusetts statute has been held penal in form, it has also been declared to be remedial in its nature,³ and that the act is penal while the action also given the administrator is merely a substitute for the indictment.⁴ In the New Hampshire cases, those arising under the statutes of 1867⁵ and of 1878⁶ should be viewed in the light of the remedy given by way of fine under those acts, and the change effected by the subsequent enactment.⁷ Again the Maine statute of 1857⁸ likewise provided a forfeiture to be recovered by way of indictment. So also does the statute of 1883,⁹ and decisions under the earlier acts should be considered in comparison with those involving the survival enactments of that state as well as those rendered under the acts providing for a civil action.¹⁰ In Louisiana the statute of 1857 was in effect a survival act,¹¹ which so remained in the Code of 1889 with a slight change as to the parties whose death gave a right of action.¹² And in this connection it is held in Illinois that the abatement or survival acts of 1874 are remedial and will be liberally construed to embrace a case not within its terms.¹³ So the Colorado statutes providing for the

14 Wkly. Dig. 400, aff'g 47 Sup. Ct. 547; Putman v. Southern Pac. Ry. Co., 21 Or. 230; Legg v. Britton, 64 Vt. 652; 24 Atl. 1016; The Harrisburg, 119 U. S. 199; 7 Sup. Ct. Rep. 140, per Waite, Ch. J.

³ Commonwealth v. Boston & A. R. Co., 121 Mass. 36.

⁴ Littlejohn v. Fitchburg R. Co., 148 Mass. 478; 20 N. E. 103, per Holmes, J.

⁵ Gen. Stat. N. H. 1867, ch. 264, sec. 14, p. 259.

⁶ Gen. Laws, 1878, ch. 282, sec. 14.

⁷ N. H. Laws, 1879, ch. 35, sec. 1; N. H. Laws, 1885, ch. 11; N. H. Laws, 1887, ch. 71; N. H. Pub. Stat. 1891, ch. 191, secs. 8-13. See French v. Masenna F. Co. (N. H.), 20 Atl. 363.

⁸ Rev. Stat. Me. 1857, ch. 51, sec. 42 p. 370; ch. 52, p. 376.

⁹ Rev. Stat. 1883, ch. 51.

¹⁰ See Acts Me. 1891, ch. 724; Rev. Stat. Me. 1883, ch. 18.

¹¹ Rev. Stat. La. 1857, sec. 18, p. 79.

¹² La. Civ. Code, 1889, art. 2315.

¹³ Northern Trust Co. v. Palmer,

recovery of damages for death by wrongful acts, etc., are held to be remedial and not penal statutes.¹⁴ Again in a Wisconsin case it is said of the death loss act of that state: "To be sure the rule of strict construction should apply as the act is in derogation of the common law¹⁵ if the language is open to construction; but in our judgment it is not."¹⁶ It is decided in an Illinois case that a liberal construction will be given to effectuate the purpose of an act for the health and safety of coal miners,¹⁷ while in Kentucky the statute is held to have a double character, remedial in part and penal in part, to be construed accordingly.¹⁸ It is clear, therefore, that the value of any decision depends upon so many factors that except in the case of, at least, substantially similar statutes, the extraterritorial force of any decision or declaration of the courts must necessarily be limited in determining its weight on the question of liberal or strict construction of these various statutes.¹⁹

171 Ill. 383; 49 N. E. 553, aff'g 70 Ill. App. 93; Ill. Rev. Stat. 1874, ch. 3, sec. 123, p. 97, secs. 10, 11. See *Henderson v. Alexander*, 2 Ga. 81; *Greene v. Martine*, 21 Hun (N. Y.), 136.

¹⁴ *Hayes v. Williams*, 17 Colo. 465; 30 Pac. 352; Mill's Ann. Stat. Colo. secs. 1509, 1510.

¹⁵ Citing *Eilers v. Wood*, 64 Wis. 422; 25 N. W. 440.

¹⁶ *Eau v. Chicago, M. & St. P. Ry. Co.*, 95 Wis. 69; 69 N. W. 997; 1 Am. Neg. Rep. 537, 538, per Marshall, J. The court adds, "There is nothing either in the terms or spirit of the act from which the court can say the legislative idea was to confine its effect to rights of action in favor of injured persons as the law existed on the subject at the time section 4255 was passed." Wis. Rev. Stat. sec. 4245. The court also considered the effect of this statute as covering the death of a railroad employee notwithstanding Laws, Wis. 1893, ch. 220, relating to liability of railroad companies to employees.

¹⁷ *Carterville Coal Co. v. Abbott*, 81 Ill. App. 279; 3 Starr & C. Ann. Code of Ill. ch. 93, sec. 14. The Miners' Act provides a remedy in case of loss of life, etc. So also Rev. Stat. Mo. 1889, sec. 7074.

¹⁸ *Board of Shelby Co. v. Seearce*, 2 Duv. (Ky.) 576.

¹⁹ Courts favoring a strict construction are, in addition to cases considered in the text, *Smith v. Louisville, etc., R. Co.*, 75 Ala. 449, 450; *Daly v. Stoddard*, 66 Ga. 145; *Hamilton v. Jones*, 125 Ind. 176; 25 N. E. 192; *Stewart v. Terre Haute, etc., R. Co.*, 103 Ind. 44; *Jackson v. St. Louis, I. M. & S. Ry. Co.*, 87 Mo. 422; *Pittsburgh, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629. Cases favoring liberal construction in addition to these noted in text are, *Lamphear v. Buckingham*, 33 Conn. 237; *Soule v. N. Y. & N. H. R. Co.*, 24 Conn. 575; *Wabash, St. L. & P. Ry. Co. v. Shacklett*, 10 Ill. App. 404; *Merkle v. Bennington Twp.*, 58 Mich. 156; 24 N. W. 776; *Bolinger v. St. Paul & D. R. Co.*, 36 Minn.

§ 504. Death—Conflict of laws—Extraterritorial jurisdiction—Foreign administrator—Federal jurisdiction.—It is decided in several cases that the test whether an action for the loss occasioned by a negligent killing can be maintained in another jurisdiction than that in which the death occurred, depends upon whether the action is contrary to the public policy of the state whose jurisdiction is invoked or inconsistent with its laws; if not, the action lies.²⁰ But the complaint must aver the existence in such other state of a statute similar to that of the

418, 421; 31 N. W. 856; *Haggerty v. Cent. R. R. Co.*, 31 N. J. L. (2 Vr.) 349, 350; *Murphy v. Board of Ch. F.* 28 Vr. (N. J. L.) 244, 250; *Lang v. Houston St., etc., R. R. Co.*, 75 Hun (N. Y.), 151; 58 N. Y. St. R. 594; 27 N. Y. Supp. 90, case aff'd 144 N. Y. 717; 70 N. Y. St. R. 868; 39 N. E. 858; *Beach v. Bay State Steamboat Co.*, 6 Abb. (N. Y.) 415; 27 Barb. (N. Y.) 248; 16 How. Pr. (N. Y.) 1, case rev'd 10 Abb. (N. Y.) 71; 30 Barb. (N. Y.) 433; 18 How. (N. Y.) 335. Examine further *Eustace v. Jahns*, 38 Cal. 3; *Burns v. Grand Rap. & I. R. Co.*, 113 Ind. 169; 15 N. E. 230. See further upon the general construction of statutes the following cases: Secs. 420 and 422 of the Kansas Civ. Code must be construed in *pari materia*, and sec. 422 is exclusive. *Martin v. Missouri, Pac. Ry. Co.*, 58 Kan. 475; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576; 3 Am. Neg. Rep. 165, 167, citing *McCarthy v. Rd. Co.*, 18 Kan. 46. The La. Civ. Code, art. 2315, relating to survival of the right of action in case of death in favor of the minor children, etc., for the space of one year from the death, applies to acts of commission as well as omission; *American Sug. Ref. Co. v. Johnson* (U. S. C. C. A. 5th C.), 60 Fed. 503. As to the application of the Ark. statutes to Indian Territory under act of congress, May 2, 1890, *Ardmore Coal*

v. Bevil (U. S. C. C. A. 8th C.), 61 Fed. 757.

²⁰ *St. Louis & S. F. R. Co. v. Brown*, 62 Ark. 254; 35 S. W. 225; *Weaver v. Baltimore & O. R. Co.* (D. C.), 21 Wash. L. Rep. 179; *Law v. Western R. of Ala.* (U. S. C. C. Ga.), 91 Fed. 817; *Burns v. Grand Rapids & I. R. Co.*, (Ind.); 15 N. E. 230; *Louisville & N. R. Co. v. Snivell*, 13 Ky. L. Rep. 902; 18 S. W. 944; *Higgins v. Central N. Eng. & W. R. Co.* (Mass.); 48 Am. & Eng. R. Cas. 212; 29 N. E. 534; *Nicholas v. Burlington, C. R. & N. R. Co.*, (Minn.); 80 N. W. 776; *Van Doren v. Pennsylvania R. Co.* (U. S. C. C. A. 3d C. N. J.), 35 C. C. A. 282; 93 Fed. 260; 13 Am. & Eng. R. Cas. N. S. 577; *Davidow v. Pennsylvania R. Co.* (U. S. C. C. D. N. Y.), 85 Fed. 943; *Kiefer v. Grand Trunk Ry. Co.*, 12 App. Div. (N. Y.) 28, aff'd 153 N. Y. 688; *Nelson v. Chesapeake & O. R. Co.*; 88 Va. 971; 14 S. E. 888; 16 Va. L. J. 255; 15 L. R. A. 583; 11 Ry. & Corp. L. J. 245. See *Chicago & E. I. R. Co. v. Rouse*, 78 Ill. App. 286, aff'd 178 Ill. 132; 52 N. E. 951; 44 L. R. A. 410; 12 Am. & Eng. R. Cas. N. S. 708; 5 Am. Neg. Rep. 549, citing numerous cases; *Stewart v. Baltimore & O. R. Co.* (U. S. Sup. C. D. C.), 168 U. S. 445; 42 L. Ed. 587; 18 Sup. Ct. 105; 25 Wash. L. Rep. 814; 3 Va. L. Reg. 645, rev'g 6 App. D. C. 56. It is held in this decision that while,

state where the suit is brought.²¹ But the fact that the statutes of the two states differ in some particulars,²² or that a different law of distribution may prevail in other jurisdictions, does not preclude the right to sue.²³ The Ohio statute²⁴ authorizes a suit in its courts by an administrator appointed in another state, subject to the same restriction as applies to a nonresident,

under the Maryland statute authorizing the survival of the right of action, the state is the proper plaintiff and the jury trying the cause is to apportion the damages recovered, and under the act of congress in force in the District of Columbia, the proper plaintiff is the personal representative of the deceased, and the damages recovered are distributed by law, these differences are not sufficient to render the statutes of Maryland inconsistent with the act of congress, or the public policy of the District of Columbia. It is also decided in the same case that the purpose of the several statutes passed in the states in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is in its nature a tort, and where such a statute simply takes away a common-law obstacle to a recovery for the tort, an action for that tort can be maintained in any state in which that common-law obstacle has been removed when the statute of the state in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. The same court also holds that the supreme court of the District of Columbia has jurisdiction of an action, sounding in tort, brought by the administrator of a deceased person against the Baltimore and Ohio Railroad Company, to recover damages for

the benefit of the widow of the deceased by reason of his being killed by a collision which took place while he was travelling on that railroad in the State of Maryland. In *Texas & P. R. Co. v. Cox* (Tex.), 145 U. S. 593; 36 L. Ed. 829; 12 Sup. Ct. 905, it is held that a cause of action founded upon a statute of one state, conferring the right to recover damages for an injury resulting in death, may be enforced in a court of the United States sitting in another state if it is not inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. This cause of action founded upon the statute of Louisiana, conferring such right, is enforceable in Texas, notwithstanding the decisions of the courts of that state, referred to in the opinion of this case, those cases being in construction of the statute of Texas on that subject, and not applicable to the Louisiana statute. See also citations of this case in 3 Russell & Winslow's Syl. Dig. U. S. p. 3922.

²¹ *Kahl v. Memphis, etc., R. Co.* (Ala.), 10 So. 661. But see *Jackson v. Pittsburgh, C. C. & St. L. R. Co.* (Ind.), 39 N. E. 663; *Lake Shore & M. S. R. Co. v. Andrews*, 14 Ohio C. C. 564.

²² *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 14 S. E. 838; 16 Va. L. J. 255; 15 L. R. A. 583; 11 Ry. & Corp. L. J. 245.

²³ *Weaver v. Baltimore & O. R. Co.* (D. C.), 21 Wash. L. Rep. 174.

²⁴ Rev. Stat. secs. 6133, 6134a.

and also gives a right of action in that state even though accruing under the laws of another state, upon the general principle of comity, that is, in cases where such other state would permit the enforcement in its courts of a statute of Ohio of like character. Therefore an administrator appointed in Indiana may sue in Ohio for the intestate's death occasioned in Indiana.²⁵ But it is not sufficient to merely show that the courts of such other state entertain actions for death.²⁶ In Georgia a dependent mother's right of action is not confined to resident mothers.²⁷ And the Illinois courts will not refuse to enforce another state's statute abolishing the fellow-servant rule in a suit for the death of one of its own citizens occurring in such foreign state, where such action is brought by one of its own citizens against a corporation in its own state.²⁸ So in Indiana a foreign administrator may sue for wrongful death occasioned in Indiana even though in the state where the intestate resided there is no statute giving a right of action in similar cases.²⁹ Again, the remedy under the Kentucky statute³⁰ is not restricted to personal representatives appointed in said state, nor to deceased persons who were citizens or residents thereof.³¹ And an administrator appointed in that state may sue for killing the intestate in Tennessee, although the statutes differ in some respects.³² But the damages recovered in Kentucky will go to the widow in accordance with the Illinois statute where the death was occasioned.³³ In Louisiana³⁴ an action for an employee's death may be brought

²⁵ Cincinnati H. & D. R. Co. v. Thiebaut (U. S. C. C. App. 6th C.), 114 Fed. 918.

²⁶ Wabash R. Co. v. Fox, 64 Ohio St. 133; 59 N. E. 888; 9 Am. Neg. Rep. 593.

²⁷ Augusta R. Co. v. Glover (Ga.), 18 S. E. 406.

²⁸ Chicago v. E. I. R. v. Rouse, 178 Ill. 132; 52 N. E. 951; 44 L. R. A. 410; 12 Am. & Eng. R. Cas. N. S. 706; 5 Am. Neg. Rep. 549, aff'g 78 Ill. App. 286. The court said in this case: "Actions not penal but for pecuniary damages for torts in civil injuries to the person or property are transitory and if actionable when committed,

in general may be maintained in any jurisdiction in which the defendant can be legally served with process."

²⁹ Memphis & C. Packet Co. v. Pikey, (Ind.); 40 N. E. 527, under Ind. Rev. Stat. 1881, sec. 284.

³⁰ Ch. 57, p. 550.

³¹ Marvin v. Marysville St. R. & Tr. Co. (U. S. C. C. Ky.), 49 Fed. 436.

³² Wintuska v. Louisville & N. R. Co., 14 Ky. L. Rep. 579; 20 S. W. 819.

³³ McDonald v. McDonald, 16 Ky. L. Rep. 412; 28 S. W. 482.

³⁴ Under Code Prac. art. 165, par. 9.

in any parish where the damage is done.³⁵ So in Missouri a citizen thereof may be sued by a foreign administrator for causing a wrongful death of another in the state of the latter's domicile without joining the person for whose benefit the suit is prosecuted.³⁶

§ 505. Same subject continued.—An administrator appointed in New Jersey and a citizen thereof may sue a citizen of another state in a Federal court in the latter state.³⁷ So unless the statute restricts the right of action to causes of death occasioned within the state, the place of death cannot affect the right to sue.³⁸ And where injuries causing the death were sustained without the state, an administrator appointed in New York may sue a foreign corporation under a complaint showing such foreign statute to be of similar import even though not exactly the same in character; but it need not be shown that letters were taken out in the state of the death, nor need it be alleged that the intestate could have maintained the action except for the death.³⁹ But although the administrator of a person killed on a British ship on the high seas may bring his action in New York, yet it is subject to the time limit of the British statute barring the right to sue.⁴⁰ Again, an action for a personal injury sustained in Indiana, pending in the United States circuit court for Ohio, does not abate upon such party's death, but may be prosecuted by his administrator appointed in Ohio.⁴¹ And it is decided that the right of action arises out of the death and in the state of its

³⁵ *Castille v. Caffery* Cent. R. & R. Co., 48 La. Am. 322; 19 So. 332. See *Campbell v. Rio Grande W. R. Co.*, 16 Utah, 346; 52 Pac. 594, under Utah Const. art. 8, sec. 5.

³⁶ *Wilson v. Tootle* (U. S. C. C. W. D. Mo.), 55 Fed. 211, under Mo. Code Civ. Proc. sec. 1991. See *Riley v. Grand Island Receivers*, 72 Mo. App. 280.

³⁷ *McCarty v. New York, L. E. & W. R. Co.* (U. S. C. C. N. Y.), 62 Fed. 437; Rev. Stat. N. J. p. 294, sec. 2. See as to averment of the right to sue *Davidow v. Pennsylvania R. Co.* (U. S. C. C. S. D. N. Y.), 85 Fed. 943.

³⁸ *Van Doren v. Pennsylvania R. Co.* (U. S. C. C. A. 3d C. N. J.), 35 C. C. 282; 93 Fed. 260; 13 Am. & Eng. R. Cas. N. S. 577, and cases cited.

³⁹ *Gurney v. Grand Trunk R. Co.*, 37 N. Y. St. R. 557; 59 Hun (N. Y.), 625; 13 N. Y. Supp. 645. See as to allegation of statute and of place of death, *Debevoise v. New York, L. E. & W. R. Co.*, 98 N. Y. 377.

⁴⁰ *Cavanagh v. Ocean Steam Nav. Co.*, 19 Civ. Proc. (N. Y.) 391; 13 N. Y. Supp. 540.

⁴¹ *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226; 19 Sup. Ct. Rep. 367; 43 L. Ed. 677; 5 Am. Neg. Rep. 760.

occurrence and not from the appointment of the administrator.⁴² In Tennessee it is decided that although the husband was a non-resident and entered into his contract of employment in a foreign state, nevertheless, the widow may sue in said state for personal injuries occurring in Tennessee and occasioning his death.⁴³ So although the persons entitled to sue are different in Canada and Vermont and the death occurs in Canada, nevertheless suit may be maintained in Vermont.⁴⁴ Again, the statute does not restrict the action to the administrator of the state where the statute exists.⁴⁵ Nor is a right of action precluded where death occurs within the state, although the injury occasioning the same occurred outside of said state, where the statute so provides.⁴⁶

§ 506. Death—Conflict of Laws—Lex loci—Lex fori.—In an action by the representatives of a railroad employee against the company to recover damages for the death of the employee, caused by an accident while in its employ, which is tried in a different state from that in which the contract of employment was made and in which the accident took place, the right to recover and the limit of the amount of the judgment are governed by the *lex loci*, and not by the *lex fori*.⁴⁷ But where a suit is brought in one state for death by negligence, etc., under the statute of another state, and the law of the latter fails to prescribe the time limitation for suing, then the statute of the former state governs in this respect.⁴⁸ Again, the law of the province of Ontario determines the right of recovery in a Federal court of admiralty in case of death from collision upon a

⁴² *Lung Chung v. Northern P. R. Co.* (U. S. D. C. Or.), 19 Fed. 254.

⁴³ *Chesapeake, C. & S. W. R. Co. v. Higgins*, 85 Tenn. 620; 4 S. W. 47. See *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 104; 48 S. W. 778.

⁴⁴ *Boston & M. R. Co. v. McDuffey* (U. S. C. C. A. Vt.), 25 C. C. A. 247; 79 Fed. 934.

⁴⁵ *Hodges v. Kimball* (U. S. C. C. A. Va.), 34 C. C. A. 108; 91 Fed. 845, *rev'g Lusk's Admrs. v. Kimball*, 87 Fed. 545.

⁴⁶ *Rudiger v. Chicago, St. P. M. &*

O. R. Co., 94 Wis. 191; 68 N. W. 661; 6 Am. & Eng. R. Cas. N. S. 50, under *Sanb. & B. Wis. Annot. Stat. sec. 4255*.

⁴⁷ *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190; 38 L. Ed. 958; 44 Sup. Ct. Rep. 973. See 2 *Russell & Winslow's Syl. Dig. U. S. p. 2920*, for citations of this case.

⁴⁸ *Munos v. Southern P. R. Co.* (U. S. C. C. A. 5th C.), 2 U. S. App. 222; 51 Fed. 188. See *Theroux v. Northern P. R. Co.* (U. S. C. C. A. 8th C.), 12 C. C. A. 52; 64 Fed. 84.

vessel in Canadian waters on the Detroit river.⁴⁹ And the question of revival of an action in case of death of the injured party in a pending suit depends upon the laws of the jurisdiction where the action was commenced, even though the injury occasioning the death occurred in another state.⁵⁰ So where a railroad employee was killed in Canada, the law of that country allowing recovery in case of death occasioned by the negligence of a fellow servant governs, rather than the law of Vermont, which precludes liability in such case, and the Canadian law, as to the beneficiaries entitled, governs instead of the Vermont law under which the action was brought.⁵¹ But the burden of proof and the amount of evidence requisite is controlled by the law of the forum.⁵² Again, while the *lex loci* governs the right of recovery, and *lex fori* the mode of procedure, yet the New York Code,⁵³ under which interest is allowed, relates to the right of recovery, so that the *lex fori* does not apply to an action for death occurring without the state,⁵⁴ although the limitation of the amount recoverable under the statute of the state wherein the suit is brought operates to limit the damages even though the death occurred in another state, having no such limitation.⁵⁵ And where one was killed from falling overboard from a British steamer, within two miles from the shore of the United States of Columbia, the laws of the latter and not those of the former country, govern.⁵⁶ It is decided, however, that although a person is a citizen of another state, yet the laws of the state where the negligence and consequent death occurred, governs, and this, notwithstanding those entitled to the damages are also citizens of the foreign state.⁵⁷ So where a railway employee received

⁴⁹ *Robinson v. Detroit & C. S. Nav. Co.* (U. S. C. C. A. 6th C.), 43 U. S. App. 191; 73 Fed. 883.

⁵⁰ *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226; 19 Sup. Ct. Rep. 387; 43 L. Ed. 677; 5 Am. Neg. Rep. 760.

⁵¹ *Boston & M. R. Co. v. McDuffey* (U. S. C. C. A. 2d C.), 51 U. S. App. 111; 25 C. C. A. 247; 79 Fed. 934.

⁵² *Geohegan v. Atlas S. S. Co.*, 3 Misc. (N. Y.) 224; 51 N. Y. St. R. 868; 22 N. Y. Supp. 749. See note 56 *post*.

⁵³ Civ. Proc. secs. 1902, 1904.

⁵⁴ *Kiefer v. Grand Trunk R. Co.*, 12 App. Div. (N. Y.) 28; 42 N. Y. Supp. 171; 26 Civ. Proc. 147.

⁵⁵ *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10; 38 N. Y. St. R. 387, aff'g 35 N. Y. St. R. 686.

⁵⁶ *Geohegan v. Atlas S. S. Co.*, 3 Misc. (N. Y.) 224; 51 N. Y. St. R. 868; 22 N. Y. Supp. 749. 6 Misc. 127, case aff'd 146 N. Y. 636, 40 N. E. 507.

⁵⁷ *Davidow v. Pennsylvania R. Co.*

his injury in Iowa, the laws of that state, as construed therein, are to be followed and construed in the same manner as in the courts of said state, even though suit is brought in a Minnesota court.⁵⁸ But it is determined that the laws of Indiana where the action is brought controls where the wrong was committed, on the Ohio river between Indiana and Kentucky,⁵⁹ although where the cause of action arose in a foreign state, by the laws of which it is barred, it cannot be amended after such limitation under the Michigan statute as to death.⁶⁰ Again, the laws of the Island of Trinidad do not govern an action for the death of an employee upon a British ship registered in England and owned and navigated by a Canadian corporation, since such vessel is English territory.⁶¹

§ 507. Death—Conflict of laws—Foreign administrator—Party in interest—Federal jurisdiction—Opinions in recent decisions.—It is decided in a Federal case in the circuit court of Ohio⁶² that a foreign administrator may in that state maintain an action under its statute⁶³ for death by wrongful act, and that the administrator is not merely a nominal party, but the real party, and may bring an action in the Federal courts notwithstanding the beneficiaries reside in another state, namely that of the death. In this decision, Thompson, Dist. J., said: "This cause is submitted to the court upon a demurrer to the petition upon the ground that it does not appear therefrom that the court has jurisdiction of the action. 1. It is said that, for aught that appears in the petition, the plaintiff may have been appointed administratrix in a foreign country, or in some state of the Union other than Ohio, and that under section 6133 of the Revised Statutes of Ohio, a foreign administrator cannot maintain an 'action for death caused by wrongful act' under sections 6134, 6134a, and 6135 of said statutes. This claim is

(U. S. C. C. S. D. N. Y.), 85 Fed. 943.

⁵⁸ *Njus v. Chicago, St. P. & M. R. Co.*, 47 Minn. 22; 49 N. W. 527.

⁵⁹ *Memphis & C. P. C. v. Pikey* (Ind.), 40 N. E. 527.

⁶⁰ *How. Mich. Stat. secs. 8313, 8314; Wingert v. Carpenter* (Mich.), 59 S. W. 662.

⁶¹ *Dupont v. Quebec S. S. Co.*, Rap. Jnd. Quebec, 11 S. C. 188. See *Wilson v. The John Ritson*, 35 Fed. 663.

⁶² *Popp v. Cincinnati, H. & D. R. Co.* (U. S. C. C. S. D. Ohio), 96 Fed. 465.

⁶³ *Rev. Stat. sec. 6133-6134a, 6135.*

based upon a construction of section 6133, which would exclude actions for wrongful death as not being brought by the foreign executor or administrator 'in his capacity,' of executor or administrator because any damages recovered in such action would not become assets of the estate, but would be apportioned among the wife, husband, children or next of kin of the deceased. I do not think this construction sound. I think the manifest intention of the legislature was to allow foreign executors and administrators to prosecute any action which might be prosecuted by an executor or administrator appointed in this state, 'in like manner and under like restrictions as a nonresident may be permitted to sue.'⁶⁴ 2. It is said that the beneficiaries under the statute are the real parties in interest, and that Federal jurisdiction, based upon diverse citizenship, has relation to the citizenship of the real parties in interest, and not to that of mere nominal parties; that the plaintiff is a mere nominal party, and for aught that appears in the petition, the other beneficiary may be a citizen of Ohio and, therefore, jurisdiction not appearing upon the face of the petition, the action must be dismissed. The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, where the party actively conducting the litigation is doing it in the name of the state, in the name of a next friend or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who institutes it, carries it on, and, with the sanction of the court, may compromise or dismiss it. She has absolute control of, and is responsible for, the conduct of the case.⁶⁵ In the *Stewart* case⁶⁶ the

⁶⁴ *Duchesse D'Auxy v. Porter*, 41 Fed. 68; *Noonan v. Bradley*, 9 Wall. 394, 403.

⁶⁵ *Harper v. Railroad Co.*, 36 Fed. 102; *Coal Co. v. Blatchford*, 11 Wall. 172; *Knapp v. Railroad Co.*, 20 Wall. (U. S.) 117; *Chappedelaine v. Dechmaux*, 4 Cranch (U. S.), 306; *Childress v. Emory*, 8 Wheat. (U. S.) 642; *Clarke v. Mathewson*, 12 Pet.

(U. S.) 164; *Bonnafee v. Williams*, 3 How. 574; *Osborn v. Bank*, 9 Wheat. (U. S.) 738; *Irvine v. Lowrey*, 14 Pet. 298; *Rice v. Houston*, 13 Wall. (U. S.) 66; *Davis v. Gray*, 16 Wall. (U. S.) 220; *Florida v. Anderson*, 91 U. S. 678; *Walden v. Skinner*, 101 U. S. 589; *Davis v. Lathrop*, 12 Fed. 353; *Shirk v. City of La Fayette*, 52 Fed. 857; *Reinach v. Railroad*

⁶⁶ 168 U. S. 445; 18 Sup. Ct. 105.

question was whether a cause of action arising in Maryland could be sued upon in the District of Columbia, owing to the peculiarities of the Maryland statute requiring suits to be brought in the name of the state. It was not a question of Federal jurisdiction, and the court held that, the state of Maryland not being the beneficiary of the fruits of the litigation, the suit might be brought in the District of Columbia by the personal representative of the deceased. The case is thus stated in the Digest: 'An action for death caused by negligence in Maryland, where the statute provides for an action in the name of the state as nominal plaintiff, but for the benefit of certain prescribed heirs, is not such a special remedy for a purely statutory right of action as will prevent the maintenance of an action by the administrator in the District of Columbia, where the statutes provide for actions by personal representatives in such cases for the benefit of certain prescribed heirs, although the beneficiaries may not be exactly the same under the two statutes.'⁶⁷ In suits by the state on relation of A. B. or by a next friend, the state and the next friend are not real parties, in the sense that they control the litigation; but executors, administrators, trustees, etc., although they have no personal interest in the fruits of the litigation, yet are real parties in the sense that they control, and are responsible for the litigation. The demurrer will be overruled." In another decision in the United States circuit court in Washington the opinion is as follows: "The demurrer to the complaint in this case raises the question whether the administrator of the estate of a deceased person in the state of Washington can maintain an action to recover damages for a personal injury to his decedent causing death, the injury being committed in Alaska, and there being no widow or children of the deceased to benefit by the recovery. The complaint in this case contains no allegation that the deceased person, of whose estate the plaintiff is administrator, left surviving him any widow or children, and presumably there are no such relatives. As the laws of this state do not authorize an action by an administrator to recover damages for the infliction of an injury causing death, ex-

Co., 58 Fed. 33; *Morris v. Lindauer*, | *v. Smith*, 24 C. C. A. 145; 78 Fed.
4 C. C. A. 162; 54 Fed. 23; *Bangs v.* 399.

Loveridge, 60 Fed. 963; *Pennington* | ⁶⁷ 4 L. Co-op. U. S. Dig. p. 59.

cept for the benefit of the immediate family, that is, wife and children of the deceased,⁶⁶ it is insisted that the plaintiff has no right to maintain the action. If the injury complained of had been inflicted in this state, the defendant would be certainly right in the position it has taken, but the law of the place where the wrong was committed must determine the rights of the parties.⁶⁷ The laws of the state of Oregon, which by an act of congress have been adopted as laws of Alaska, confer upon the personal representatives of a deceased person a right of action to recover damages for the wrongful act or omission of another, causing death, in cases in which the deceased, if he had lived, might have maintained an action for the injury to himself, by the same act or omission. The serious question in the case is whether this statute creates any right in favor of personal representatives residing and acting beyond the limits within which the laws of Alaska have force, and whose authority to represent the deceased does not spring from the laws of Alaska. I consider, however, that the question is practically settled in favor of the plaintiff by the decisions of the supreme court of the United States in cases of *Dennick v. Railroad Co.*,⁷⁰ and *Stewart v. Railroad Co.*,⁷¹ and upon the authority of these decisions I will overrule the demurrer.⁷²

§ 508. Death—Conflict of laws—Foreign administrator—Extraterritorial jurisdiction—Where action does not lie—Federal jurisdiction.—In Alabama the law has no extraterritorial force and although the death occurred and the action is brought in the state having the statute, such law does not apply where the wrongful act causing the death was committed in another state.⁷³ So where, by the law of Maryland, an action must be brought in the name of the state for the use of the beneficiaries, no recovery can be had in another jurisdiction, and the United States statutes⁷⁴ do not include death in Maryland, so as to permit a

⁶⁶ *Noble v. City of Seattle*, 19 Wash. 133; 52 Pac. 1013.

⁶⁷ *Railroad Co. v. Babcock*, 154 U. S. 190, 203; 14 Sup. Ct. 978.

⁷⁰ 103 U. S. 11-21.

⁷¹ 168 U. S. 445-450; 18 Sup. Ct. 105.

⁷² *Erickson v. Pacific Coast Steamship Co.* (U. S. C. C. D. Wash. W. D.), 96 Fed. 80, per Hanford, Dist. J.

⁷³ *Louisville & N. R. Co. v. Williams*, 113 Ala. 402; 21 So. 938.

⁷⁴ 23 U. S. Stat. at L. p. 307, ch. 126; Acts Cong. February 17, 1885.

recovery by the administrator of a resident of the District of Columbia, to which the said statute only applies as to casualties within its borders.⁷⁵ Again, an administrator of Missouri has no standing in the Federal courts of Kansas,⁷⁶ and the theory of the law in Kansas differs from that in New Mexico in relation to the recovery for death losses, in that in the former state it is compensatory, while in the latter it is strictly penal, so that the law that penal statutes have no extraterritorial force applied to an attempt to enforce the New Mexico enactment in Kansas.⁷⁷ So if the statute is a penal one, the Federal courts of another state will not entertain jurisdiction,⁷⁸ and it is decided in Maryland that the courts of a state other than that where the accident occurred, causing the death, cannot entertain jurisdiction.⁷⁹ Again, where a cause of action accrues in Minnesota, a Missouri appointee cannot sue in the former state, but the administrator of Minnesota can in such case sue in Missouri.⁸⁰ And where a declaration under the Pennsylvania statute shows the widow to be entitled, and such enactment requires her to bring the action instead of the personal representative, the complaint is demurrable,⁸¹ for an administratrix appointed under the New Jersey statute cannot sue for death by negligence in the former state.⁸² So under a Federal decision an administrator cannot maintain an action under the statute of and in another state,⁸³ and the statute

⁷⁵ *Stewart v. Baltimore & O. R. Co.* (D. C. App.), 23 Wash. L. Rep. 247. See *Stone v. Grotore Bridge & Mfg. Co.*, 77 Hun (N. Y.), 99; 59 N. Y. St. R. 53; 28 N. Y. Supp. 445.

⁷⁶ *Hurlburt v. City of Topeka* (U. S. C. C. Kan.), 34 Fed. 510; *Lime-killer v. Hannibal & St. J. R. Co.*, 33 Kan. 83; 5 Pac. 401, under 1 Rev. Stat. Mo. 1879, secs. 2121, 96, and Comp. L. Kan. 1879, sec. 422.

⁷⁷ *Dale v. Atchison T. & S. F. R. Co.*, 57 Kan. 601; 47 Pac. 521; 14 Nat. Corp. Cas. 34; 1 Am. Neg. Rep. 46, and note, p. 47. See *Adams v. Fitchburg R. Co.* (Vt.), 30 Atl. 687; *Matheson v. Kansas City, Ft. S. & M. R. Co.*, 61 Kan. 667; 60 Pac. 747, under Rev. Stat. Mo. 1889, sec. 4425;

St. Louis & S. F. R. Co. v. Brown, 62 Ark. 254; 35 S. W. 225; *Russell v. Pacific R. Co.*, 113 Cal. 258; 45 Pac. 323; 34 L. R. A. 747; 12 Nat. Corp. R. 650; *Lower v. Segal*, 59 N. J. L. (30 Vr.) 66; 34 Atl. 945.

⁷⁸ *Marshall v. Wabash R. Co.* (U. S. C. C. Ohio), 46 Fed. 269.

⁷⁹ *Ash v. Balt. & O. R. Co.*, 72 Md. 144; 19 Atl. 643; 7 Rd. & Corp. L. J. 509; 20 Am. St. Rep. 401.

⁸⁰ *Wilson v. Tootle* (U. S. C. C. W. D. Mo.), 55 Fed. 211; Mo. Act, April 20, 1891.

⁸¹ *Lower v. Segal*, 60 N. Y. L. 99; 36 Atl. 777.

⁸² *Lower v. Segal*, 59 N. J. L. (30 Vr.) 66; 34 Atl. 945.

⁸³ *Mackay v. Central R. Co.* (U. S.

has no extraterritorial force as to an injury occurring in another state in the absence of evidence of a similar statute in such foreign jurisdiction.⁸⁴ So although the statute⁸⁵ gives a right of action, though the death occurred in another state, nevertheless, suit cannot be maintained for the death of an employee where he could not, upon the proven facts, have recovered in such foreign jurisdiction.⁸⁶ Nor can a nonresident alien sue under the act of 1855 of Pennsylvania,⁸⁷ and a recovery can be had in that state for death occurring in a foreign jurisdiction only where some negligent act or omission in the former state was the proximate cause of the injury.⁸⁸ Nor will the statute of a foreign jurisdiction be enforced in Texas, where the provisions of the enactment are dissimilar;⁸⁹ and so, even though the injury occurred in another state and the death within Texas, and the defendant railroad company's line extends into another country or state.⁹⁰ Again, in an action under 9 and 10 Vict. ch. 93, and 27 and 28 Vict. ch. 95, where the death of a person occurred in the course of his employment on board a steamer belonging to a railway company during the passage from Milford to Waterford, it was alleged that the boiler explosion, which occasioned the accident, was caused by the corrosion of part of the machin-

C. C. N. Y.), 4 Fed. 617, under the acts of 1847 and 1849. If the injuries occasioning death are inflicted in another state even though done by a New York corporation, an action cannot be there maintained. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, aff'g 3 Bosw. (N. Y.) 67; *Mahler v. Norwich & N. Y. Trans. Co.*, 45 Barb. (N. Y.) 226; 30 How. (N. Y.) 237, case rev'd 35 N. Y. 352; *Van Deventer v. New York & N. H. R. Co.* See *Van Derwerker v. Same*, 27 Barb. (N. Y.) 244; 6 Abb. (N. Y.) 239.

⁸⁴ *Debevoise v. N. Y. L. E. & W. R. Co.*, 98 N. Y. 377.

⁸⁵ Rev. Stats. Ohio, sec. 6134a.

⁸⁶ *Ott v. Lake Shore & M. S. R. Co.*, 18 Ohio Civ. Ct. R. 395; 10 O. C. D. 85. See *Campbell v. Rogers*, 2 Handy (Ohio), 110.

⁸⁷ Act April 26, 1855 (F. L. 309);

Deni v. Pennsylvania R. Co., 181 Pa. 525; 3 Am. Neg. Rep. 91; contra *Vetaloro v. Perkins* (U. S. C. C. E. D. Mass.), 101 Fed. 393, per Colt, Cir. J.; *Mulhall v. Fallon*, 176 Mass. 266; 57 N. E. 386.

⁸⁸ *Derr v. Lehigh Valley R. Co.*, 158 Pa. 365; 33 W. N. C. 295; 27 Atl. 1002.

⁸⁹ *Belt v. Gulf C. & S. F. R. Co.* (Tex. Civ. App.), 22 S. W. 1062, under *Mansfield's Ark. Dig.* secs. 5225, 5226, adopted as the law of Indian territory by act of Congress, May 2, 1890; *St. Louis, I. M. & S. R. Co. v. McCormick* (Tex.), 9 S. W. 540.

⁹⁰ *De Ham v. Mexican N. R. Co.* (Tex. Civ. App.), 22 S. W. 249, under Tex. Rev. Stat. art. 2899; S. C., 86 Tex. 68; 23 S. W. 381; 7 Nat. Corp. Rep. 350; *Belt v. Gulf C. & S. F. R. Co.* (Tex. Civ. App.), 22 S. W. 1062.

ery, and that the process of corrosion extended over a period during which the steamer had been several times in Ireland, it was decided that no part of the cause of action was shown to have arisen within the jurisdiction of the Irish court.⁹¹

§ 509. Death—Conflict of laws—Extraterritorial jurisdiction—Federal jurisdiction—Mexican laws.—The statute of Mexico giving a civil right of action to recover damages for wrongful death through negligence, although it bases such right of action on the fact that defendant's negligent acts or omissions constitute crimes, does not for that reason belong to the class of criminal laws which can be enforced only in the courts of the country where the offense was committed. So that said laws in so giving a right of action to recover damages for a wrongful death occurring in that country are not contrary to the public policy of Texas, nor to natural justice or good morals, nor is their enforcement in that state calculated to injure the state or its citizens, and an action to enforce the right so given may be maintained therein in a state or Federal court having jurisdiction of the parties, in which the established forms of procedure are such that substantial justice can be done between the parties. Again, under the Rev. St. Tex. 1895, art. 3027, in an action for wrongful death, "the jury may give such damages as they may think proportionate to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action . . . in such shares as the jury shall find by their verdict." As construed by the courts of the state, while such damages are limited to compensation for pecuniary loss, they are not confined to such sum as can be exactly proved, but may include a further element of damages where the person killed stood in the relation of husband, wife, or parent to the beneficiaries; also to be fixed by the jury in the exercise of "their own knowledge, experience, and sense of justice," and the right to such damages is not affected by the remarriage of the surviving wife or husband. The statute also

⁹¹ Walsh v. Great Western Ry. Ir. 188; Wilson v. The John Ritson, 35 R. 6 C. L. 532; 10 Mew's Eng. Dig. Fed. 663; The Olga, 32 Fed. 229; The (1898) p. 114. See Dupont v. Quebec Branford City, 29 Fed. 373. S. S. Co., Rep. Jud. Quebec, 11 S. C.

requires that the rights of all entitled to damages shall be determined and settled in one action. Under the laws of Mexico the liability of the defendant in such case is limited to the furnishing of a continuing support to the legal dependents of the deceased during the periods of time that such support would have been due from him, and in the amounts that it would have been due, proportioned to his ability to give it and the necessities of those entitled to receive it, which questions are required to be determined by the judge. The recovery in such case is in the nature of alimony or pension awarded by the court to each beneficiary, payable in monthly installments, which cease in the case of a widow or daughters on their marriage, and in case of sons on their attaining majority. Held, that the right of recovery given by such laws, at least in a case where the wife and daughters of the deceased are beneficiaries, is so dissimilar to that given by the laws of Texas, and so incapable of enforcement through any procedure provided for trials at law by the statutes of Texas or by the common law, with due regard to the rights of the defendant, that a circuit court of the United States in that state should decline jurisdiction of an action at law for its enforcement.⁸² But in Texas a suit may be brought in its courts where the defendant's railroad extends into that state and said defendant is incorporated in the United States, nor is the suit precluded by the fact that the road is also owned and operated in Mexico nor by the facts that the injuries were there received and the action could have been instituted in that country.⁸³

⁸² The above text is the syllabus to *Mexican Nat. R. Co. v. Slater* (U. S. C. C. A. 5th C.), 115 Fed. 593. There was also evidence of a learned professional man as to the law of Mexico in addition to the laws offered in evidence. This case also fully sets forth the laws of Mexico.

⁸³ *Evey v. Mexican C. R. Co.* (U.

S. C. C. A. 5th C.), 52 U. S. App. 118; 81 Fed. 294; 38 L. R. A. 387. See *De Ham v. Mexican N. R. Co.* (Tex. Civ. App.), 22 S. W. 249, under Tex. Rev. Stat. art. 2899; S. C., 86 Tex. 68; 23 S. W. 381; 7 Nat. Corp. Rep. 350; *Belt v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 22 S. W. 1062.

CHAPTER XXIV.

DEATH—RECOVERY AND DAMAGES—GENERAL PRINCIPLES
AND RULES.§ 510. Death—Measure of damages—
Generally.

511. Same subject continued.

512. Death—Measure of damages
—Age as a factor—Gener-
ally.513. Death—Measure of damages
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ity, health, strength, etc.,
as factors—Generally.514. Death of children—Damages
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physical ability, health,
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of support.516. Beneficiaries — Widow — Fi-
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damage—Construed.

521. Same subject continued.

§ 510. Death—Measure of damages — Generally.—There are, as will be apparent from the following sections, numerous factors which enter into the determination of the measure of damages in cases where recovery is sought for negligently causing death. Any attempt to logically arrange these various elements of damages upon any basis of underlying principle, is made most difficult, if not impossible, for obvious reasons, principally because of the different express statutory provisions, and also by reason of the conflicting decisions as to the construction of these statutes. Still another element is the nature or character of the statute under which damages for injuries resulting in death, or for death losses are sought to be recovered. Thus it has been declared in a case under the Massachusetts enactment, that the penalty when recovered is conferred on the widow and heirs not as damages for their loss but as a gratuity from

the commonwealth,¹ while in Louisiana it is said that the object of the statute is not benefit but compensation.² Again, the question whether survival, death loss statutes and employer's liability acts are penal laws or penal in the international sense, is important in connection with the right to enforce such enactments in foreign states or in Federal courts.³

§ 511. Same subject continued.—It has been declared in New York that the action to recover damages for loss by death is given upon different principles and for different causes, although it can be maintained only in those cases in which it could have been brought by the deceased if he had survived.⁴ So it is declared in a Georgia case that in an action against a railroad company, the liability rests on other grounds than the criminal negligence, then evidently necessary under certain other decisions based on the statute.⁵ Again, in Massachusetts, the action which is given the administrator is declared to be merely a substitute for the indictment,⁶ and in Nevada the statute⁷ is said to give two causes of action, one requiring proof of the existence of kindred, the other not.⁸ So it may be generally stated that the measure of damages depends frequently upon whether the action is based upon a survival statute or exists solely by virtue of a statutory right to damages for the death itself, irrespective of the damages which the injured party might have recovered

¹ *Carey v. Berkshire Ry. Co.*, 1 Cush. (Mass.) 475, 480, per Metcalf, J.

² *McFee v. Vicksburg, S. & P. R. Co.*, 42 La. Ann. 790; 7 So. 720, per Breaux, J.

³ See *Huntington v. Attrill*, 146 U. S. 657, 673, per Mr. Justice Gray. See *Boston & M. R. R. Co. v. Hurd* (U. S. C. C. A. 1st. C. Dist. N. H.), 108 Fed. 116, per Putnam, J.

⁴ *Whitford v. The Panama R. R. Co.*, 23 N. Y. 465, 469.

⁵ *McDonald v. Eagle & P. Mfg. Co.*, 67 Ga. 761; 68 Ga. 839, but Ga. Code of 1882, sec. 2971, was amended, Laws, 1887, and as amended includes

all cases where death of a human being results from a crime or from criminal or other negligence. See *Daly v. Stoddard*, 66 Ga. 145; *Central R. & B. Co. v. Roach*, 70 Ga. 434; *Augusta Factory v. Hill*, 83 Ga. 709; 10 S. E. 450.

⁶ *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478; 20 N. E. 103, per Holmes, J. See Pub. Stat. Mass. ch. 112, secs. 212, 213; Stat. 1886, ch. 140.

⁷ Gen. Stat. sec. 3898, 3899.

⁸ *Roach v. Consolidated I. M. Co.*, 7 Fed. 698; 7 Sawy. (U. S.) 224. See also *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117; 7 L. R. A. 283; 44 Am. & Eng. R. R. Cas. 690.

had he lived.⁹ The above points merely suggest the impossibility of formulating positive rules of other than general applicability. The difficulty in determining the value of a human life needs no demonstration, but it may be briefly stated in conclusion that the law can furnish no definite measure of damages; they are and must be essentially indefinite. Human life is not property capable of an exact market valuation. Whatever compensatory value the statutes give by way of damages to beneficiaries for loss of life must depend upon the varying circumstances of each particular case, excluding any certain rule of admeasurement. Much must therefore be left to the judgment and discretion of the jury, aided as far as possible by the instructions of the court as to the law under the statute, upon which recovery depends.¹⁰

⁹ See *Maier v. Philadelphia Tract Co.*, 181 Pa. 391; 37 Atl. 571; 40 Wkly. N. C. 477; 3 Am. Neg. Rep. 85.

¹⁰ "It is for the jury to say under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money." *Pym v. Great Northern Ry. Co.*, 2 Best & S. 750; 4 Best & S. 396, per Cockburn, C. J. That mother of deceased adult should be placed pecuniarily in same condition that she would probably have occupied except for the death, there having been an annuity allowance during their joint lives, see *Rowley v. London & N. Ry. Co.*, L. R. 8 Exch. 221. "Such sum will depend on a variety of circumstances and future contingencies and will, therefore, be difficult of exact ascertainment," but may be appropriated. *Pierce v. Conners*, 20 Colo. 182; 37 Pac. 722. That no measure of damages was provided prior to act of December 16, 1878, in Georgia, see *Macon & W. R. Co. v. Johnson*, 38 Ga. 409. That the amount of the verdict is particularly within the province of the jury,

see *Chesapeake & O. R. Co. v. Judd*, 20 Ky. L. Rep. 1978; 50 S. W. 539.

"Almost impossible systematically to figure out by items what may amount to an adequate relief." *Myhan v. Louisiana E. L. & P. Co.*, 41 La. Ann. 964; 6 So. 799, per Bermudez, C. J. There seems to have been a "natural and almost universal repugnance among enlightened nations to setting a price upon human life or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened or refined." *Hyatt v. Adams*, 16 Mich. 191, per Christiancy, J. As to jury's discretion, see *Stoher v. St. Louis, etc., R. Co.*, 91 Mo. 509. "Such damages are not merely nominal. What they should be depends upon the varying facts of each particular case and are for the jury to assess, guided by the instructions of the court as to the law." *Corliss v. Worcester N. & R. R. Co.*, 63 N. H. 404, per Bingham, J. "In but few cases arising under this act is the plaintiff able to show direct specific pecuniary loss . . . the proof may be unsatisfactory and the

It may be stated, however, in conclusion, that there are certain elements of damages, some of which enter into nearly, if not all the cases, while the terms of some of the statutes permit the admission of evidence upon the question of damages which is ex-

damages be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can." *Lockwood v. N. Y. L. E. & W. R. Co.*, 98 N. Y. 523, per Earl, J. This case affirms 20 Week Dig. (N. Y.) 341. "There is no way to ascertain mathematically what that damage would be; it necessarily must be to a great extent speculative and the only thing the legislature has done to help out the jury is to limit the amount." *Etherington v. Prospect Park & C. I. R. R. Co.*, 88 N. Y. 641. This case affirms 24 Hun (N. Y.), 235. So in case of a child of tender years it would be impracticable except in very rare instances to furnish direct evidence of the loss by death, and the question would be for the jury in view of the circumstances. *Ihl v. Forty-second St. & G. St. F. R. R. Co.*, 47 N. Y. 317. That the measure of damages "must be somewhat indefinite" and dependent upon the judgment of the jury, see *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25, 32, per Allen, J. As to the sufficiency of a general allegation of damages without pleading particular facts showing damages, see *Haug v. Great Northern R. Co.*, 8 N. D. 23; 42 L. R. A. 684; 77 N. W. 97; 12 Am. & Eng. R. Cas. N. S. 25, citing and criticising numerous cases. "It is not human possessions that are destroyed, but humanity itself, and as this has no market value it must be very much a matter of human feeling. Hard then as the task may be and however uncertain its results,

it is to be performed by the jury, aided by the cautions and counsels of the judge . . . the law can furnish no definite measure of damages which are essentially indefinite." *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. 526, per Lowrie, J. "While the law does not . . . intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence . . . the difficulties of proof are known to the lawmaker . . . When no amount is fixed by law and no rule is prescribed . . . we think that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should fix and assess the proper sum." *Missouri P. R. Co. v. Lehmberg*, 75 Tex. 61. That matter should largely be left to the jury's discretion. See *Whitton v. Chicago & N. W. Ry. Co.*, 2 Biss. (U. S. C. C.) 282. *Examine St. Louis I. M. & S. Ry. Co. v. Needham*, 3 U. S. C. C. A. 129; 52 Fed. 371. That "jury have no arbitrary discretion to give as damages what they may see proper without reference to a proper basis from which to estimate them," see *Louisville, etc., Ry. Co. v. Orr*, 91 Ala. 548, 553, per Coleman, J.

cluded under other enactments. These various factors will be fully considered under the different statutes under this title.

§ 512. Death—Measure of damages—Age as a factor—Generally.—Age of the deceased constitutes one of the most important factors to be considered in the determination of the amount to be awarded as damages in cases of death losses; and this is so whether the action be brought under a survival, death loss, or employer's liability statute. It is important not only as an independent factor, but also because it is one of many other constituent parts dependent upon it in the ascertainment of damages. Thus upon age depend in a greater or less degree (1) mental or physical ability, health, strength, endurance or weakness, intelligence and education; (2) permanency or otherwise of habits affecting mental and physical ability, etc., such as those of temperance or intemperance and the like; (3) perhaps, though not necessarily so, disposition to labor, habits of industry, frugality, power to accumulate, and their opposites; (4) an increasing or diminishing earning power or capacity for labor, or for accumulating property; (5) expectancy of life; (6) to some extent at least, the need of support or the extent of capability of supporting dependents; and (7) in certain cases the power to render service or the necessity of exacting, or right to require service.¹¹ In conclusion it may be stated as a rule that evidence of the intestate's age is admissible as relevant and material upon the trial of actions of the character under consideration, and it is also constantly relied upon in determining whether the damages awarded in this class of cases are excessive or not, or inadequate. But while age constitutes an important factor, the necessity of proof of age is subject to whatever qualification exists in those states where nominal damages are awarded without proof of other than the express statutory requisites.¹²

§ 513. Death—Measure of damages—Mental and physical ability, health, strength, etc., as factors—Generally.—Dependent upon the age of the deceased are mental and physical

¹¹ These various factors will be fully considered under the sections within this title.

¹² For citations see the sections under this title as to general elements of damages.

ability, health, strength, and their adjuncts, essential and otherwise. A person's endurance or weakness, the fact whether he is robust and strong or not, his intellectual and physical condition, his education or want thereof, enter partly or as a whole into questions affecting his ability to labor or follow his profession, business or occupation, his earning capacity, his increasing or diminishing power in these respects, his probable accumulations, his expectancy of life, his ability to attend to the proper care, education and training of children, where there are any children, to support dependents in certain cases, etc. It is therefore apparent that the factors mentioned at the beginning of this section constitute, as applied to the intestate, especially when an adult, important, relevant and material evidence in determining what damages shall be awarded for losses occasioned by death. This rule is subject to whatever qualification exists in these cases where proof of other than the express statutory requisites is not necessary to entitle the beneficiaries to some recovery, or to nominal damages. Where such evidence is relied on, its weight and value must depend largely upon the nature of the statutory action and also upon the character of the recovery sought, in whose behalf, the relation which the surviving beneficiaries sustained to the deceased by way of dependency and the like in certain cases, and other matters apparent throughout this chapter.¹³

§ 514. Death of children—Damages—Age, sex, mental and physical ability, health, strength, etc.—Generally.—In actions brought to recover damages for loss occasioned by the death of a child its age, sex, talents, mental and physical condition, ability, health, strength, state of development and the like, are very important factors in the estimation of the amount to be awarded. So the fact is material that a child is of very tender years. This rule is well supported by the decisions and also by the declarations of courts. It is not intended, however, that this rule should exclude the right to recover at all unless such proof be given.¹⁴ The general basis of recovery for loss by death of

¹³ The above principles are fully supported by the decisions throughout this title.

¹⁴ See in addition to cases below, citations under the next preceding section herein. A complaint al-

a minor child, where the action for damages is brought by the father, is held to be loss of service and it is held that such parents' right thereto is to be determined primarily by the laws applicable to the relation of master and servant, and that this applies to a case of negligent homicide of a minor son,¹³ although in Alabama it is decided in a like action that the damages sought are purely punitive and do not depend upon loss of services.¹⁶ And it is also determined that there can be no recovery by a father for the loss of the services of a minor son, from the date of his death until he would have attained his majority, in an action against one for having negligently caused such death, since the statute expressly provides that the action must

though not alleging special damages which sets forth the age, occupation, relationship, etc., is sufficient in case of death of minor son. *Orman v. Mannix*, 17 Colo. 564; 30 Pac. 1037. Evidence of relationship of plaintiff and deceased son and of their relative ages and habits may authorize a recovery of damages. *Mollie Gibson Consol. Min. Co. v. Sharp* (Colo. App.), 38 Pac. 850. See also *Colorado Coal & I. Co. v. Lamb* (Colo. App.), 40 Pac. 251. Age, health, habits, etc., of deceased son may be considered. *Hall v. Galveston, H. & S. A. Ry. Co.*, 39 Fed. 18. As to health, age, talents, habits of industry, etc., past success in life where child is an adult, see *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5; 46 N. W. 79. That proof of age of son and condition in life of father is sufficient, see *Grogan v. Broadway, etc., Co.*, 87 Mo. 321. As to reaching majority and noncontinuance of family relations and as to the effect of age under the statute as affecting the action, see *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499. Examine *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 96. In case of the death of an infant daughter, the court charged that the jury should consider the age

and sex of the deceased, etc., and the probability of the next of kin sustaining any pecuniary damage by her death. *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, case aff'd 24 Hun (N. Y.), 235.

¹³ *Frazier v. Georgia, R. & B. Co.*, 101 Ga. 70; 28 S. E. 684; 46 Cent. L. J. 133. But in New York, see as to the relation of parent and child, *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; 14 N. Y. St. Rep. 788; 16 N. E. 65. This was a personal injury case. That jury may allow for value of services though no proof thereof be made, see *Callaway v. Spurgeon*, 63 Ill. App. 571. See further as to loss of services, *Covington St. Ry. Co. v. Packer*, 9 Bush (Ky.), 455; 15 Am. Rep. 725; *McGovern v. New York Cent. R. Co.*, 67 N. Y. 417; *Pressman v. Mooney*, 5 App. Div. (N. Y.) 121; 39 N. Y. Supp. 44; *Coghlan v. Third Ave. R. R. Co.*, 7 App. Div. (N. Y.) 124; 39 N. Y. Supp. 11098, aff'g 16 Misc. (N. Y.) 677; 25 Civ. Pro. (N. Y.) 249. Damages for loss of services is fully considered elsewhere herein.

¹⁶ *Alabama, G. & S. R. Co. v. Burgess*, 116 Ala. 509; 22 So. 913, under Ala. Code, sec. 2539.

be brought by the personal representative of the deceased.¹⁷ So in other jurisdictions the right of action is held to lie only for the pecuniary loss resulting from the death.¹⁸ While in other states the pecuniary loss is not confined to the minority of the child, but includes a reasonable expectation of pecuniary benefits thereafter, to those entitled as beneficiaries.¹⁹ Again, the age of a minor is deemed of importance in determining whether he is capable or incapable of rendering services for which the parent could recover, as in case of children of very tender years.²⁰ So, age, sex and health affect the right to support or the parents' liability therefor, and consequently the measure of damages.²¹ And the age, sex, intelligence, strength, etc., of minor

¹⁷ *Harris v. Kentucky Timber & L. Co.*, 19 Ky. L. Rep. 1731, 1732; 45 S. W. 94, denying rehearing 43 S. W. 462, under Ky. Stat. sec. 6. See also *Illinois C. R. Co. v. Hunter*, 70 Miss. 471; 12 So. 482, under Miss. Const. 1890, sec. 193; *Fitzhenry v. Consolidated Tract. Co.* (N. J.), 42 Atl. 416, under 1 N. J. Gen. Stat. p. 1188. The question of the majority of a child as a limit in determining damages is considered elsewhere herein.

¹⁸ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417, under 1 Gen. Stat. N. J. p. 1188; Acts N. J. approved March 3, 1848. *Myers v. Holborn*, 58 N. J. L. (29 Vr.) 193; 33 Atl. 389; 30 L. R. A. 345, under N. J. Rev. Stat. p. 294. This question of pecuniary loss is fully considered elsewhere herein.

¹⁹ *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C.), 35 C. C. A. 105; 92 Fed. 953; 13 Am. & Eng. R. Cas. N. S. 520; *McLean Co. Coal Co. v. McVey*, 38 Ill. App. 158; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424; 49 Pac. 599; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576; 57 N. W. 298. Loss of services is fully considered elsewhere herein.

²⁰ *Atlanta Consol. St. R. Co. v. Ar-*

nold, 100 Ga. 566; 28 S. E. 224; *Allen v. Atlantic St. R. R. Co.*, 54 Ga. 503; *Crawford v. Southern R. Co.*, 106 Ga. 870; 33 So. 826; 4 Chic. L. J. Wkly. 436; 6 Am. Neg. Rep. 459. See *Consolidated Traction Co. v. Graham* (N. J.), 40 Atl. 773; 4 Am. Neg. Rep. 660; *Graham v. Consolidated Traction Co.* (N. J. 1899), 44 Atl. 964; *Ihl v. Forty-second St. Ry. Co.*, 47 N. Y. 317; *Lehman v. City of Brooklyn*, 29 Barb. (N. Y.) 334.

²¹ It is held that a father's liability for his daughter's support ceases at her attaining her majority if she is then able to support herself, and that even though she thereafter becomes mentally incompetent, the liability is not revived. *Mt. Pleasant Overseers v. Wilcox*, 12 Pa. Co. Ct. 447; 2 Pa. Dist. R. 628. Before the act of 1873 in Arkansas a female was a minor until 21 years of age. *Rowland v. McGuire*, 64 Ark. 412; 42 S. W. 1068. It is held that a parent's obligation to support a daughter is not determined by her marriage and removal from her parent's domicile, where her husband cannot provide for her wants, and she is in actual need. *Pratt v. Pratt*, *Rapports' Judic. Quebec*, 10 C. S. 134. A father may emancipate his minor daughter.

children also affect the question of contributory negligence by parents and infants, and necessarily the determination of the point whether a right exists to recover any damages whatsoever.² So the same factors are considered as of weight in determining whether the damages assessed are excessive, inadequate or other-

Kain v. Larkin, 131 N. Y. 300; 43 N. Y. St. R. 197; 30 N. E. 105, rev'g 42 N. Y. St. R. 571; 17 N. Y. Supp. 223. And a son is also held emancipated by marriage, notwithstanding continued residence with his father's family. *Craftsbury v. Greensboro*, 66 Vt. 585; 29 Atl. 1024. As to recovery of damages where deceased son was emancipated, etc., see *Franklin v. South Eastern Ry. Co.*, 3 Hurl. & N. 211. Examine *Dalton v. South Eastern Ry. Co.*, 4 C. B. (U. S.) 296. An infant husband who married without his father's consent, and needs his wages for the support of himself, his wife and children, is entitled to them. *Commonwealth v. Graham* (Mass.), 31 N. E. 706; 16 L. R. A. 578. The father's liability for board, care and medicine furnished a minor son ceases where the circumstances show an emancipation. *Kubic v. Zemke*, 105 Iowa, 269; 74 N. W. 748. A father may also be liable for necessities furnished a minor son who is sick and in a destitute condition, where he had abandoned the son and had been notified of his condition. *Manning v. Wells*, 61 N. Y. St. R. 59; 29 N. Y. Supp. 1044; 8 Misc. (N. Y.) 646, aff'd 85 Hun (N. Y.), 27; 66 N. Y. St. R. 109; 32 N. Y. Supp. 601. The question of expenses for medical attendance, care, nursing, etc., of minors as an element of damages, and also the deduction for support and maintenance, will be considered elsewhere herein.

²Age, intelligence and ability to understand the character of the act

and its consequences may be considered by the jury in determining the contributory negligence of a boy 14 years old. *Texas v. P. R. Co. v. Phillips*, 91 Tex. 278; 42 S. W. 852, rev'g 40 S. W. 344. It is held that an old person is not required to exercise greater care than a young and vigorous one. *Culbertson v. Holliday*, 50 Neb. 229; 69 N. W. 853. Precisely the same degree of care and prudence is not required in an infant of about twelve years of age as in case of an adult. *Baltimore & P. R. Co. v. Cumberland*, 12 App. (D. C.) 598; 26 Wash. L. Rep. 306. Age of infant and all the other circumstances are to be considered and what might be contributory negligence in the case of an adult may constitute a question of fact for the jury in case of an infant of tender age. *Brown v. Syracuse*, 77 Hun (N. Y.), 411; 60 N. Y. St. R. 16. See also *Ginchard v. New*, 84 Hun (N. Y.), 54; 65 N. Y. St. R. 20; 31 N. Y. Supp. 1080; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa, 602; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401; 21 L. Ed. 114; *Goff v. Ockers*, 49 N. Y. St. R. 615; 21 N. Y. St. R. 454; 1 Misc. (N. Y.) 468, aff'd 139 N. Y. 653; 54 N. Y. St. R. 934; 355 N. E. 207; *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295; *Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511; 40 N. E. 1034, aff'g 56 Ill. App. 196. That age, sex, health, strength, capacity, experience, intelligence, ability, extent of information, activity, etc., go to the question of contributory

wise.²³ Again, it is held that damages will not be restricted to a merely nominal sum for the negligent killing of a child five years old, although the only evidence furnishing a basis for the determination of the amount of damages is as to the age, sex and general intelligence of the child.²⁴ So the habits and energy of a

negligence of minors, see *Cleveland, C. C. & St. L. R. Co. v. Tartt* (U. S. C. C. A. 7th C.), 12 C. C. A. 625; 64 Fed. 830; *Omaha & R. V. R. Co. v. Cook*, 42 Neb. 577; 60 N. W. 899, rehearing denied 42 Neb. 905; 62 N. W. 235; *Carson v. Chicago, R. I. & P. R. Co.*, 96 Iowa, 583; 65 N. W. 881; *Union P. R. Co. v. McDonald*, 152 U. S. 262; 14 Sup. Ct. Rep. 619; 38 L. Ed. 434; *Collis v. N. Y. Cent. & H. R. R. Co.*, 71 Hun (N. Y.), 504; 55 N. Y. St. R. 82; 24 N. Y. Supp. 82; *Robertson v. Mayor of N. Y.*, 7 Misc. (N. Y.) 645; 58 N. Y. St. R. 391; 28 N. Y. Supp. 13, aff'd 144 N. Y. 609; 44 N. E. 1128; *East Tennessee, V. & G. R. Co. v. Hughes* (Ga.), 58 Am. & Eng. R. Cas. 373; 17 S. E. 949; *Turner v. Norfolk & W. R. Co.* (W. Va.), 22 S. E. 83; *Butz v. Cavanagh*, 137 Mo. 503; 38 S. W. 1104. As to distinction in this respect between children of tender years and minors of years of discretion, see *E. S. Higgins Carpet Co. v. O'Keefe* (U. S. C. C. A. 2d C.), 51 U. S. App. 74; 25 C. C. A. 220; 79 Fed. 900. As to imputed negligence in case of children, see *Dudley v. Westcott*, 44 N. Y. St. R. 882; 18 N. Y. Supp. 130, rev'g 40 N. Y. St. R. 506; 15 N. Y. Supp. 952; *Foley v. N. Y. Cent. & H. R. R. Co.*, 78 Hun (N. Y.), 248; 60 N. Y. St. R. 6; *Jeffersonville v. McHenry*, 22 Ind. App. 10; 53 N. E. 183, and numerous cases cited. See further on the above points, *Joyce on Elect. Law* (ed. 1900), secs. 585, 586; 1 *Shearman & Redf. on Neg.* (ed. 1898) secs. 73-83.

²³ See note at end of this chapter entitled "Age, etc., of children—Excessive and inadequate damages—Decisions."

²⁴ *Howell v. Rochester R. Co.*, 24 App. Div. (N. Y.) 502; 49 N. Y. Supp. 17. That proof of son's age and father's condition in life sufficient, see *Grogan v. Broadway, etc., Co.*, 87 Mo. 321. As to proof of age (daughter 6 years old) health and intelligence being sufficient, see *Houghkirk v. Delaware & H. C. Co.*, 92 N. Y. 219, rev'g 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 How. (N. Y.) 328; 4 Month. Law Bull. 65. See also *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; *Nagle v. Missouri Pac. R. Co.*, 75 Mo. 653. *Examine Silberstein v. Wiche Co.*, 29 Abb. N. C. (N. Y.) 291; 22 N. Y. Supp. 170.

"Where the testimony shows the bodily health and strength, the sprightliness or want of it of mind, the aptitude and willingness to be useful in performing services, the mode in which such faculties are exercised as in useful labor or otherwise, and when from the age and undeveloped state of the child, any estimate of the value of the services until majority would be matter of opinion in which no particular or special knowledge could be procured better than the judgment and common sense of the ordinary person called to the duty of determining such value then upon such testimony the sound discretion of the jury can be relied on to determine the value without any witness naming a sum

deceased minor son, his tender age and expectancy of life until majority, his ability to learn well, his obedience, the help rendered to his parents and the character thereof and willingness to work are properly considered.²⁵ So it is decided in Texas that it is sufficient proof of damages to warrant an award by the jury, for the negligent killing of a child, to show that he was twenty-five months old, could understand what was said, obeyed his mother, was just beginning to talk and was stout and healthy.²⁶ And in an Illinois case it is determined that the value of services of a deceased minor may be estimated from the child's age and the knowledge and experience of the jurors in matters of common observation.²⁷ So where from the undeveloped state of a daughter six years old, an estimate of her services would be a matter of opinion, the jury may use their own judgment, common sense and sound discretion upon the evidence, as no expert opinion would be better.²⁸ And in Arkansas it is decided that a child's age may be such as to make his loss a matter of conjecture as in case of an infant of tender years where the question may be left to the jury without evidence.²⁹

§ 515. Beneficiaries—Widow—Loss of support.—In an action by a widow to recover damages for the wrongful or negligent death of her husband, she is entitled to a reasonable compensation for the loss of support which he was legally bound to provide for her.³⁰ And evidence is admissible that the husband

... As the age of the child increases and his faculties develop testimony to actual service, can and should be produced." *Brunswig v. White*, 70 Tex. 504; 8 S. W. 85.

²⁵ *Missouri, K. & T. Ry. Co. v. Gilmore* (Tex. Civ. App. 1899), 53 S. W. 61. *Examine Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 496; 7 S. W. 857; *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640, where the son was strong, sober, industrious, etc.

²⁶ *Austin v. Rapid Trans. R. Co. v. Cullen* (Tex. Civ. App.), 29 S. W. 256, rehearing denied, 30 S. W. 578.

²⁷ *Callaway v. Spurgeon*, 63 Ill. App. 571.

²⁸ So held in *Brunswig v. White* (Tex.), 8 S. W. 85, Annot case. See *Pacific R. Co. v. Dundon*, 37 Kan. 1, 14 Pac. 501.

²⁹ *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491.

³⁰ *Florida C. & P. R. Co. v. Foxworth*, 41 Fla.; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469; *Chesapeake & O. R. Co. v. Dixon*, 20 Ky. L. Rep. 792 (1883); 47 S. W. 615; 50 S. W. 252; 14 Am. & Eng. R. Cas. N. S. 827; *Hayes v. Williams*, 17 Colo. 465; *Baltimore, etc., R. Co. v. State*, 71 Md. 573; *Baltimore, etc., R. R. Co. v. State*, 24 Md. 271; *Nichols v. Winfrey*, 90 Mo. 403; *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W.

was at his decease the wife's sole support.³¹ So it is held that the measure of damages in such case would be the probable amount which the husband would have contributed to her maintenance and support had he lived.³² But in case of a wife who was openly adulterous and living apart from her husband at his decease no damages can be recovered.³³ Again, where a deceased

152; *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427; *Kaspari v. Marsh*, 74 Wis. 563; *Annas v. Milwaukee & N. R. R. Co.*, 67 Wis. 48; *Lanson v. Chicago, etc.*, R. Co., 64 Wis. 448; *Castello v. Landwehr*, 28 Wis. 522. In this connection as bearing upon the principle involved, examine the following cases: That husband is obliged to support wife as long as legal relation exists, see *State v. Tierney*, 1 Penn. (Del.), 116; 39 Atl. 774; Duty of husband to support wife to extent of ability and reasonable and necessary comforts according to circumstances and to society in which they live, *Thill v. Polman*, 76 Iowa, 638; 41 N. W. 385. Examine also *Baker v. Carter*, 83 Me. 132; 21 Atl. 834; *McGrath v. Donnelly*, 131 Pa. 549; 20 Atl. 382; *Leuppie v. Osborn*, N. J. Ch. 29 Atl. 433; 39 Cent. L. J. 187; *Roll v. Davison*, 165 Pa. 392; 35 Wkly. N. C. 562; 25 Pitts. L. J. N. S. 450; 30 Atl. 987.

³¹ *Pennsylvania Co. v. Keene*, 143 Ill. 172; 32 N. E. 260; *Chicago & A. R. Co. v. May*, 108 Ill. 288. See also *Annas v. Milwaukee & N. R. R. Co.*, 67 Wis. 46. That it need not be alleged that widow was dependent on her deceased husband for support, see *Salem Bedford Stove Co. v. Hobbs* (Ind. App.), 38 N. E. 538.

³² *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152.

³³ *Stimpson v. Wood*, 57 L. J. L. B. 484; 36 W. 734; 59 L. T. 218. See *Brash v. Steele*, 7 D. B. M. (Scotch) 539; *Fort Worth, etc.*, R. Co. v. *Floyd* (Tex. Civ. App.), 21 S.

W. 544. In this connection as bearing upon the principle involved, examine the following cases: Where a husband had separated from his wife because of her adultery, it was held that he was not liable for her board to one whom he had notified of the facts although he had specially agreed to pay her board while she lived with him. *Ford v. Hoover* (C. P.), 13 Lanc. L. Rev. 81. That husband is not liable for support of wife guilty of adultery, see *Mitchell v. Torrington Union*, Q. B. 76 Law T. Rep. 724. That adultery, a sufficient defense for refusing to support wife, see *State v. Schweitzer*, 57 Conn. 532; 18 Atl. 787; 6 L. R. A. 125; 12 Crim. L. Mag. 273, under Conn. Gen. Stat. sec. 3402. See *McCutchen v. McGahan*, 11 Johns. (N. Y.) 281. That husband's abandonment excused by wife's infidelity, see *Carney v. State*, 84 Ala. 7; 4 So. 285. That a husband is legally obliged to support his wife who is living apart from him, though she is not entirely without fault, and to pay her an amount suitable to his financial condition, see *Euslin v. Euslin* (N. J. Ch.), 37 Atl. 442. If a wife voluntarily leaves her husband without sufficient legal grounds, as in case of his utter indifference and neglect, there being no physical violence, etc., she cannot pledge his credit for her support. *Bostick v. Brower*, 49 N. Y. Supp. 1046; 22 Misc. (N. Y.) 700. That husband not bound to provide a dwelling for his wife apart from the family, see *Rodenbaugh, Young, v.*

employee leaves a widow only, the measure of damages is the pecuniary value of his life resulting from the relation of dependency or from expectation of benefit from the distribution of such estate as it may be inferred from the evidence he would have earned and saved but for his death.³⁴ The fact however that the husband did not intend to contribute to his wife's support cannot affect her right to damages.³⁵ But damages for the

Rodenbaugh (C. P.), 17 Pa. Co. Ct. 477. See *People v. Pettit*, 74 N. Y. 320; 3 Hun (N. Y.), 416. That husband liable when he forces wife to live apart, see *Scott v. Carothers*, 17 Ind. App. 673; 47 N. E. 389. That husband liable for wife's support when she is boarding with another, her husband having failed or refused support, see *McClary v. Warner*, 69 Ill. App. 223. In California under sec. 137 of Cal. Civ. Code, wife is entitled to maintain an action for permanent support where her husband deserts her. *Benton v. Benton*, 122 Cal. 395; 55 Pac. 152. When not relieved from liability for lodgings for wife living apart, see *Oldman v. Yost*, 62 Minn. 261; 64 N. W. 564. Where a husband who is the wrongdoer has abandoned his family and they are living apart from him, he is liable for medical attendance furnished his wife and minor son. *Hardy v. Eagle* (N. Y. City Ct.), 23 Misc. (N. Y.) 441; 51 N. Y. Supp. 501. But examine *Morgan v. Bartels*, Reports Jud. Quebec, 12 C. S. 125. That husband is liable for maintenance or necessities, etc., of wife when she is separated or living apart from him, see *Llewellyn v. Levy*, 163 Pa. 647; 30 Atl. 292; *Davis v. St. Vincents Inst.* (U. S. C. C. A. 9th C.), 61 Fed. 277; *Seybold v. Morgan*, 43 Ill. App. 39; *McKinney v. Juhman*, 38 Mo. App. 344; *Le Boutilier v. Fiske*, 47 Hun (N. Y.), 323; *Anonymous*, 21 Misc. (N. Y.) 656; *Lord v.*

Thompson, 9 J. & S. (N. Y.) 115; *Hartjen v. Reubsamen*, 19 Misc. (N. Y.) 149; 77 N. Y. St. R. 446; 43 N. Y. Supp. 466; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248; *Kent v. Brinckerhoff*, 8 N. Y. St. R. 794; 26 Wkly. Dig. (N. Y.) 438; *Bloomingtondale v. Brinckerhoff*, 2 Misc. (N. Y.) 49; 49 N. Y. St. R. 142; 20 N. Y. Supp. 858; *Minck v. Martin*, 22 J. & S. (N. Y.) 136; 6 N. Y. St. R. 803; *Com. v. Tragle*, 4 Pa. Super. Ct. 159; 40 Wkly. N. C. 350. Contra see *Sawyer v. Richards*, 65 N. H. 185; 23 Atl. 150; *Raymond v. Cowdrey*, 42 N. Y. Supp. 557; 19 Misc. (N. Y.) 34; *Catlin v. Martin*, 69 N. Y. 393; *Anderson v. Cullen*, 29 N. Y. St. R. 494; 16 Daly (N. Y.), 15; 8 N. Y. Supp. 643; *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46; *Guthrie v. Gorrecht* (Pa. C. P.), 8 Lanc. L. Rev. 25; *Hentze v. Marjenhoff*, 42 S. C. 427; 20 S. E. 278. Examine *Haymond v. Haymond*, 74 Tex. 414; 12 S. W. 90. See *Morse v. Morse*, 65 Vt. 112; 26 Atl. 528; *Hunt v. Hayes*, 64 Vt. 89; 15 L. R. A. 661; 23 Atl. 920; 34 Cent. L. J. 473; 45 Alb. L. J. 414; *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Belknap v. Stewart* (Neb.), 56; N. W. 881.

³⁴ *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350, 354, per *McClellan, J.*

³⁵ *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427. That \$6,250 not excessive damages where husband had always supported his wife, was a

negligent killing of a husband are not limited to the simple value of his support and protection to the widow.³⁶

§ 516. Beneficiaries—Widow—Financial condition of deceased husband—Increase of his property—Dower—Settlement on widow.—In a New York case the administratrix of the deceased was permitted to testify in an action to recover damages for his negligent death that he left no property.³⁷ And the widow may recover for the negligent killing of her husband not only the value of his support, but the damages may include compensation for the share which she might reasonably be expected to have received from an increase to his property or accumulations to his estate had he not been thus wrongfully killed.³⁸ So in an action by a widow under the Florida statute for her husband's death, the damages may include compensation for her loss of whatever she reasonably could have expected to receive by way of dower or legacies from his estate, where her life expectancy would exceed his.³⁹ Again, it is held not error to refuse to charge the jury that in case the deceased was largely indebted at the time of his death, the plaintiff would have no pecuniary interest in his life until his debts were paid, and the jury in estimating the pecuniary value of the loss of the plaintiff's husband, must, if they can, fix a period in his life if he had lived when he would have acquired property beyond his debts.⁴⁰ And in an English case it is declared that financial provisions made by a husband for the maintenance of his widow might be considered in estimating her loss, but that the nature of the provision and the position and means of the deceased ought to govern the extent to which reduction should be made in the damages, as where deceased did not earn his living, and had set-

healthy man, earning from \$500 to \$1,200 a year and of the age of 55, see *Paschall v. Owen* (Tex.), 14 S. W. 203.

³⁶ *Bauer v. Richter*, 103 Wis. 412; 79 N. W. 404.

³⁷ *Koosorowska v. Glasser*, 8 N. Y. Supp. 197.

³⁸ So held in *Bauer v. Richter*, 103 Wis. 412; 79 N. W. 404. See *Kaspari v. Marsh*, 74 Wis. 563; *Annas v.*

Milwaukee, etc., R. Co., 67 Wis. 48; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 448.

³⁹ *Florida C. & P. R. Co. v. Foxworth*, 41 Fla.—; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469, under Fla. Acts, 1883, chap. 3439, sec. 2. See chap. 27, herein, as to dower.

⁴⁰ *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315.

tled one half of his income on his wife, his death would not occasion the loss of that half, although, to the extent of her interest in the other half, the jury might estimate her loss.⁴¹

§ 517. Beneficiaries—Widow and children—Number, ages, sex, dependency and support—Financial and physical condition—Expenditures and financial condition of deceased—Generally.—The courts in determining whether or not the damages awarded are excessive, have in numerous cases considered not only the number, ages and sex of the surviving children, but also the fact of the dependency of the widow and children upon the deceased for support, his contribution in whole or in part thereto, and in some case their physical condition and the financial as well as physical condition of the deceased.⁴²

⁴¹ Grand Trunk Ry. Co. of Canada v. Jennings, 13 App. Cas. 800; 58 L. J. P. C. 1; 59 L. T. N. S. 679; 37 Week. R. 403, per Lord Watson who also considers Hicks v. Newport, A. & H. Ry. Co., 4 Best & S. 403. See Louisville, etc., R. Co. v. Trammell, 93 Ala. 350, 354, per McClellan, J., noted in next preceding section herein.

⁴² Deceased whose expectancy of life was 25 years contributed \$800 to \$900 a year to his wife and children for their support—\$10,000 held not excessive. St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550; 31 S. W. 571. Deceased contributed from his earnings of \$60 per month, from \$40 to \$55 per month to his family, consisting of a widow and children. He had no other means of revenue—\$7,500 held excessive. St. Louis, I. M. & S. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 566. Deceased had dependent upon him a wife and adult unmarried daughter and his expectancy of life was about nine and one half years and his utmost gross earnings would have only amounted to \$12,000. Held that \$8,000 was exces-

sive. Harrison v. Sutter St. Ry. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403. Invalid wife and daughter survived—\$8,000 held not excessive. Cook v. Ry. Co., 60 Cal. 604. Widow and minor children survived; deceased was a laborer—\$5,000 held excessive. Illinois C. R. Co. v. Welden, 52 Ill. 290. Husband left a wife and three children and he owned two teams at his decease—\$5,000 held not excessive. Louisville, N. A. & C. R. Co. v. Patchen, 66 Ill. App. 206. Widow and two minor children were left—\$5,000 held not excessive. Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215. Labor of deceased furnished only means of support for his wife and three children—\$5,000 held not excessive. Chicago & E. I. R. Co. v. Kneinin, 48 Ill. App. 243. Widow and two sons 19 and 14 years old; deceased was in good health and a postal employee—\$5,000 held not excessive. Malott v. Shimer, 153 Ind. 35; 54 N. E. 101; 1 Repr. 1234; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774. Widow and six young children survived. Deceased provided for his family to

§ 518. Death—Pecuniary loss or injury—The statutes—Generally.—Some of the statutes expressly provide for compensation based upon the pecuniary injury, while in others the word pecuniary does not appear, and in several states there are ex-

the best of his ability; \$5,000 held not excessive. *Board of Commrs. Howard Co. v. Legg*, 110 Ind. 479; 11 N. E. 612. Employee 50 years old left widow and four children. His wages were 50 cents an hour while he worked, and the amount of his earnings were left indefinite by the evidence; \$1,500 was awarded. *Boden v. Demwolf* (U. S. D. C. E. D. La.), 56 Fed. 846. Widow two minors and another child left—\$5,000 held not excessive. *Bolinger v. St. Paul & D. R. Co.*, 38 Minn. 418; 31 N. W. 856. Intestate was a bricklayer, 57 years old. He left a widow and three children, aged respectively 17, 14 and 11. Deceased was prosperous in business and had accumulated property. He was suffering from a disease which might soon have terminated his life; \$3,800 held not excessive. *Williams v. Camden & A. R. Co.* (N. J.), 37 Atl. 1107; 3 Am. Neg. Rep. 569. Deceased, a railroad fireman, left a wife, son and daughter. He never earned more than two dollars a day—\$15,000 held excessive. *Cooper v. N. Y. O. & W. R. Co.*, 25 App. Div. (N. Y.) 383; 49 N. Y. Supp. 481. Widow and three children were left. Deceased was in good health and sole support of his family and earned \$1.25 per day—\$5,000 held not excessive. *Felice v. N. Y. C. & H. R. R. Co.*, 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637. Deceased, an expert railroad man, 30 years old, in good health, contributed at least \$45 out of his earnings of \$75 per month to the support of his wife and two small children. He was thrifty and

provided a comfortable home for his family. There was no evidence of what sum would purchase the equivalent of the pecuniary benefit which the widow and children had a right to reasonably expect from his life continuance—\$15,000 held not excessive. *Ft. Worth & G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, aff'd 54 S. W. 240. Deceased devoted most of his earnings of \$60 per month to the support of his wife and five children. He was about 40 years old, industrious, frugal and economical, and a railroad brakeman, but was affected with asthma—\$10,000 held not excessive. *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826. Deceased contributed his entire wages of \$60 per month to the support of his wife and children. He was in good health, 47 years old—\$11,000 held not excessive. *Tyler v. S. E. R. Co.* (Tex. Civ. App.), 34 S. W. 796. Widow and seven year old daughter survived, average wages of deceased were \$125 per month; \$5,000 to each survivor held not excessive. *St. Louis, A. & T. R. Co. v. Johnston*, 78 Tex. 536; 15 S. W. 104. Widow and two young children left. Deceased was stout and healthy, 35 years old and earned \$1.25 per day—\$10,000 held not excessive, although the court declared that the law did not intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, but that the inquiry was not intended to be narrowed down by the law to a result that could be exactly accounted for by the facts in

press provisions for the recovery of exemplary or punitive damages, while in a few states such damages are recoverable even though not expressly so provided, although in some of these latter states there are later decisions which substantially overrule the earlier ones allowing such damages. These differences in the statutes, in so far as they affect the measure of damages under the decisions, will appear under the several sections within this title.

§ 519. Death—Pecuniary loss as measure of damages.—In determining whether or not the pecuniary loss sustained, or a loss susceptible of a pecuniary estimate, is the sole standard for the admeasurement of damages in case of the death of a human being, reference must be had (1) to the meaning of the word pecuniary; (2) to the terms and intent of the statute under which recovery is sought; (3) to the statutory allowance in certain states, of exemplary or punitive damages and the limitations thereto; (4) to the factor of solatium or the inclusion or exclusion of injuries not susceptible of being estimated on any pecuniary basis; (5) to the nature of the action, viz: (*a*) whether the recovery rests upon a survival of the original action, or (*b*) whether it is an action for compensation to the beneficiaries for the loss to them by the death itself; and (6) to the class of beneficiaries seeking a recovery having in view their relation to deceased.*

§ 520. Death—Pecuniary loss or damage—Construed.—In so far as the statutes authorize a recovery only of pecuniary loss or damage occasioned by the death of a human being, the meaning of "pecuniary" becomes important. The word ought not to be construed in this connection as covering a loss of actual money alone. Thus what dependents may have received from deceased in "money" may have been the very least of the benefits conferred,⁴⁴ and, therefore, not of itself the measure of

evidence and that every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings. *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61; 12 S. W. 838.

⁴³ See citations throughout this title.

⁴⁴ *Chicago, Rock I. & T. R. Co. v. Porterfield*, 19 Tex. Civ. App. 225; 46 S. W. 919, *aff'd* 49 S. W. 367; 12 Am. & Eng. R. Cas. N. S. 383.

damages or of the pecuniary loss. The word pecuniary may, however, include something of money value, or the means of acquiring either money itself or that which is of money value.⁶⁶ Again, pecuniary loss is evidenced in this class of cases in numerous instances by facts covering not only that which is capable of being definitely estimated in money, but also the capacity to create something tangible, having approximately at least a money equivalent or actual commercial value, or on the contrary it may include some benefit or advantage absolutely incapable of being estimated on any certain money basis, and as has been clearly stated "there is no way to ascertain mathematically what that damage would be, it necessarily must be to a great extent speculative."⁶⁷

§ 521. Same subject continued.—An instruction may properly be refused which fixes the pecuniary loss at the actual amount in money which a widow has lost by reason of being deprived of her husband's support,⁶⁸ although an instruction may direct the jury to fix the damages at a fair equivalent in money for the earning power of the deceased, lost by the destruction of his life, taking into consideration his age, etc.⁶⁹ It is declared in a New Jersey case that, "our statute confines the amount of the recovery in such cases to the pecuniary injury sustained by the next of kin, by reason of the death of the decedent and that injury as was said by Beasley, Ch. J.,⁷⁰

⁶⁶ *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25, 33, per Allen, J. See *Tilley v. Hudson R. R. Co.*, 29 N. Y. 274.

⁶⁷ *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, aff'g 24 Hun (N. Y.), 235; *Lockwood v. N. Y. L. E. & W. R. Co.*, 98 N. Y. 523, case affirms 20 Wkly. Dig. 341; *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; 38 N. E. 760; *Andrews v. Chicago, M. & St. P. R. Co.*, 86 Iowa, 677; 53 N. W. 399; 12 Ry. & Corp. L. J. 296; 52 Am. & Eng. R. Cas. 252; *Tennessee Coal I. & R. Co. v. Herndon*, 100 Ala. 451; 14 So. 287. "When the suit is brought by the representative the pecuniary injury resulting to the

next of kin is equally uncertain and indefinite." *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, case aff'd 153 N. Y. 680.

⁶⁸ *Barth v. Kansas City El. Ry. Co.*, 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682.

⁶⁹ *Chesapeake & O. R. Co. v. Lang*, 100 Ky. 221; 19 Ky. L. Rep. 67; 40 S. W. 451, modifying 19 Ky. L. Rep. 65; 38 S. W. 503, modification denied 19 Ky. L. Rep. 68; 41 S. W. 271.

⁷⁰ *In Paulmier v. Railroad Co.*, 34 N. J. L. 158.

'is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased.'"⁵⁰ And to much the same effect is a Mississippi case which holds that the word "pecuniary" comprehends such prospective advantage and is not confined in its meaning to present money losses.⁵¹ But it is held under the Michigan statute that all injuries not susceptible of being compensated for by a money consideration to the beneficiaries should be excluded in admeasuring damages.⁵² In conclusion we may add that the recovery is the money estimate of the loss sustained, based on as certain elements of damages, as the particular circumstances of each case may permit of, reference being had to the intent, express or implied, of the statute under which recovery is sought, and also to the class of beneficiaries seeking recovery.⁵³

⁵⁰ Consolidated Traction Co. v. Graham, 62 N. J. L. 90; 58 Alb. L. J. 93; 40 Atl. 773; 17 Natl. Corp. Rep. 213; 31 Chic. L. News, 35; 4 Am. Neg. Rep. 660, per Gummere, J.

⁵¹ City of Vicksburg v. McLain, 67 Miss. 4. See Dalton v. Southeastern Ry. Co., 4 C. B. N. S. 296; Boyden v. Fitchburg R. Co., 70 Vt. 125; Pym v. Great Northern Ry. Co., 4 B. & S. 406.

⁵² Mynning v. Detroit L. & N. R. Co., 59 Mich. 257; 26 N. W. 514, under How. Mich. Stat. sec. 8314.

⁵³ *Opinions of text writers.*—The principle on which damages are awarded in this class of cases is compensation for the pecuniary loss or injury. There must be evidence of pecuniary loss to the survivors or beneficiaries to enable them to recover substantial damages. . . . The loss must be such as can be computed or estimated by a money consideration." Black's Law & Pract. in Accdt. Cas. (ed. 1900), sec. 254, citing Demarest v. Little, 18 Vr. (N. Y.) 28; Huntingdon, etc., R. Co. v. Decker, 84 Pa. St. 419; Myn-

ning v. Detroit, etc., R. R. Co., 59 Mich. 257; Louisville, etc., R. R. Co. v. Berry, 96 Ky. 604, and other cases.

"The pecuniary damage which alone can be recovered in most of the states for the death of any person must be something of definite and almost of commercial value. It is not necessary, however, to show that the deceased was under any legal obligation to the next of kin. If they had a reasonable expectation from the continuance of his life, they may recover for it." 2 Shearman & Redfield on Neg. (5th ed.) sec. 769. "The rule confining recoveries to pecuniary losses is not applied in a strict sense. 'When we consider' says Fullerton, 'the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word pecuniary was used in so limited a sense as to embrace only losses of money.'" 3 Sutherland on Dam. (2d ed.) sec. 1263, citing McIntyre v. New York C. R. Co., 37 N. Y. 287 (35 How. [N. Y.] 36; 4 Trans. App. 1, case affirms 47 Barb. [N. Y.] 515); Tilley

v. Hudson R. R. Co., 24 N. Y. 471 (23 How. [N. Y.] 383); Pennsylvania R. Co. v. Keller, 67 Pa. St. 300. "The use of 'pecuniary' to designate the kind of loss for which recovery can be had is misleading for the damages are by no means confined to the loss of money or of what can be estimated in money. . . . The meaning would be better expressed by 'material' as was suggested by Patterson, J., as in an opinion in which he carefully reviews all English decisions" (citing Lett v. Lawrence & O. Ry. Co., 11 Out. App. 1; Patterson's Railway Accident Law); Tiffany's Death by Wrongful Act (ed. 1893), sec. 158.

Age, etc., of children—Excessive and inadequate damages—Decisions. Boy 16 months old, healthy, etc.,—\$1,000 held not excessive. Hoppe v. Chicago, M. & St. P. R. Co., 61 Wis. 359; 21 N. W. 227. Child 18 months old—\$2,000 held not excessive. Schrier v. Milwaukee, L. S. & W. R. Co., 65 Wis. 467; 27 N. W. 167. Son 25 months old, a stout, healthy sensible boy—\$6,000 held not excessive. Austin Rap. Trans. R. Co. v. Cullen (Tex. Civ. App.), 29 S. W. 256, rehearing denied 30 S. W. 578. Child 3 years old—\$12,500 in favor of the parents held excessive and reduced to \$4,000. Rice v. Crescent City R. Co., 51 La. Ann. 108; 24 So. 791. Deceased was under 4 years of age—\$10,500 held excessive where compensation only is allowed. Louisville & N. R. Co. v. Creighton, 20 Ky. L. Rep. 1691, 1698; 50 S. W. 227; 15 Am. & Eng. R. Cas. N. S. 713. Deceased was not 4 years old and no special pecuniary injury was shown—\$4,000 held excessive. West Chicago St. R. Co. v. Mabie, 77 Ill. App. 176. Girl 4 years old, \$3,500 held excessive—\$2,000 declared sufficient. West Chicago St. R. Co. v.

Scanlan, 2 Chic. L. J. Wkly. 113, aff'd 168 Ill. 34; 44 N. E. 148. Boy 4 years old—\$5,000 held excessive. Graham v. Consolidated Traction Co. (N. J. 1899), 44 Atl. 964. Boy between 4 and 5 years old—\$5,000 held grossly excessive. This sum was awarded on three different trials and set aside each time and the court declared that it would continue to set aside excessive verdicts just as often as rendered. Consolidated Traction Co. v. Graham, 62 N. J. L. 90; 40 Atl. 773; 58 Alb. L. J. 93; 31 Chic. L. News, 35; 4 Am. Neg. Rep. 660; 17 Natl. Corp. Rep. 213. Boy 4 years old, ordinarily bright, healthy, affectionate and obedient—\$6,000 held excessive. Fox v. Oakland Consol. St. R. Co., 118 Cal. 55; 9 Am. & Eng. R. Cas. N. S. 825. Child 5 years old, healthy, well grown, of fine mind, bright, able-bodied, dutiful, etc.,—\$2,500 held not excessive. Ross v. Texas & P. Ry. Co. (U. S. C. C. W. D. Tex.), 44 Fed. 44. Daughter 5 years old—\$2,000 in favor of a father held not excessive. Huerzeler v. Central Cross-Town R. Co. (C. P.), 1 Misc. (N. Y.) 136; 48 N. Y. St. R. 649; 20 N. Y. Supp. 676. Son was 5 years old—\$1,000 was recovered for damages to the child and nominal damages to the father. Westerfield v. Levis (La.), 9 So. 52. A 5 year old boy—\$3,000 held not excessive. West Chicago St. R. Co. v. Waniata, 6 Ill. App. 481, aff'd 169 Ill. 17; 48 N. E. 437. Child 6 years old—\$4,500 recovered. Ahern v. Steele, 46 Hun (N. Y.), 517; 1 N. Y. Supp. 257; 16 N. Y. St. R. 24; case rev'd 115 N. Y. 203; 26 N. Y. St. R. 296; 22 N. E. 193. Girl 6 years old, healthy, bright and intelligent, only child of gardener and his wife who survived her—\$3,000 recovered. Age, sex, general health and intelligence considered as factors. Hough-

kirk v. Delaware & H. Canal Co., 92 N. Y. 219, rev'g 38 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 How. Pr. (N. Y.) 328; 4 Month. L. Bull. 65. Deceased was 6 years old—\$2,300 held not excessive. Strutzel v. St. Paul City R. Co., 47 Minn. 543; 50 N. W. 690; 11 Ry. & Corp. L. J. 132. Son was 6 years old, in good health and of ordinary intelligence and promise—\$3,000 held excessive. Gunderson v. North Western El. Co., 47 Minn. 161; 49 N. W. 694. Son 6 or 7 years old—\$2,000 held not excessive. Chicago & A. R. Co. v. Becker, 84 Ill. 483. Boy 7 years old, bright, intelligent, healthy and very industrious—\$5,000 held not excessive. Taylor, B. & H. R. Co. v. Warner (Tex. Civ. App.), 31 S. W. 66. Son 7 years old—\$2,000 to a parent held not excessive. Missouri, K. & T. Ry. Co. v. Gilmore (Tex. Civ. App. 1899), 53 S. W. 61. Boy 7 years old, bright and healthy—\$3,500 not excessive. Heinz v. Brooklyn Heights R. Co., 91 Hun (N. Y.), 640; 71 N. Y. St. R. 623; 38 N. Y. Supp. 675. Son 7 years old—\$2,500 held not excessive. Johnson v. Chicago & N. W. R. Co., 64 Wis. 425; 25 N. W. 223. Son was 8 years old—\$4,000 was reduced to \$2,000. Vicksburg v. McLain, 67 Miss. 4; 6 So. 774. Son 8 years old—\$1,200 held not excessive. Strong v. Stevens Point, 62 Wis. 255; 22 N. W. 425. Bright boy 8½ years old—\$6,000 held excessive. Schaffer v. Baker Trans. Co., 29 App. Div. (N. Y.) 459; 51 N. Y. Supp. 1092. Boy 10 years old—\$2,850 held not excessive. Omaha v. Richards, 49 Neb. 244; 68 N. W. 528, aff'd 70 N. W. 363. Boy 10 years old—\$5,000 to next of kin held excessive. North Chicago St. R. Co. v. Wrixon, 51 Ill. App. 307. Boy 10 years old attending school and at times did errands

for his mother—\$1,500 in her favor held excessive. Heusner v. Houston W. St. & P. F. Ry. Co., 7 Misc. (N. Y.) 48; 57 N. Y. St. R. 528; 27 N. Y. Supp. 365. Boy 11 years old—\$1,500 recovered. O'Mara v. Hudson R. R. Co., 38 N. Y. 445. Girl 11 years old, healthy and strong—\$1,500 held not excessive. Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261; 33 N. W. 306. Son 11 years old—\$1,300 held not excessive. Citizens St. Ry. Co. v. Lowe (Ind. App.), 39 N. E. 165. Boy 11 years, 8 months old, intelligent, healthy and promising—\$3,000, held not grossly excessive. Union Pac. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501. Boy about 12 years old—\$2,500 held not more than compensatory. Case was principally one of negligence and contributory negligence and evidence would have justified punitive damages. Iron Mountain R. Co. v. Dies, 98 Tenn. 655; 3 Am. Neg. Rep. 273. Boy, 12 years old, was killed by elevator. The death was occasioned by defendant's negligence. Verdict of one cent damages was held inadequate and new trial granted. Lee v. Publishers, 137 Mo. 385; 38 S. W. 1107; 1 Am. Neg. Rep. 297. Boy, 12 years old, healthy and ordinarily intelligent, had gone to school and learned to read, write and cipher, was good boy to work and helped to do chores—\$1,000 not excessive. New York C. & St. L. R. Co. v. Mushrush (Ind. App. 1894), 37 N. E. 954. Girl, 12 years old—\$2,500 held not excessive. Baltimore & O. S. W. R. Co. v. Then, 159 Ill. 535; 42 N. E. 971, aff'g 59 Ill. App. 561. Sons, one 13, another 15 years old—\$936 and \$1,056 both held excessive. Telfer v. Northern R. Co., 30 N. J. L. 188. Son, 14 years old, earning capacity and expenses of maintainance considered also—\$1,250 held not excessive.

sive. *Pennsylvania Coal Co. v. Nee* (Pa.), 13 Atl. 841, and annotations. Boy, 15 years old, a farm hand—\$3,000 held excessive in action by next of kin—\$1,500, declared sufficient. *May v. West Jersey & S. R. Co.*, 62 N. J. L. 87; 42 Atl. 165; 5 Am. Neg. Rep. 417; 13 Am. & Eng. R. Cas. N. S. 517. Boy, 15 years old, strong, robust and attentive to business, etc.—\$1,846.40 held not excessive. *Franke v. St. Louis (Mo.)*, 19 S. W. 938. Son, 16 years old—\$1,700 in favor of a mother held not excessive. *Thompson v. Johnston Bros. Co.*, 86 Wis. 576; 57 N. W. 298. Son, 16 years old, strong, healthy, industrious and of average intelligence—\$4,500, in favor of widowed mother, held not excessive. *Turner v. Norfolk & W. R. Co. (W. Va.)*, 22 S. E. 83. Daughter, 16 years old—\$4,000 reduced to \$2,500. *Dinnihan v. Lake Ont. B. Imp. Co.*, 8 App. Div. (N. Y.) 509; 40 N. Y. Supp. 764. Boy, 16 years old, was killed by collision with team, while he was riding a bicycle—\$2,000 held not excessive. *Quinn v. Pistro*, 38 App. Div. (N. Y.) 484; 56 N. Y. Supp. 419. A 17 year old boy—\$2,500 to next of kin, held not excessive. *Illinois C. R. Co. v. Gilbert*, 51 Ill. App. 404. Daughter, 17 years old—\$5,000 held excessive. *Chicago, E. & L. S. R. Co. v. Adamick*, 33 Ill. App. 412. Boy, 17 years old, and a competent compositor—\$2,400 held not excessive. *Post v. Olmstead*, 47 Neb. 893; 66 N. W. 828. Son, 18 years old, industrious, etc.—\$5,000 held not excessive. *Gulf C. & S. F. R. Co. v. Hamilton* (Tex. Civ. App.), 28 S. W. 906. Son, 18 years old—\$2,250 held excessive. *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344. Son, 18 years old and brakeman—\$5,000 held excessive. *Parson v. Missouri Pac. R. Co.*, 94 Mo. 286; 6 S. W. 464. Son, 18 years old—\$3,400 held excessive. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. Son, between 18 and 19 years old, robust, healthy and dutiful, etc.—\$2,000 awarded. *Myhan v. Louisiana Elect. L. & P. P. Co.*, 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172. Girl, 19, bright and industrious, and gave earnings to support family—\$6,000 held excessive—\$4,000 sufficient. *Seeley v. N. Y. C. & H. R. R. Co.*, 8 App. Div. 402; 40 N. Y. Supp. 866; 75 N. Y. St. R. 261. Son 19 years old, healthy and industrious—\$5,000 held not excessive. *Twist v. Rochester*, 37 App. Div. (N. Y.) 307; 55 N. Y. Supp. 850. Son 19 years old, strong and vigorous—\$2,500 in favor of the parents was recovered. *Erslew v. New Orleans & N. E. R. Co.*, 49 La. Ann. 86; 21 So. 153. Deceased was 19 years old, in good health, strong and intelligent—\$3,000 to next of kin not excessive. *Chicago & E. R. Co. v. Branyon* (Ind. App.), 37 N. E. 190. Unmarried son 21 years old—\$2,500 held not excessive. *Webster Mfg. v. Mulvaney*, 68 Ill. App. 607, aff'd 168 Ill. 311; 48 N. E. 168. Deceased was 22 years old and one of eight children—\$5,000 reduced to \$3,500 in favor of parents. *Flaherty v. N. Y. N. H. & H. R. Co. (R. I.)*, 36 Atl. 1132; Index S. S. Rescripts, 19. Son 22 years old—\$3,000 held excessive. *Paulmier v. Erie R. Co.*, 34 N. J. L. 151. Son 22 years old—\$7,500 was reduced to \$6,000 as the object was compensation and not benefit. *McFee v. Vicksburg S. & P. R. Co.*, 42 La. Ann. 790; 7 So. 720. Son 22 years old had given one half his earnings to his mother who was 60 years old—\$3,550 held not excessive. *Missouri Pac. Ry. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828. Deceased was 23 years old, of good habits, etc.—\$3,000 held not excessive. *O'Callaghan v. Bode*, 84 Cal.

489; 24 Pac. 269. Son 26 years old, only child of widow 51 years old—\$4,200 recovered. *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56. Unmarried son 33 years old and supported parents over 70 years old—\$5,000 held excessive, \$3,000 declared sufficient. *Leiter v. Kinnare*, 68 Ill. App. 558. Son 35 years old—\$870 in favor of father and mother, respectively 68 and 67 years old, held not excessive. *Texas & P. R. Co. v. Spence* (Tex.), 52 S. W. 562. Daughter 36 years old, in good health, etc. *Bowles v. Rome W. & O. R. Co.*, 46 Hun (N. Y.), 324; 21 N. Y. St. R. 457, aff'd 113 N. Y. 648; 22 N. Y. St. R. 997; 21 N. E. 414. Young man of perfect and vigorous health, etc.—\$2,500 held not excessive. *Sieber v. Great Northern R. Co.*, 76 Minn. 209; 79 N. W. 95. Daughter in good health and supporting aged father—\$3,000 not excessive. *Purcell v. Lauer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988. Strong healthy boy and of assistance to his widowed mother—\$3,500, held not excessive. *San Antonio St. R. Co. v. Watzlavzick* (Tex. Civ. App.), 28 S. W. 115. Infant instantly killed. *Hamilton v. Morgan L. & T. R. & S. S. Co.*, 42 La. Ann. 824; 8 So. 586. Adult daughter earning small wages, etc.—\$4,140 held excessive. *Armour v. Cziachki*, 59 Ill. App. 17. Unmarried son—\$3,500, held excessive by \$2,000, in favor of a woman 54 years old. *Innes v. Milwaukee*, 103 Wis. 582; 79 N. W. 783. Son's expectancy of life was over 36 years—\$2,000, in favor of mother 69 years old, held not excessive. *Gulf C. & S. F. R. Co. v. Royall*, 18 Tex. Civ. App. 86; 43 S. W. 815. Deceased son's expectancy of life, was 23½ years, his health was good, etc.—\$6,500, held not excessive. *Little Rock & Ft. S. R. Co. v. Voss* (Ark.), 18 S. W. 172. Boy killed by an electric car—\$2,783, held excessive, although remitted to \$2,000. *East St. Louis Elect. St. R. Co. v. Burns*, 77 Ill. App. 529. Amount of recovery for minor child killed by negligence of railroad held to be \$5,000. *Tobin v. Mo. Pac. R. Co.* (Mo.), 18 S. W. 986, under Mo. Rev. Stat. 1889, sec. 2305. Infant son—\$1,000 not excessive. *Joliet v. Weston*, 123 Ill. 641.

CHAPTER XXV.

DEATH—DAMAGES PROPORTIONED TO THE INJURY.

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| <p>§ 522. Damages proportioned to the injury—Statutes.</p> <p>523. Damages proportioned to the injury — Statutes — Continued.</p> <p>524. Damages proportioned to the injury—Pecuniary loss.</p> <p>525. Damages proportioned to the injury—Pecuniary loss — Evidence.</p> <p>526. Damages proportioned to the injury—Exemplary damages.</p> <p>527. Damages proportioned to the injury—Jury and instructions to jury.</p> <p>528. Damages proportioned to the injury—Factors generally to be considered.</p> <p>529. Damages proportioned to the injury—Sufferings of injured person.</p> <p>530. Damages proportioned to the injury—Mental and physical suffering—Loss of society, etc.</p> <p>531. Damages proportioned to the injury—Relationship legal and actual of deceased to beneficiaries—Support and dependency.</p> <p>532. Same subject continued.</p> <p>533. Same subject concluded.</p> <p>534. Damages proportioned to the injury—Contract relation.</p> <p>535. Damages proportioned to the injury—Reasonable expectation of pecuniary benefit.</p> <p>536. Same subject continued.</p> | <p>537. Damages proportioned to the injury—Physical and financial condition, age, number of family, etc., of beneficiaries.</p> <p>538. Damages proportioned to the injury—Expenses of sickness, funeral, etc.</p> <p>539. Damages proportioned to the injury—Annuity.</p> <p>540. Damages proportioned to the injury—Life expectancy—Annuity, etc., tables.</p> <p>541. Damages proportioned to the injury—Nominal damages.</p> <p>542. Damages proportioned to the injury—Death of husband—Husband and father.</p> <p>543. Damages proportioned to the injury—Death of wife.</p> <p>544. Damages proportioned to the injury—Death of parent.</p> <p>545. Damages proportioned to the injury—Death of parent—Care, training, etc., of children.</p> <p>546. Damages proportioned to the injury—Death of parent—Children's majority.</p> <p>547. Damages proportioned to the injury—Death of children—Generally.</p> <p>548. Damages proportioned to the injury—Death of minor children.</p> <p>549. Damages proportioned to the injury—Death of children—Minority and majority.</p> |
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| <p>§ 550. Damages proportioned to the injury—Death of children—Adults.</p> <p>551. Damages proportioned to the injury—Evidence—Generally.</p> <p>552. Damages proportioned to the injury—Excessive and inadequate damages—Generally.</p> <p>553. Damages proportioned to the injury—Evidence of deceased's habits—Mitigation.</p> | <p>554. Damages proportioned to the injury—Insurance.</p> <p>555. Damages proportioned to the injury—Legacy, devise or inheritance.</p> <p>556. Damages proportioned to the injury—Marriage and remarriage.</p> <p>557. Damages proportioned to the injury—Defenses—Prescribing medicine for own family.</p> <p>558. Damages proportioned to the injury—Self-defense—justification.</p> |
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§ 522. Damages proportioned to the injury—Statutes. The statutes of England, Nova Scotia, Ontario, Arizona,¹ Maryland, South Carolina and Texas² provide that "the jury may give

¹ Rev. Stat. Ariz. 1887, sec. 2155, now changed; but the state is here classified by reason of the decisions under that enactment.

² Eng. 9 and 10 Vict. ch. 93, am'd 27 and 28 Vict. ch. 95 (Scotland expressly excluded). As to English Employer's Liability act, see 43 and 44 Vict. ch. 42 (personal injuries); English Workmen's Compensation Act, 1897, cl. 1 (a) (i); id. sec. 7, subd. 2; Nov. Scot. Rev. Stat. 1884, ch. 116 Ont. Rev. Stat. 1887, ch. 135 (R. S. Ont. 1877, ch. 128, re-enacted in that province, Lord Campbell's Act, 9 and 10 Vict. ch. 93; In re The Garland; Monaghan v. Horn, 7 S. C. R. 409, Ont., and art. 1056, C. C. is re-enactment and reproduction of the Con. Stat. L. C. C. 78; Canadian Pacific Ry. Co. v. Robinson, 14 S. C. R. 105, (Ont.) Canada. Code, art. 1056. Ariz. Rev. Stat. 1901, pp. 733, 734, secs. 2764, 2766 changes Ariz. Rev. Stat. 1887, tit. 36, secs. 2145, 2155, and see Rev. Stat. 1901, p. 438, sec. 1349, (140), as to nonabatement by death. See Ariz. Rev. Stat. 1901, p. 734, sec. 2767, as to liability of corporation

to employee. The act secs. 2764, 2767 took effect April 19, 1901. Md. Pub. Gen. Laws, Poes Code, 1888, art. 67, secs. 1, 4; Pub. Gen. Laws, 1888, sec. 25; Pub. Gen. Laws, 1860, art. 65, secs. 1-4; 1852, ch. 299, sec. 1. S. C. 1 Rev. Stat. 1893, pp. 800, 801, secs. 2315-2318; Gen. Stat. 1882, secs. 2183, 2186; 21 S. C. Stat. at L. p. 523. Tex. Const. art. 16, sec. 26; Sayle's Civ. Stat. & Supp. 1900, p. 1113, art. 3017 (2899); p. 1115, arts. 3018 (2900), pp. 1117-1119, arts. 3019-3027, (2901-2909), p. 1248, arts. 3354 (3203); arts. 1248, 1255, 3353a; Act May 4, 1895, Act March 25, 1887; Paschal's Dig. 1866, p. 98, art. 15. Right of action, etc., for death, etc., including loss of life by negligence, etc., of railroad train, stage coach and other vehicles of conveyance by common carriers, etc., Sayle's Civ. Stat. arts. 2899, 2909, 3202; Paschal's Dig. 1866, art. 15, sec. 1, p. 98; Rev. Stat. 2879, art. 2899. As to injuries, etc., to employees, see Laws, 1891, ch. 24. Rev. Stat. 1895, arts. 3021, 3022; id. arts. 3024, 3026, provide only for survival of action for negligent

such damages as they may think proportioned to the injury resulting from such death.”³ The action lies whenever the death of a person is caused by wrongful act, neglect or default, such as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.⁴

killing during lifetime of person at fault. *Johnson v. Farmer*, 89 Tex. 610; 35 S. W. 602. Under act May 4, 1895, actions did not abate by death of either party and action of personal injuries received before passage of act survived death of plaintiff. *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; 39 S. W. 1112; Under Rev. Stat. 1895, sec. 3353a, actions pending or thereafter brought for personal injuries, not resulting in death, survive in favor of heirs or legal representatives of injured party upon his death. Rev. Stat. art. 1044, provides that after appeal the death of a party shall not abate the action.

³ In Ontario “the judge or jury.” In Arizona under Rev. Stat. 1901, p. 734, sec. 2766, “The jury shall give such damages as they shall deem fair and just not exceeding \$5,000.”

⁴ The Ariz. Stat. of 1887, sec. 2145, was “when the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another,” but the Stat. of 1901 is same as in above text. The Ariz. act of 1887, also provides against “unfitness, gross negligence or carelessness,” etc., of certain carriers. The Texas Stat. Sayle’s Civ. Stat. & Supp. 1900, p. 1113, art. 3017, (2899); id. art. 3018 (2900), is the same as the Ariz. act of 1887, sec. 2145.

* The act applies though deceased was an alien and was at the time of the wrongful act, etc., causing his death on the high seas. *The Explorer*, 40 L. J. Adm. 41; L. R. 3

Adm. 289; 23 L. J. 604; 19 W. 166; 10 Mew’s Eng. Dig. (1898) p. 106.

Causes of action are several, for death of fifty miners by flooding a mine, in favor of their relatives brought under Lord Campbell’s Act and the employer’s liability act and cannot be joined in one action. *Carter v. Rigby* (C. A. 1896), 2 Q. B. 113; 65 L. J. Q. B. N. S. 537; 74 Law T. Rep. 744.

Pleading and evidence. As to allegation that injuries did not result in death, and evidence of physicians as to cause of death, see *Klatt v. Houston Elec. St. R. Co.* (Tex. Civ. App. 1900), 57 S. W. 1112. That accident to employee actually caused by positive fault, imprudence or neglect of person charged must be proven, see *Montreal Rolling Mills Co. v. Corcoran*, 26 Can. S. C. 595, an action by a widow against her husband’s employer.

Only when party injured could have sued. The action is given only when deceased, had he survived, could have maintained the action against the negligent, etc., person. *Senior v. Ward*, 1 El. & El. 385; 28 L. J. Q. B. 139; 5 Jur. (N. S.) 172; 7 W. R. 261; *Read v. Great Eastern Ry.*, 9 B. & S. 714; 37 L. J. Q. B. 278; L. R. 3 Q. B. 555; 18 L. T. 82; 16 W. R. 1040. *Haigh v. Royal Mail S. P. Co.*, 52 L. J. Q. B. 640; 49 L. T. 802; 5 Asp. M. C. 189; 48 J. P. 230; *Tucker v. Chaplin*, 2 Car. & K. 730; *Johnson v. Farmer*, 89 Tex. 610, 612, 613; 35 S. W. 1062, per Gaines, C. J.; *Galyeaton, Harrisburg & S. A. R. Co. v. Kutac*, 72 Tex. 643, 651; 11 S. W. 127;

And, the person, who would have been liable if death had not ensued, is liable notwithstanding the death of the injured person, although such death was caused under such circumstances as amount in law to a felony.⁵

Artusy v. Missouri Pac. R. Co. (Tex.), 11 S. W. 177. See *Armsworth v. South Eastern Ry.*, 11 Jur. 758; *Coyle v. Great Northern Ry.*, 20 L. R. Ir. 409; *Wright v. Midland Ry.*, 51 L. J. 539; *Reed v. Northeastern R. Co.*, 37 S. C. 42; 16 S. E. 289. Not necessary to allege that defendant's negligence was such that if death had not occurred the injured party could have maintained the action. *Philadelphia, W. & B. R. Co. v. State, Bitzer*, 58 Md. 372. Not necessary to charge that plaintiff could not recover unless deceased, if living, could have recovered. *Taylor B. & H. B. Co. v. Taylor*, 79 Tex. 104; 14 S. W. 918; 23 Am. Rep. 316. There may be a recovery for pecuniary loss although that pecuniary loss would not have resulted to deceased had he lived. *Pym v. Great Northern Ry.*, 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. (N. S.) 199; 8 L. J. 734; 11 W. R. 922.

⁵ *Who liable—Generally.* One who fraudulently sells a horse knowing that it has a contagious disease may be liable for the death of one ignorant of the fact, even though he is merely in charge of the horse for the purchaser, where such disease is the natural and probable cause of the death. *State, Hartlove, v. Fox*, 79 Md. 574; 29 Atl. 801; 24 L. R. A. 679. So one may be liable for personal injury or death caused by his inducing one whose mental faculties are suspended by intoxication to swallow spirituous liquors to such an excess as to endanger his life. *McKue v. Klein*, 60 Tex. 168; 48 Am. Rep. 261.

Who not liable—Generally. The failure of a sheriff to resist a mob that takes a prisoner from a jail does not make him liable, he being bona fide unable to physically withstand and there being no malicious motive on his part and no participation in the violence, even though it was alleged that he had been warned of the existence of public excitement and had been requested to remove him to a secure place. *State, Cocking, v. Wade*, 87 Md. 529; 40 Atl. 104; 40 L. R. A. 628; 47 Cent. L. J. 368. Where a person is killed while illegally engaged in oyster dredging by a shot from one of the vessels of the state fishery force while attempting to arrest him and seize his vessel, neither the Maryland board of public works nor the commander-in-chief of such fishery force is liable for damages for the killing. *Mister v. Brown* (U. S. D. C. D. Md.), 59 Fed. 900. A principal's liability for the acts of his agent is confined to the class of cases under the first clause of art. 2899 (art. 3017 of Stat. 1900), and this does not include a sheriff and his bondsmen for acts of a deputy in killing one attempting to escape. *Hendrick v. Walton*, 69 Tex. 192; 6 S. W. 749. See this case as to construction of this act and the effect of change of one subdivision of said section by act of March 25, 1887. When railroad company not liable for killing by its agent, *Houston & T. C. R. Co. v. Lipscomb* (Tex. Civ. App.), 62 S. W. 954, judgment modified, *Lipscomb v. Houston*, 64 S. W. 923.

§ 523. Damages proportioned to the injury—Statutes—Continued.—The executor or administrator may sue in England, Nova Scotia, Ontario and South Carolina.⁶ While in

Said art. 2899 (3017) Does not include persons other than carriers, servants or agents. *Asher v. Cabell* (U. S. C. C. A. 5th C.), 2 U. S. App. 158; 50 Fed. 818.

Corporations. A corporation is a person within art. 2899 of Tex. Rev. Stat. (art. 3017 of Sayle's, 1900, Stat.). *Rigdon v. Temple Waterworks Co.*, 11 Tex. Civ. App. 512; 32 S. W. 828. A private corporation is liable for injuries resulting in death from what may be deemed its own wrongful acts or omissions as distinguished from acts or omissions of its servants or agents. Cases of municipal corporations should be distinguished from this case under art. 2899, subd. 2, Rev. Stat. Tex. and in view of art. 3140, *id.* construing the word "person." *Fleming v. Texas Loan Agency*, 87 Tex. 238; 27 S. W. 126; 26 L. R. A. 250 (Tex. Civ. App.), 28 S. W. 388. Private corporations include common carriers and those not common carriers. *Lynch v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.), 32 S. W. 776; 2 Am. & Eng. Corp. Cas. N. S. 574. A corporation is still liable though it goes out of business. *Jones v. Spartenburg Herald Co.*, 44 S. C. 526; 22 S. E. 731. Under the Texas statute as

it stood in 1884, a railroad company was not liable in damages for the death of a person killed upon its track, unless it was shown by the evidence that the death was caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of such road or by the unfitness, gross negligence or carelessness of their servants or agents. *Dallas City R. Co. v. Beeman*, 74 Tex. 291, 293; 11 S. W. 1102, per *Acker P. J.*, citing, *R. Co. v. Cowser*, 57 Tex. 305. The principal case was an action by parents for damages for death of an infant son who was run over by defendant's car. Prior to the Texas act of March 25, 1887, omitting the word "gross" from art. 2899, par. 2, a railroad company was not liable for injuries resulting in death caused by the negligence of servants of the company unless the negligence was gross. *Sabine & East Tex. R. Co. v. Hawks*, 73 Tex. 323, 324; 11 S. W. 377, citing *Texas & Pac. R. Co. v. Hill*, 71 Tex. 451; 9 S. W. 351. See *Ariz. Rev. Stat.* 1901, p. 734, sec. 2767, as to liability of corporations to employees. See as to English Employer's Liability Act, 43 and 44 Vict. ch. 42. "Corporation" is expressly

⁶ See statutes cited at beginning of next preceeding section. In England and Ontario, if there is no executor or administrator, or if there is one and no action is brought in his name in 6 months after the death, all or any of the persons for whose benefit the action lies may sue. 27 and 28 Vict. ch. 95; Ont. Rev. Stat. 1887, ch. 135, sec. 7. See also *Ariz. Rev. Stat.* 1887, sec. 2151;

Sayles Civ. Stat. and Supp. 1900, p. 1119, art. 3023 (2905), as to duty of executor or administrator to sue within limited time. Action lies by the person beneficially entitled within 6 months, where there is no executor or administrator (*Lampman v. Gainsborough*, 17 O. R. 191; *C. P. D.* [Ont.], or by a relative. *Holleran v. Bagwell*, 4 L. R. Ir. 740.

Arizona the action is brought by the personal representative, except that the father or in certain cases the mother may sue for a child's death or a guardian for the death of his ward,⁷ and in Texas,⁸ all the persons entitled or any one or more of them, may sue for the benefit of all.⁹ But in Maryland the action is brought by and in the name of the state for the use of those entitled to damages.¹⁰ The beneficiaries in all the juris-

included as liable under Ariz. Rev. Stat. 1901, p. 733, sec. 2764, and so under 1 Rev. Stat. S. C. 1893, p. 800, sec. 2315 (2183), while the Ariz. act of 1887, sec. 2145, and Sayle's Tex. Civ. Stat. and Supp. 1900, p. 1113, art. 3017 (2899) made and make certain carriers liable, and the same section of the statute in Texas provides for liability of receivers of railroads, and both the Const. (1876, art. 16) and the statute (Sayle's 1900, p. 1117, art. 3020 [2902]) of that state also excluded regard for criminal proceedings while the statute (id.) has the above text provision as to felony. "Person" includes bodies politic and corporate under the Md. Stat. sec. 34.

Municipal corporation is not liable under Texas Rev. Stat. art. 2899 (art. 3017, Sayle's Stat. 1900).¹¹ Ritz v. Austin, 1 Tex. Civ. App. 455; 20 S. W. 1029, 1031; Searight v. Austin (Tex. Civ. App.), 42 S. W. 857. Examine City of Galveston v. Barbour, 62 Tex. 172; 50 Am. Rep. 519, where it is said that in the absence of an express statute declaring the liability of a municipal corporation for an injury resulting from neglect of a city to keep its sidewalks and streets in repair, the corporation is liable.

Receivers. Although the Texas statute of 1900 (see beginning of this note) contains a provision as to a liability of receivers, the decisions in that state are that they are not liable for death through their negligence or

that of the employees under them upon the railroad. Burke v. Dillingham (U. S. C. C. App. 5th C. E. D. Tex.), 60. Fed. 729; Allen v. Dillingham (U. S. C. C. App. 5th C. E. D. Tex.), 8 C. C. A. 544; 60 Fed. 176; Dillingham v. Scales (Tex. Civ. App.), 24 S. W. 975; Texas & Pac. R. Co. v. Collins, 84 Tex. 121; 19 S. W. 365; Turner v. Eddy, 88 Tex. 218; 18 S. W. 578; 15 L. R. A. 262; Texas & Pac. R. Co. v. Geiger, 79 Tex. 13; 15 S. W. 214; Brown v. Record (Tex. Civ. App.), 23 S. W. 704; Texas & Pac. R. Co. v. Bledsoe (Tex. Civ. App.), 20 S. W. 1135. This case, however, makes the qualification that they were not personally and immediately guilty of negligence, etc., and it is held that such receiver is not a necessary but a proper party to the action. Dallas Consol. Tract. R. Co. v. Hurley (Tex. Civ. App.), 31 S. W. 73. Examine 5 Thompson's Com. on Corp. sec. 7159.

Felony. This clause is considered hereinafter under the section as to defenses.

⁷ Action may be by the father, or in case of his death or desertion of his family, then by the mother. Ariz. Rev. Stat. 1901, p. 733, sec. 2765.

⁸ And in Ariz. under Rev. Stat. 1877, sec. 2150.

⁹ Sayle's Civ. Stat. and Supp. 1900, p. 1118, art. 3022 (2094).

¹⁰ Md. Pub. Gen. art. 67, sec. 2; Pub. Gen. Laws (1860), art. 65, sec. 2; 1852, ch. 299, sec. 2.

dictions noted under this section are the wife, husband, parent and child, although the statutes are differently worded, some of them using the disjunctive "or" and others the conjunctive "and," while the acts of England, Nova Scotia and Ontario, extend the meaning of the words "parent" and "child."

¹¹ Viz: parent includes grandparent and stepparent, and child includes grandchild and stepchild; and in England words denoting the singular number include the plural, and the masculine gender includes the feminine. In Arizona Rev. Stat. of 1887, and in Texas the action is for the "sole and exclusive benefit," etc. In S. C. Rev. Stat. 1893, p. 801, sec. 2316, dependent heirs at law and distributees are included where there are none of the others in existence. An illegitimate child is not within the purview of the statute. *Dickinson v. North Eastern Ry.*, 2 H. & C. 735; 33 L. J. Ex. 91; 9 L. T. 299; 12 W. R. 52; *Clarke v. Carfin Coal Co.*, L. R. (1891) App. Cas. 412, H. of L. (Sc). Declarations need not negative the existence of any relations entitled to compensation other than those on whose behalf the action purports to be brought. *Barnes v. Ward*, 2 Car. & K. 661; 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334; 10 Mew's Eng. Dig. (1898) p. 115. The question whether such an action can be maintained for general administration instead of for the surviving family cannot be raised by allowance of an amendment as thereby the purpose of the action would be changed. *All v. Barnwell County*, 29 S. C. 161; 7 S. E. 58, and annot. Complaint must state whether person for whose benefit action is brought is only one beneficially interested. *Nohrden v. Northeastern R. Co.*, 54 S. C. 492; 32 S. E. 524; 13 Am. & Eng. R. Cas. N. S. 557, under 21 S. C. Stat. at L. p. 523. Inaccu-

rate or erroneous declaration in this respect may be amended. *Reed v. Northeastern R. Co.*, 37 S. C. 42; 16 S. E. 289. As to what is not a sufficient averment of relationship of plaintiff and her children, see *Lilly v. Charlotte, C. & A. R. Co.*, 32 S. C. 142; 10 S. E. 932. Under act of 1859, existence of one or more beneficiaries must be averred. *Conlin v. Conlin*, 15 Rich. Law (S. C.), 201.

One action for benefit of all. Suit by widow under Ariz. Rev. Stat. 1887, tit. 36, secs. 2145, 2155. Deceased was killed at a railroad crossing; four children also survived. "The obvious intent and effect of these provisions is that the action is to be brought once for all; that is that it is to be prosecuted for the benefit of all the relatives mentioned, the husband, the wife, the children and the parents of the deceased, and that any damages recovered are to belong to all those relatives and to be shared among them in the proportions determined by the verdict of the jury. By the express terms of the statute the action may be brought by all or any of them, but for the benefit of all; no one or more of them less than all can excuse the executor or administrator from bringing and prosecuting the action if they do not. The action does not abate by the death of one suing, but may be prosecuted by the survivors if there are any, and the damages recovered are to be divided among all of them in such shares as the jury shall fix by their verdict." *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369; 41 L. Ed.

In England the statute does not give an independent cause of action but a right of action where there was a subsisting one at

193; 16 Sup. Ct. Rep. 1171, per Gray, J. Complaint cannot be amended by averment that widow brings action for benefit of herself and children and so entirely change the nature of the action. *Lilly v. Charlotte, C. & A. R. Co.*, 32 S. C. 142; 10 S. E. 932. Statute intends but one action for the benefit of all entitled. *Paschal v. Owen*, 77 Tex. 583; 14 S. W. 203. Widow may sue for herself and for use and benefit of her deceased husband's parents without their knowledge or consent and even though the parents have no right to recover. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829. Grandchildren are not necessary parties. *Dallas Rapid Transit R. Co. v. Elliott* (Tex. Civ. App.), 26 S. W. 455. Father of adult leaving wife and children is not necessary party. *St. Louis, A. & T. R. Co. v. Taylor*, 5 Tex. Civ. App. 668; 24 S. W. 975. Under Lord Campbell's Act and the Employer's Liability Act, the judgment is for all, but the amount to be paid to each must be found and set forth in the judgment. *Carter v. Rigby* (C. A.), (1896), 2 Q. B. 113; 65 L. J. Q. B. N. S. 537; 74 Law T. Rep. 744.

Not more than one action lies for the same subject-matter under the statutes of England, Nova Scotia, Ontario and Maryland and the South Carolina act makes action by and final judgment in favor of the injured party a bar (see citations of statutes at beginning of this section). Judgment by widow does not bar a suit in favor of posthumous child, for although the statute contemplates only one suit, yet this means one suit brought by all the beneficiaries or one to which they are parties, and if the

amount of the compensation of any one of the beneficiaries is not included in a suit, he is entitled to it and should not be excluded by a judgment in which his rights are not considered. *Nelson v. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 626, 627; 14 S. W. 1021; 22 Am. St. Rep. 81; 11 L. R. A. 391. Although the Rev. Stats. art. 2899, intends that but one suit be brought nevertheless a person who has a right of action is not precluded nor his rights in any manner affected by a judgment to which he was not a party, and a judgment against a father as surviving husband suing for himself comes within this rule as to his children thereafter suing for their mother's death. *Galveston, Harrisburg & S. A. R. Co. v. Kutac*, 72 Tex. 643, 647, 648; 11 S. W. 127. Action by widow and two minor children for death of husband and father. Suit was brought by deceased during his lifetime and was dismissed by him at his own costs. Another suit was brought similar to the first about a month before his death. This was subsequently consolidated with the suit by the widow and children. Held that the fact that deceased had instituted a suit for damages, which suit was pending at his death was no bar to plaintiff's action. *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582, 587; 8 S. W. 484. See note to sec. 545, herein.

When does not bar action on contract. A passenger on a railway was injured by an accident and after an interval died therefrom. His executrix brought an action under Lord Campbell's Act for his death and recovered £ 750. Held that his executrix might recover in an action for

the time of the death,¹² and the suit does not abate in Arizona and Texas.¹³ While in Maryland the statute has created a new cause of action, it is not a survival of deceased's rights to sue.¹⁴ But in South Carolina there seems to be a question whether or not the statutory suit is a continuation of deceased's cause of action.¹⁵ In Texas, however, the injured party's right to sue survives.¹⁶ One peculiar provision in the statutes in

breach of contract against the railway company the damage to his personal estate arising in his lifetime from inability to attend business. *Daly v. Dublin, Wicklow & W. Ry.*, 30 L. R. Ir. 514; 10 *Mew's Eng. Dig.* (1898) p. 116. See *Leggott v. Great Northern Ry.*, 45 L. J. Q. B. 557; 1 Q. B. D. 599; 35 L. T. 334; 24 W. R. 784; *Barnett v. Lucas Ir. R.*, 6 C. L. 247.

¹² *Read v. Great Eastern Ry.*, 9 B. & S. 714; 37 L. J. Q. B. 278; L. R. 3 Q. B. 535; 18 L. T. 82; 16 W. R. 1040; 10 *Mew's Eng. Dig.* (1898) p. 106. See note to sec. 544, herein.

¹³ See citations of statutes at beginning secs. 522, 523 next preceding. Upon death of beneficiary, action survives to remaining beneficiaries. *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668; 46 S. W. 53; case rev'd 49 S. W. 1039; 44 L. R. A. 279; 6 Am. Neg. Rep. 214.

¹⁴ The statute has created a new cause of action. It is not a survival of deceased's cause of action. It allows recovery of damages resulting from the death alone and not such as the injured person could have recovered if he had survived. It creates a new cause of action for something which the deceased person never had the right to sue, that is to say the injury resulting in his death, and has not undertaken to keep alive a cause of action which would otherwise die with the person. "But notwithstanding that the wrongful act, neglect or default is of

the same character as that for which the injured party could have sued if he had survived the injury." *Tucker v. State, Johnson*, 89 Md. (decided 1899) 471, 479; 43 Atl. 778; 44 Atl. 1004; 46 L. R. A. 181, per Boyd, J. See *Ott v. Kaufman*, 68 Md. 56; 11 Atl. 580, and annot. under Rev. Code, Md. art. 50, sec. 146.

¹⁵ *Garrick v. Florida C. & P. R. Co.*, 53 S. C. 448; 31 S. E. 334; 69 Am. St. Rep. 874, dis'g *Price v. Richmond & D. R. Co.*, 33 S. C. 556; 12 S. E. 413; 26 Am. St. Rep. 700, which holds that it is only a continuation of the injury party's cause of action.

¹⁶ An action for personal injury survives the death. *City of Marshall v. McAllester*, 18 Tex. Civ. App. 159; 43 S. W. 1043; 3 Am. Neg. Rep. 743, 745, per Rainey, J., under art. 3353a, Rev. Stat. Tex. 1895. Estate of wrongdoer is not liable for injuries resulting in death where action was not commenced during lifetime of deceased against the wrongdoer himself. The cause of action does not survive in such case under Tex. Rev. Stats. arts. 3018, 3024, 3026, 1248, 1255. "Until the passage of the act of May 4, 1895, which changes the rule of the common law as to the survival of causes of action the injured party if he had lived could not have maintained a suit against the legal representative of the person inflicting the injury after the death of the latter. *Watson v. Loop*, 12 Tex. 11. Hence

some of the above jurisdictions is that either a bill of particulars of persons or of the nature of the claim or both are required,¹⁷ while in England and Ontario, the defendant may, if so advised pay money into court as a compensation.¹⁸

§ 524. Damages proportioned to the injury—Pecuniary loss.—Only damages for the pecuniary loss can be recovered as distinguished from those of a sentimental character. There should be a pecuniary compensation for the injury suffered as a direct consequence of the death, and also for the probable prospective damages occasioned thereby. It does not necessarily follow, however, that such pecuniary injury must be one capable of exact ascertainment in money, upon a strictly mathematical calculation, for as a rule rather than as an exception, the circumstances will not admit of much more than a closely approximate estimation and award.¹⁹ The words of the statute, “proportioned

in the absence of some other provision in the statute when the injured party dies, the beneficiary under the act could not, under the same circumstances, maintain the action.” Art. 3018, Rev. Stat. provides that the wrongful act or negligence, etc., must be such as would, if death had not ensued, have entitled the party injured to have maintained the action. “We have in this opinion cited the Rev. Stats. of 1895, though at the time the cause of action arose, as we infer from the briefs, they were not in force. The provisions are the same as in the former revision. Nor had the act of May 4, 1895, been passed when the death in this case occurred.” *Johnson v. Farmer*, 89 Tex. 610, 612, 613; 35 S. W. 1062, per Gaines, C. J.

¹⁷ See statutes of Eng., Nov. Scot. Ont. and Md. cited at the beginning of this subject of statutes. The omission to furnish particulars with the complaint is ground for setting aside the service of the writ but not for setting aside the writ itself.

McCabe v. Guinness, Ir. R. 9 O. L. 510; 10 Mew's Eng. Dig. (1898) p. 115.

¹⁸ See statutes cited at beginning of secs. 522, 523 covering statutes. See also *Condliff v. Condliff*, 29 L. T. 831; 22 W. R. 325; *Shallow v. Vernon, Ir. R.* 9 O. L. 150.

¹⁹ *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 135, 146, also holding that the damages must be founded on the pecuniary loss, actual or expected, suffered by the persons specified in the statute. *Baltimore & O. R. Co. v. State, Woodward*, 41 Md. 268; *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271, 280, per *Cochran, J.*; *State, Coughlan, v. Baltimore & O. R. Co.*, 24 Md. 84, 106; 87 Am. Dec. 600, per *Bowie, C. J.*; *Hall v. Galveston, H. & S. A. R. Co. (U. S. C. C. W. D. Tex.)*, 39 Fed. 18, per charge of *Maxey, J.*, to jury; *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148; 27 S. W. 113; 24 L. R. A. 637, rev'g 26 S. W. 114, where it was said that the statute gave damages only for the pecuniary loss.

to the injury," are construed to mean in proportion to the respective losses sustained by those entitled to sue,²⁰ and a charge which directs the jury to assess such sum as they might "think

McGown v. International & G. N. R. Co., 85 Tex. 289, 293; 20 S. W. 80, holding that recovery is limited to actual damages such as are purely pecuniary and compensatory. St. Louis, Ark. & T. R. Co. v. Johnston, 78 Tex. 536, 542; 15 S. W. 104, per Gaines, Assoc. J., holding that damages are for the pecuniary loss of the party benefited by the recovery. Missouri Pac. R. Co. v. Henry, 75 Tex. 220, 224; 12 S. W. 828, per Acker, P. J.; Missouri Pac. R. Co. v. Lehmberg, 75 Tex. 61, 67, 68; 12 S. W. 838, per Henry, Assoc. J., who also said: "It must be admitted that the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence." Texas & Pac. R. Co. v. Lester, 75 Tex. 56, 58; 12 S. W. 955; International & G. N. R. Co. v. McDonald, 75 Tex. 41, 45; 12 S. W. 860, per Acker, P. J., Brunswick v. White, 70 Tex. 504, 512; 8 S. W. 85, holding that a refusal to give an instruction limiting the recovery to the pecuniary loss is not erroneous where such instruction has already been given by the court. Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 502, 503; 7 S. W. 857, such damages as will compensate for the loss. The true measure is a sum equal to the pecuniary benefit reasonably to be expected, except for the death. Damages are essentially indefinite, hence the law furnishes no definite measure therefor. City of Galveston v. Barbour, 62 Tex. 172, 174; 50 Am. Rep. 519, per Stayton, Assoc. J.;

Houston & T. C. R. Co. v. Cowser, 57 Tex. 297, 301, 306, per Bonner, Assoc. J. Measure of damages for the death of a husband and father is a fair compensation for the pecuniary loss sustained. Galveston, H. & S. A. R. Co. v. Johnson (Tex. Civ. App. 1900), 58 S. W. 622; Houston & T. C. R. Co. v. White, 23 Tex. Civ. App. 280; 56 S. W. 204. Louisiana West. Ext. R. Co. v. Carstens, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781, holding that the damages should be such a sum as will compensate for the loss of pecuniary benefits, etc. Missouri, K. & T. R. Co. v. Hines (Tex. Civ. App.), 40 S. W. 152, entitled to the pecuniary damages sustained. San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229; 38 S. W. 829, only pecuniary loss considered. Gulf C. & S. F. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 590, measure of damages is not pecuniary value of deceased wife's services. Hicks v. Newport, A. & H. Ry., 4 B. & S. 403n, damages are restricted to the actual pecuniary loss. Blake v. Midland Ry., 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562, compensation can be given for pecuniary loss only. Dalton v. Southeastern Ry., 4 C. B. (N. S.) 296; 27 L. J. C. P. 227; 4 Jur. (N. S.) 711; 6 W. R. 57, probable pecuniary loss recoverable. Grand Trunk R. W. Co. of Can. v. Jennings, 13 App. Cas. 800 (Ont.), aff'g 15 A. R. 477, damages restricted to actual pecuniary loss. City of Montreal v. La Belle, 14 S. C. R. (Ont.) 741; Pater-son v. Wallace, 1 Mac. H. L. 748,

²⁰ Houston & T. C. R. Co. v. Cowser, 57 Tex. 297, 301, per Bonner, Assoc. J.

proportioned to the injury," although copied from one article, of the statute is erroneous in that it ignores the other article of said enactment which confines the right of recovery to actual damages, as well as the settled construction of the article, to the effect that the sum found must be a compensation for the pecuniary injury sustained. It is also error to refuse to charge that the jury are confined to the consideration of the money value of deceased's life,²¹ although it has been determined that the court should not restrict the jury to such a sum as the plaintiffs would have received "in money" from deceased, had he lived.²² The jury should not, however, give an award equal to a perfect compensation for the pecuniary injury, but only what they consider under all the circumstances a fair compensation;²³ and circumstances may be considered which are capable of pecuniary estimate,²⁴ although actual damages must have accrued.²⁵ So, if the value of services are incapable of estimation there is no pecuniary loss.²⁶ Again, in so far as the recovery of punitive or exemplary damages is not permitted, the statutory action for death allows only the recovery of actual damages,²⁷

damages must be of a pecuniary character in England, contra in Scotland. See further sec. 526, herein.

²¹ Galveston, H. & S. A. R. Co. v. Worthy, 87 Tex. 459, 465-467; 29 S. W. 296, per Brown, Assoc., J., who also said that it was well settled that under arts. 2899, 2909. Rev. Stat. plaintiffs were entitled to recover the pecuniary value of the life lost, and that the verdict should be in a sum which would compensate for the injury caused by the death.

²² Chicago, R. I. & T. R. Co. v. Porterfield, 19 Tex. Civ. 225; 46 S. W. 919, aff'd 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 333; 4 Am. Neg. Rep. 461. But see San Antonio Tract. Co. v. White (Tex. Supr. Ct. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323, where the court charged the jury to "consider alone the money value" and in Missouri Pac. R. Co. v. Lehmborg, 75 Tex. 61, 67, 68; 12 S. W. 839, Henry, Assoc. J.,

uses the words "money value" and "pecuniary loss" in juxtaposition.

²³ Rowley v. London & N. W. Ry., 42 L. J. Ex. 153; L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R. 869, per Brett, J. Should give a fair compensation, Armsworth v. Southeastern Ry., 11 Jur. 758.

²⁴ Pym v. Great Northern Ry., 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. (N. S.) 199; 8 L. T. 734; 1 W. R. 922.

²⁵ Duckworth v. Johnson, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655. See secs. 525, 526, herein.

²⁶ Holleran v. Bagnell, 6 L. R. Ir. 333. This rule, however, has been much qualified as we have shown under other sections, as in case of minor children, etc., and see secs. 525, 526, 544, herein.

²⁷ International & G. N. R. Co. v. McDonald, 75 Tex. 41; 12 S. W. 860. Where the petition is sufficient for

and it is said that in determining the amount to be awarded, the jury should confine themselves to such compensation as will supply the surviving members of deceased's family, the same results as would have followed from his labor during his probable duration of life except for the death, based of course upon other general factors, such as we have elsewhere considered.²⁹ In South Carolina the injury for which damages are allowed is seemingly not limited to the pecuniary loss or the deprivation of a right susceptible of measurement by a pecuniary standard, but the language of the statute is much broader and authorizes the jury to award such damages as they may think proportioned to the injury resulting from the death.³⁰

§ 525. Damages proportioned to the injury—Pecuniary loss—Evidence.—It is declared that it is "necessary for the plaintiff in cases of this kind to show a damage of a pecuniary nature . . . It is incumbent upon the plaintiff to prove such facts and circumstances as will enable the jury to return a verdict upon the evidence which would approximate reasonable certainty."³¹ But it is also decided that in an action for the

actual damages it cannot be reached by a general demurrer although it is deficient in the claim for exemplary damages. *Taylor B. & H. B. Co. v. Taylor*, 79 Tex. 104; 14 S. W. 918. See sec. 526, herein.

²⁹ *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271.

³⁰ *Mason v. Southern Ry.*, 58 S. C. 70, 77; 36 S. E. 440; 79 Am. St. Rep. 826, per Gary, J., quoting *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303; 7 S. E. 515, which is cited with approval in *Strother v. South Carolina & G. R. Co.*, 47 S. C. 375; 25 S. E. 272; 5 Am. & Eng. R. Cas. N. S. 430.

³¹ *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, per charge of Maxey, J., to jury. In the entire absence of proof of damages there can be no recovery. *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80. The loss must be proved like

any other fact. "It is difficult to imagine a case in which it can be proved directly. It must be proved by circumstances . . . The law does not and cannot compel the party causing the death to give a gratuity in these cases. The recovery is to compensate the loss and not to confer a bounty." *St. Louis, Ark. & T. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per Gaines, Assoc. J. It must be shown that the parties to whom the right of action is given have sustained some pecuniary injury by the death. *Missouri Pac. R. Co. S. v. Henry*, 75 Tex. 220, 223, 224; 12 W. 828, per Acker, C. J. And regard must be had in each instance to such facts and conditions as cast light upon the subject. *Missouri Pac. R. Co. v. Lehmburg*, 75 Tex. 61, 67, 68; 12 S. W. 838, per Henry, Assoc. J. As to proof, see also *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297,

negligent killing of a wife, a mere claim for damages is sufficient, it being unnecessary to either allege or prove pecuniary injury.³¹ And it is also determined in a South Carolina case that it is not necessary to prove damages.³²

§ 526. Damages proportioned to the injury—Exemplary damages.—Punitive or exemplary damages are not recoverable under the Maryland act of 1852.³³ And in South Carolina it is error to charge the jury that "if there was gross carelessness or recklessness or wilfulness then you may give what is known as punitive or smart money damages." Nor will the appellate court uphold the verdict upon the assumption that it does not embrace such damages, but merely gives compensatory damages.³⁴ But in Texas exemplary damages are recoverable where the death was due to wilful act or omission, or gross negligence.³⁵

304, per Bonner, Assoc. J. Must show a pecuniary loss, *Texas & N. O. R. Co. v. Brown*, 14 Tex. Civ. App. 687, 29 S. W. 140. Jury should be limited to a consideration of the evidence, *Galveston, H. & S. A. Co. v. Worthy* (Tex. Civ. App.), 27 S. W. 426. As to facts considered sufficient evidence of pecuniary loss by a father, to go to the jury, see *Hetherington v. Northeastern Ry.*, 51 L. J. Q. B. 495; 9 Q. B. D. 160; 30 W. 797. That pecuniary advantage accrued to survivors during lifetime of deceased must be proven, see *Sykes v. Northeastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. 473. Something more than proof of the death and relationship is required, although in this case there was evidence of pecuniary loss sufficient to sustain the verdict. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Juv. (N. S.) 630; 7 W. 655. Damages of a pecuniary nature must be shown. *Franklin v. Southeastern Ry.*, 3 H. & N. 211; 4 Jur. (N. S.) 565; 6 W. 573. For facts held not sufficient evidence of pecuniary loss, see *Johnston v. Great*

Northern Ry., 26 L. R. Ir. 691; *Holleran v. Bagnell*, 6 L. R. Ir. 333. Under the facts a nonsuit was ordered in *Mason v. Bertram*, 18 Ont. R. 1 Chy. D. As to necessity and character of evidence to justify exemplary damages, see *International and G. N. R. Co. v. McDonald*, 75 Tex. 41, 45; 12 S. W. 860, per Acker, P. J. See also sec. 525, herein.

³¹ *Chapman v. Rothwell*, El. Bl. & El. 168; 27 L. J. Q. B. 315; 4 Jur. (N. S.) 1180. See sec. 543, herein.

³² *Mason v. Southern Ry.*, 58 S. C. 70, 77; 36 S. E. 440; 79 Am. St. Rep. 826, per Gary, J.

³³ *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271.

³⁴ *Garrick v. Florida C. & P. R. Co.*, 53 S. C. 448; 13 Am. & Eng. R. Cas. N. S. 541; 31 S. E. 334; 69 Am. St. Rep. 874.

³⁵ Const. sec. 26, art. 16, Sayle's Civ. Stat. and Supp., 1900, p. 1117, art. 3019 (2901); *Sternenberg v. Mailhos* (U. S. C. O. A. 5th C. C. C. E. D. Tex.), 99 Fed. 43; *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80; *Winnt v. International & G. N. R. Co.*, 74 Tex.

The right, however, to such damages for the death of one killed by a corporation or company, is confined to the class of persons who are entitled by the constitution to maintain such action, that is, to the surviving husband or wife, or heirs of the body of deceased, and this does not include the parent.³⁸ And if the act, omission or negligence, however wilful or gross, was that of a mere servant of the corporation, or of an employee thereof, it must have been ratified by the corporation.³⁹ So if there is no basis in the case for exemplary damages, they will not be considered,⁴⁰ and the wilful act, etc., and the corporate capacity of the officer, or the ratification of the servant or agent's acts must be alleged.⁴¹ But a charge for exemplary damages is harmless and will be disregarded on appeal when the jury has found for defendant on that issue.⁴²

32; 11 S. W. 907; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 305, per Bonner, Assoc. J., in *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, exemplary damages were denied under the facts.

³⁸ *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 33, 35; 11 S. W. 907; 5 L. R. A. 172. See *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 305, per Bonner, Assoc. J.; *Gulf C. & S. F. R. Co. v. Compton*, 75 Tex. 667, 674, 675; 13 S. W. 667.

³⁹ *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80. See *International & G. N. R. Co. v. McDonald*, 75 Tex. 41, 45; 12 S. W. 860, per Acker, P. J. "The statute clearly draws a distinction between an act done by the owner, charterer or hirer of a railroad and one by their servants or agents, and also between actual and exemplary damages. In our opinion under its proper construction, although actual damages may be given for death caused by the unfitness, gross negligence or carelessness of the proprietor, owner, charterer or hirer himself, yet that exemplary damages are

allowed only for the wilful act, omission or gross negligence, of the 'defendant' to the suit, if a corporation for the wilful act, omission or gross negligence, of one representing it in its corporate capacity as a corporate officer, but not as a mere ordinary servant or agent. Exemplary damages being penal in their character for a quasi criminal act, involves on the part of him who commits the act, the question of an express wilful intent or that degree of gross negligence which implies it. This criminal intent should not by implication be imputed to the principal when the act has neither been authorized nor ratified by him so as to make it in law virtually his own act." *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 305, 306, per Bonner, Assoc. J.

⁴⁰ *City of Galveston v. Barbour*, 62 Tex. 172, 174; 50 Am. Rep. 519, per Stayton, Assoc. J. See also *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18.

⁴¹ *Winnt v. International & G. N. R. Co.*, 74 Tex. 32; 11 S. W. 907. Examine *Gulf C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667.

⁴² *Taylor B. & H. B. Co. v. Taylor*,

§ 527. Damages proportioned to the injury—Jury and instructions to jury.—The amount of damages is a question for the jury to determine under appropriate instructions. No precise definite rule can be laid down in these cases, for the assessment cannot be based upon any exact mathematical calculation, even if it were permissible. The question, therefore, being peculiarly for the jury, their finding or award should stand unless it results from prejudice or passion, or it is clearly evident that it rests upon some palpable error, or that the jury have totally mistaken the law applicable to the admeasurement of damages, or have shrunk from their duty, or it appears that other improper motives actuated them.⁴¹ There may, however, be a re-

79 Tex. 104; 14 S. W. 918; 23 Am. Rep. 316. See *Galveston, H. & S. A. R. Co. v. Worthy*, 87 Tex. 459; 29 S. W. 376, where charge was held erroneous.

⁴¹ *Ross v. Texas & Pac. R. Co.* (U. S. C. C. W. D. Tex.), 44 Fed. 44, 48, 49, per Maxey, J. Damages are necessarily indeterminate and much must be left to the sound sense of the jury. *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148, 159; 27 S. W. 113; 47 Am. St. Rep. 87; 24 L. R. A. 637, per Gaines, Assoc. J. See also *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per Gaines, Assoc. J. Whether there is a pecuniary loss is a question for the jury. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 224; 12 S. W. 828, per Acker, P. J. So in *Missouri Pac. R. Co. v. Lehmburg*, 75 Tex. 61, 67, 68; 12 S. W. 838, Henry, Assoc. J., said in regard to the jury's estimate of pecuniary loss and revision of the verdict by the court: "When no amount is fixed by law and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should assess the proper sum. They are expected to act uninfluenced by passion, prejudice or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements, their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think the law intends that the jury's estimate rather than the equally undefined one of the judges shall prevail." Judgment was affirmed, the verdict being \$10,000 for the wife and children. Again it has been said that damages are essentially indefinite, and that the law furnishes no definite measure therefor (*Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 503; 7 S. W. 837, per Walker, Assoc. J.), and there is an element of uncertainty which excludes any mathematical standard

mittitur instead of setting aside a verdict where, after finding the issue in plaintiff's favor, the amount is based upon sympathy rather than upon passion and prejudice.⁴² But notwithstanding the damages rest largely in the discretion of the jury⁴³ under proper instructions, yet the charge should not be such as to give them discretionary power without limitation, leading them to believe that the law places no restraint upon the exercise of their uninformed discretion,⁴⁴ since the amount must be based as far as possible upon the facts found and proved, and is not

of compensation and unless the record or the size of the verdict shows passion or prejudice it will not be set aside. *International & G. N. R. Co. v. Ormond*, 84 Tex. 485, 490, per *Robinson, Assoc. J.* So the amount is for the jury to determine and where there is nothing to indicate that the verdict was not the result of a conscientious and honest investigation of the case under all the facts it will not be disturbed. *Dallas & Wichita R. Co. v. Spicker*, 81 Tex. 427, 430, 431; 48 Am. Rep. 297. And if there is evidence for the jury whereby the verdict should be sustained, it will be retained. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655. But if it is evident that the jury has shrunk from deciding the issue so that the damages are absurd, a new trial will be granted (*Springett v. Balls*, 6 B. & S. 477), and if the damages are clearly erroneous the court will interfere. *Secord v. Great Western Ry.* 15 Q. B. (Ont.) 631. Damages should not rest upon mere conjecture or speculation. *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 135, 147.

⁴² *Southern P. Co. v. Tomlinson* (Ariz.), 33 Pac. 710.

⁴³ *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per *Gaines, Assoc. J.*

⁴⁴ *In City of Galveston v. Barbour*, 62 Tex. 172, 174; 50 Am. Rep. 519,

the charge was: "As to amount or measure of damages, there is no rule that I can give you as the proper measure thereof. If you should find the plaintiff entitled to damages, you must look to all the evidence and attendant circumstances to ascertain what amount of damages the plaintiffs are entitled to, proportioned to the injury resulting from the death," and the court, per *Stayton, Assoc. J.*, said: "The charge placed no limit on the discretion of the jury and tended to influence the jury to believe that the law placed no restraint upon them, and left the whole matter to their own unbridled and uninformed discretion. In this class of cases while it is difficult to prove, with that exactness which may be done in some other classes of cases, the actual damage to which the plaintiff or plaintiffs are entitled, yet it is not true that the law gives no measure of damages in such cases and instructions should be given, definite in their character as to the true measure." *Pennsylvania R. Co. v. Vanderveer*, 36 Pa. St. 303." So the jury should not be charged to allow what they consider a reasonable compensation, as thereby they would be given discretionary power without limitation. *State, Coughlan, v. Baltimore & O. R. Co.*, 24 Md. 84, 107; 87 Am. Dec. 600, per *Bowie, C. J.*

within the uncontrolled discretion of the jury, although they may refer to their own judgment, common sense, experience and observation.⁶ Again, an instruction to the jury is decided to be erroneous when it directs them to give such damages as they may think proportioned to the injury, in that it gives no measure of damages, and in no way limits the recovery to actual or compensatory damages, and imposes upon the jury no limitation

⁶ *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56, 61; 12 S. W. 955, per Henry, Assoc. J. "The eighth assignment challenges the correctness of the charge upon the mode of ascertaining the amount of the damages, 'and the value of the child's services during the period of her minority is to be ascertained by you as best you can from your own judgment, common sense, sound discretion and the evidence before you.' . . . In (*Houston & T. C.*) *R. Co. v. Nixon*, 52 Tex. 24, the question was raised, but not decided in this character of case, whether 'the jury can determine for themselves in their own uncontrolled discretion the amount of pecuniary compensation which the parents should recover.' In 57 Tex. 304, (*Houston & T. C.*) *R. Co. v. Cowser*, in discussing the discretion which may be exercised by the jury in fixing the amount of compensation, the court suggests, 'If it should be allowed in any case, it would be upon the principle of necessity only and should be restricted to that class of cases in which from the necessity of the case satisfactory evidence was not attainable.' Again in 57 Tex. 503, (*International & G. N.*) *R. Co. v. Kindred*, in case of the mother suing for damages from death of an adult son, it was held that 'the evidence in this class of cases from the nature of things cannot furnish the measure of damages with that certainty and ac-

curacy with which it may be done in other cases, hence the necessity and wisdom of leaving the question of damages to the discretion of the jury, which will be revised by the court, but their finding will not be set aside unless it be made to appear that such discretion has been abused.' Those cases show the condition in which the courts leave the question raised in this assignment. In this case the cause of action is the damages for loss of services during the minority of the child. This limit in time and the fact that the parents have the legal right to the child's services during minority, prevent the direct application of the rule in the *Kindred* case as a matter of principle." The court then considers *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 374; *City of Chicago v. Mayor*, 18 Ill. 359; *City of Chicago v. Hesig*, 83 Ill. 207 and *Chicago & Alton R. Co. v. Beecker*, 84 Ill. 486. It was also said, "'We cannot and will not presume that the jury were other than intelligent men. They are not an accidental part of the tribunal of justice. Juries are an institution of the fundamental law of the land and we as a court of errors can predicate nothing upon their errors or call that an error of instruction which is intelligible and right.' *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 73; 78 Am. Dec. 322;" *Brunswick v. White*, 70 Tex. 504, 508-512; 8 S. W. 86, per Walker, Assoc. J.

as to a consideration of the evidence.⁴⁶ And, generally the charge should confine the jury with sufficient certainty and clearness to the actual proof. If too much latitude is given as to the amount to be assessed, there will be much in the objection that it constitutes error.⁴⁷ So a charge is erroneous which instructs the jury to assess a widow's damages at such sum as they believe from the evidence she would probably have received from her husband in a pecuniary way.⁴⁸ But a requested instruction should be refused which is calculated to restrict the jury too closely in assessing damages,⁴⁹ although a charge as to exemplary damages which is harmless or not prejudicial will not be considered.⁵⁰ Again, the findings as to the cause of death of a wife, and that the husband has suffered no damage but awarding a specified sum to the minor child, are not inconsistent to the extent of granting a new trial, since damage to one does not necessarily follow from damage to the other.⁵¹

§ 528. Damages proportioned to the injury—Factors generally to be considered.—The factors which constitute the general basis for a recovery for death from negligence, etc., under those statutes where damages are proportioned to the injury are substantially the same as in other cases and are deceased's age,

⁴⁶ *Galveston, H. & S. A. R. Co. v. Worthy*, 87 Tex. 459; 29 S. W. 376; 27 S. W. 426. Especially so where a request embodying such necessary elements is refused.

⁴⁷ Thus a charge that "you will take into consideration the age, health and strength of the deceased, his usual earnings and length of time he could probably live and give such damages as you see proper," is within this objection. *International & G. N. R. Co. v. Ormond*, 62 Tex. 274; S. C. 65 Tex. 167; *S. C. Ormond v. Hayes*, 60 Tex. 180, where question of damages for death was not considered.

⁴⁸ *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 51 S. W. 586.

⁴⁹ *Missouri, K. & T. R. Co. v. Ran-*
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son, 15 Tex. Civ. App. 689; 41 S. W. 826, as that they should award such a sum as would purchase an annuity equal to the value of the pecuniary aid which would have been received, based upon the evidence.

⁵⁰ *Taylor B. & H. B. Co. v. Taylor*, 79 Tex. 104; 14 S. W. 918; 23 Am. Rep. 316, where the jury has found on that issue for the complaining party. *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; 56 S. W. 204, where a special charge cured whatever error might have existed in an instruction which did not distinguish between the elements of damages and the circumstances which were the ground thereof.

⁵¹ *Kerry v. England* (P. C.) (1898), A. C. 742; 67 L. J. P. N. S. 150.

mental and physical health and condition, life expectancy, occupation at time of injury and prior thereto; skill, experience and ability, or degree of expertness as a laborer, mechanic, business or professional man, activity in business, whether deceased was in the line of promotion, competency to fill a higher position and chances for promotion, and in this connection the relations sustained towards the employer and reasonable future expectations; additional skill from experience; the holding higher positions in the past; preparation for trade or a profession or for a higher position; character of professional reputation and extent of practice; amount of earnings or income; value of services; probable future earnings; earning capacity and increase thereof with experience; whether earning capacity would probably be continuous; but earnings are not an exclusive test nor is the recovery limited by the amount thereof, nor is evidence thereof necessary, nor is recovery precluded because deceased was out of employment at the time of his injury, nor are the damages restricted to pecuniary benefits from mental or bodily labor of the deceased. Therefore the source of income may rest solely upon property, although superior ability of deceased in managing the same advantageously will be considered. Other elements are: deceased's habits of sobriety, industry, thrift, economy or otherwise; the disposition of earnings in the support of a family and the character of home furnished it; the amount of his property or financial condition; his expenses, condition in life and circumstances generally; the persons dependent upon him for support, if any; whether he is married or single, and in case the deceased was a child, his mental characteristics, disposition, age, health and general ability to be useful and render service will be considered.²² Under the English statutes, however,

²² Evidence whether deceased saved anything out of his earnings is irrelevant. *Baltimore & O. R. Co. v. State*, Chambers, 81 Md. 371; 32 Atl. 201. Life expectancy of deceased and of widow are factors. *Baltimore & Reistertown Twp. v. State*, Grimes, 71 Md. 573; 18 Atl. 884. Deceased minor son was a farm hand and earned from \$110 to \$120 a year. *Agricultural & Mech. Assoc.*

v. State, Carty, 71 Md. 86; 18 Atl. 37; 17 Am. St. Rep. 507. The value of deceased's services is a proper factor. *Baltimore & O. R. Co. v. State*, Mahone, 63 Md. 135. The professional income of deceased is admissible evidence to be ascertained by the testimony of witnesses who knew his character and professional reputation and the extent of his practice in the locality and its

the courts do not seem to have extended their inquiries into the circumstances as fully as have the courts of those states in this

neighborhood. *State, Grice, v. County Commrs.*, 54 Md. 426. Life expectancy of widow should be considered. *Baltimore & O. R. Co. v. State, Trainer*, 33 Md. 542. Age and condition of health, occupation, habits admissible. In this case, however, there was no evidence of the specific wages paid deceased and it was said that the rate of wages was not the true and exclusive standard of damages, and also the proof of being out of employment should not limit the recovery. *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271, 280-282. Health and mental condition may be testified to by brother of deceased after stating facts on which opinion is based. Financial condition of deceased during illness admissible to offset release under claim of imposition and duress. *Price v. Richmond & D. R. Co.*, 38 S. C. 377; 17 S. E. 739; 33 S. C. 556; 12 S. E. 413; 26 Am. St. Rep. 700. Deceased son was eighteen years old, strong, healthy, sober, hard working, and it was alleged that his earning capacity would have increased and his occupation was that of a fireman on railroad. *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C. Tex.), 35 C. C. A. 105; 92 Fed. 953, 955, 956; 13 Am. & Eng. R. Cas. N. S. 520. Deceased was 5 years old and a stout, able-bodied boy with a fine mind and well grown. He was kind, dutiful and had begun to be of service. There was no evidence of actual earnings. *Ross v. Texas P. R. Co.* (U. S. C. C. W. D. Tex.), 44 Fed. 44. Testimony may include the circumstances of deceased son, his occupation, age, health, habits of industry, sobriety and economy, his skill and

capacity for business, the amount of his property, his annual earnings and the probable duration of his life. *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, per Maxey, J., charging the jury. Deceased son was 35 years old, but was dissipated and a spendthrift—\$870 in favor of his parents not excessive. *Texas & P. R. Co. v. Spence* (Tex.), 52 S. W. 562. Age of deceased and expectancy of life are evidence for the jury and need not be alleged. *International & G. N. R. Co. v. Knight*, 91 Tex. 680; 45 S. W. 556; 4 Am. Neg. Rep. 79, rev'g 45 S. W. 167. Deceased adult son was employee of railroad company and was preparing himself for a machinist and engineer. *Bonnett v. Galveston, H. & S. A. R. Co.*, 89 Tex. 72, 76, 77; 33 S. W. 334. Alleged that deceased was an experienced railroad engineer earning \$175 monthly and capable of continually earning that sum; that he was 43 years old. *Galveston, H. & S. A. R. Co. v. Worthy*, 87 Tex. 459; 29 S. W. 376. Deceased had property from which she derived most of her income, and the recovery is not limited to pecuniary benefits resulting from deceased's mental or bodily labor. *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148, 150, 153; 27 S. W. 113; 47 Am. St. Rep. 87, case reverses 26 S. W. 114. The value of the wife's services should be proven. In this case there was no proof of the value of services nor of reasonable expectations and deceased had been an invalid in the last stages of consumption. *McGown v. International & G. N. R. Co.*, 85 Tex. 289; 20 S. W. 80. Deceased was 40 years

country which have the same statutory clause as to the damages to be awarded.²³ Again, under the English Workmen's Compen-

old, in good health, an experienced railroad man who had held higher positions in such service in another state and had capacity to fill a higher position—\$10,000 not excessive, being divided among the parties—a widow, children and mother. *Texas & P. R. Co. v. Robertson*, 82 Tex. 657; 17 S. W. 1041; 27 Am. St. Rep. 929. Deceased was a healthy, robust man, 29 years old, an engineer earning about \$125 a month, with a life expectancy of 36 years—\$10,000 for wife not excessive. *Texas & Pac. R. Co. v. Geiger*, 79 Tex. 13, 22; 15 S. W. 214. Deceased was a railroad engineer and competent, and the average pay

of such employees was \$125 monthly. The proof must cover the age of deceased and survivors, the former's earning capacity. *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per *Gaines, Assoc. J.* Deceased was 55 years old, a healthy, active, vigorous business man with a life expectancy of 16 or 17 years, always supported his wife and earned from \$500 to \$1,200 a year—\$6,250, for widow, not excessive. *Paschal v. Owen*, 77 Tex. 583; 14 S. W. 203. Age and employment of deceased considered. *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 18 S. W.

²⁴ Deceased was a bricklayer and received the wages of a skilled laborer from his father, to whom he was of great assistance, the father being also a bricklayer. But damages were not allowed. *Sykes v. Northeastern Ry.*, 44 L. J. C. R. 191; 32 L. T. 199; 23 W. R. 473. Deceased was an attorney and 40 years old at the time of his death. *Rowley v. London & N. W. Ry.*, L. R. 8 Ex. 221; 42 L. J. Ex. 153; 29 L. J. 180; 21 W. R. 869. Deceased son's age and weekly earnings, duration of employment, and the fact that he was out of employment at the time of his death were considered. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655. Deceased son's age and earnings considered. *Franklin v. South-eastern Ry.*, 3 H. & N. 211; 4 Jur. (N. S.) 565; 5 W. R. 573. Deceased's earnings and her disposition thereof towards the family's support were in evidence. *Johnston v. Great Northern Ry.*, 26 L. R. Ir. 691.

Deceased mother's services in the household were proven. *Hull v. Great Northern Ry.*, 26 L. R. Ir. 289. Deceased son's age, health, mental ability and that he was being educated for mercantile pursuits were considered. *Bourke v. Cork & Macroom Ry.*, 4 L. R. Ir. 282. Deceased was a blacksmith 35 years old, the patentee of an invention for improved plows. He was industrious, careful, etc.; \$5000 awarded and new trial granted. *Morley v. Great Northern Ry.*, 16 Q. B. (Ont.) 504. Deceased son was employee in machine shop, but also worked on his father's farm without wages, and was intending to take a course of medical study. *Mason v. Bertram*, 18 Ont. R. 1 Chy. D. Household services of deceased wife have a value when they would have to be replaced by hired service. *St. Lawrence & Ottawa R. W. Co. v. Lett*, 11 S. C. R. (Ont.) 422, aff'd C. A. (11 A. R. 1) which rev'd Q. B. D. (1 O. R. 545).

sation Act,⁵⁴ the amount of compensation paid dependents for death is based upon the period of continuous employment immediately preceding said death.⁵⁵

667. Deceased's age, salary and expenses considered—\$3,550 not excessive. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828. Damages are not limited by amount of earnings. In this case, deceased was a laborer about 35 years old and earned \$1.25 per day. He was "stout, healthy and sober." *Missouri P. R. Co. v. Lohmberg*, 75 Tex. 61; 12 S. W. 838. Deceased was the only child of a widowed mother. He was 26 years old, a locomotive engineer, was economical, industrious and temperate and earned \$1,000, a year. *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56; 12 S. W. 955. Age of child and mental characteristics and its bodily health and strength were shown and also its ability to be useful. *Brunswick v. White*, 70 Tex. 504; 8 S. W. 85. Deceased was oldest son of widow. He was sober, industrious and economical. His life expectancy was also considered and from the evidence of his character, etc., he gave prospects of being a useful and prosperous citizen. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 502, 503; 7 S. W. 857, per Walker, Assoc. J. Deceased was a young and robust man with probabilities of a long life. He was a skilled workman whose loss could not be estimated solely by the remuneration he had received for his labor—\$15,000 not so clearly excessive as to be set

aside although larger than ought to have been given. *East Line & Red R. R. Co. v. Smith*, 65 Tex. 167; S. C., 62 Tex. 274. The age, life expectancy and earnings of deceased might yield a much smaller sum than that awarded—\$12,000—"but the additional skill which may have been acquired in some of the years of life he was deprived of, would increase his wages," and verdict sustained. *International & G. N. R. Co. v. Ormond*, 64 Tex. 485, 490, per Robertson, Assoc. J. Deceased was 31 years old, sober, industrious and of good physical constitution for some time before he sustained the injury. But there was evidence tending to show that at some former period he may have been intemperate. He was a druggist by profession, although at his death he was engaged in other business under contract with persons who had undertaken to grade a railroad and lay the rails and he was to receive \$2.50 a day. And there was evidence of ability to furnish pecuniary aid to his wife and mother—\$5,000 not excessive. *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297. See S. C., 60 Tex. 435. Evidence should show the circumstances of deceased, his occupation, health, habits of industry, sobriety and economy, his skill and capacity for business, the amount of his

⁵⁴ Act 1897, cl. 1, (a) (i).

⁵⁵ *Appleby v. Horseley Co.* (No. 1), (C. A.), 68 L. J. Q. B. N. S. 892 (1899), 2 Q. B. 521. In this case the employment had not been continuous, for there was an interval of eleven months when deceased was not in

said employ, and at the time of his death he had returned and was working under another contract, although the period from the beginning of his original employment was a few months less than three years.

§ 529. Damages proportioned to the injury—Sufferings of injured person.—Under the statutory clause providing that

property, his annual earnings and the probable duration of his life. Deceased here was over 21 years of age. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 301, per Bonner, Assoc. J., citing *Pierce on Rds.* 396; 2 *Thomp. on Neg.* 1290. The present and probable future earnings of deceased and his age should be considered. *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; 56 S. W. 204. Deceased was 31 years old, healthy and industrious and earned \$60 a month, but had been divorced and remarried. Son by first wife recovered \$5,000. Not excessive. *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; 55 S. W. 538. Deceased was 30 years old with a life expectancy of 35 years, was in good health, an expert railroad man earning about \$75 a month, of which about \$45 a month was expended for his wife and two small children. He provided a comfortable home for them, was industrious and thrifty and had presumptively the usual chances of promotion by his employers—\$15,000 not excessive although a less sum might have covered the loss. *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, *aff'd* 54 S. W. 240. Deceased's income from her estate and superior business ability in managing the same are factors. *San Antonio & A. P. R. Co. v. Long*, 19 Tex. Civ. App. 649; 48 S. W. 599. Deceased was a fireman in the line of promotion to locomotive engineer, and the wages of the latter were held competent evidence as showing reasonable expectations as to the future. *Galveston, A. & S. A. R. Co. v. Ford* (Tex. Civ. App.), 46 S. W. 77. De-

ceased was about 40 years old, a railroad brakeman who stood well with his employers and had good business prospects. He had asthma but was temperate, industrious, frugal and economical, and earned \$60 a month and supported his wife and 5 children—\$10,000 not excessive. *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826. \$5,000 is not excessive for death of a healthy young man although he had been out of employment. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 48 S. W. 829. Financial condition of deceased may be shown. *Galveston, H. & S. A. R. Co. v. Gormley* (Tex. Civ. App.), 35 S. W. 488. Evidence is competent as to deceased's affection, etc., for his family. *Missouri P. R. Co. v. Bond* (Tex. Civ. App.), 30 S. W. 930. That deceased was unmarried was a factor in determining whether or not the damages are excessive. *International & G. N. R. Co. v. McNeel* (Tex. Civ. App.), 29 S. W. 1133. Reasonable prospect of promotion and increasing wages are factors. *Gulf C. & S. F. R. Co. v. John* (Tex. Civ. App.), 29 S. W. 558. Evidence is admissible as to the amount of cotton and corn deceased could raise yearly, and his earnings in money. *International & G. N. R. Co. v. Kuehn* (Tex. Civ. App.), 21 S. W. 58. The following Texas cases are to much the same effect as the preceding ones: *Missouri, K. & T. R. Co. v. Gilmore* (Tex. Civ. App. 1899), 53 S. W. 61; *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 51 S. W. 536; *San Antonio St. R. Co. v. Renken*, 19 Tex. Civ. App. 229; 38 S. W. 829; *Chicago, R. I. & T. R. Co. v. Porterfield*, 19 Tex.

damages proportioned to the injury shall be awarded, the most important consideration is whether the action is for the death alone or a survival action.⁵⁶ And where the recovery is for the death itself nothing can be awarded as damages for deceased's physical or mental suffering.⁵⁷ But the survival action for personal injuries carries with it the right to damages for mental and physical anguish and suffering of deceased.⁵⁸ In South

Civ. App. 225; 46 S. W. 919; 4 Am. Neg. Rep. 461, *aff'd* 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 383; Louisiana W. E. R. Co. v. Carstens, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781; International & G. N. R. Co. v. Culpepper, 19 Tex. Civ. App. 182; 46 S. W. 922; Tyler S. E. R. Co. v. McMahon (Tex. Civ. App.), 34 S. W. 796; Tyler S. E. R. Co. v. Raspberry, 13 Tex. Civ. App. 185; 34 S. W. 794; 3 Am. & Eng. R. Cas. N. S. 376; Ft. Worth & D. C. R. Co. v. Hyatt (Tex. Civ. App.), 34 S. W. 677; San Antonio & A. P. R. Co. v. Harding, 11 Tex. Civ. App. 497; 33 S. W. 373; 3 Am. & Eng. R. Cas. N. S. 389; Taylor B. & H. R. Co. v. Warner (Tex. Civ. App.), 31 S. W. 66; Gulf C. & S. F. R. Co. v. Hamilton (Tex. Civ. App.), 28 S. W. 906; Galveston, H. & S. A. R. Co. v. Gormley (Tex. Civ. App.), 27 S. W. 1051; Galveston, H. & S. A. R. Co. v. Arispe, 5 Tex. Civ. App. 611; 23 S. W. 928, rehearing denied 5 Tex. Civ. App. 617; 24 S. W. 31.

⁵⁶ See secs. 522, 523, herein and notes. "This suit you are aware is brought not by the person injured . . . but by the father. The measure of damages in the two cases is entirely different. *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18. The measure of damages is not the same as when the party injured sues and recovers compensation for physical and mental suffering. *Houston & T. C. R. Co.*

v. Cowser, 57 Tex. 297, per Bonner, Assoc. J.

⁵⁷ *Galveston, H. & S. A. R. Co. v. Manila*, 79 Tex. 577, holding that pain and suffering of deceased are not elements. *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56; 12 S. W. 955, holding also that although there was evidence that deceased's body was mangled and that he died a few hours thereafter, the testimony of the mother that she was at the hospital where there was only a partition between her and her son and that she could hear him "moaning until he died" is no more suggestive of his suffering pain than the other evidence. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 301, per Bonner, Assoc. J., citing *Southern Cotton P. & Mfg. v. Bradley*, 52 Tex. 601; *March v. Walker*, 48 Tex. 375. In *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85, the judgment was affirmed but the charge of the court below, which was not considered also excluded physical and mental suffering of deceased. See *San Antonio Tract. Co. v. White* (Tex. Supr. Ct. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616; 60 S. W. 323.

⁵⁸ *Missouri, K. & T. R. Co. v. Settle*, 19 Tex. Civ. App. 357; 1 J. A. 37; 47 S. W. 825, the same as if the suit had been tried before the death and includes also loss of time and diminished earning capacity future as well as past. See *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; 39

Carolina the action is a new right and not a survival of the action which deceased might have brought for the injuries.⁸⁰

§ 530. Damages proportioned to the injury—Mental and physical suffering—Loss of society, etc.—Nothing is allowed as damages by way of solatium to the survivors for bereavement, grief, physical or mental suffering or anguish,⁸¹ but the comfort afforded his family by deceased has been declared to be a proper element of damages,⁸² although the Texas cases exclude the loss of the comfort of a child's society,⁸³ and the loss of society in general in estimating the award.⁸⁴ Nor in the

S. W. 1112, as to rights of widow and who is widow in survival suit.

⁸⁰ In *re Mayo's Estate*, 60 S. C. 401; 38 S. E. 634; *Ex parte North-eastern R. Co.*, *id.*, under Rev. Stat. 1893; secs. 2315, 2316, 2318.

⁸¹ *Agricultural & Mech. Assoc. v. State*, Carty, 71 Md. 86; 18 Atl. 37; 17 Am. St. Rep. 507; *Baltimore & O. R. Co. v. State*, Mahone, 63 Md. 135, 146; *Baltimore & O. R. Co. v. State*, Kelly, 24 Md. 271, 280; *State, Coughlan, v. Baltimore & O. R. Co.*, 24 Md. 84, 106; 87 Am. Dec. 600, per Bowie, C. J.; *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18; *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80; *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 224; 12 S. W. 828, per Acker, P. J.; *City of Galveston v. Barbour*, 62 Tex. 172, 174; 50 Am. Rep. 519; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, per Bonner, Assoc. J.; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829; *Storrie v. Marshall* (Tex. Civ. App.), 27 S. W. 224; *Blake v. Midland Ry.*, 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562; *Paterson v. Wallace*, 1 Mac. H. L. 748; *Canadian Pacif. R. W. Co. v. Robinson*, 14 S. C. R. 105 (Ont.); *St. Lawrence & Ottawa R.*

W. Co. v. Lett, 11 S. C. 422 (Ont.), aff'g 11 A. R. 1, which rev'd Q. B. D. (1 O. R. 545); *Filiatrault v. Canadian Pac. R. Co.*, Rap. Jud. Quebec, 18 C. S. 491. See *City of Montreal v. Labelle*, 14 S. C. R. 741 (Ont.); *Storrie v. Marshall* (Tex. Civ. App.), 27 S. W. 224. See *San Antonio Tract. Co. v. White* (Supr. Ct. Tex. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323. Contra in Scotland, *Paterson v. Wallace*, 1 Macq. H. L. 748.

⁸² *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271.

⁸³ *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18; *Taylor B. & H. R. Co. v. Warner* (Tex.), 19 S. W. 449. See *San Antonio Tract. Co. v. White* (Supr. Ct. Tex. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323.

⁸⁴ *Galveston, H. & S. A. R. Co. v. Worthy*, 87 Tex. 459, 466, 467; 29 S. W. 376; *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80. *Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 583, 584; 15 S. W. 573; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829; *Galveston, H. & S. A. R. Co. v. Gormley* (Tex. Civ. App.), 27 S. W. 1051. Loss of society not an element in England.

absence of proper pleadings can the loss of advice and counsel of a father and husband be considered,⁶⁴ although the fact may be admissible that a deceased son had aided his mother with counsel and advice.⁶⁵ And loss to deceased's personal estate by reason of his inability to attend to business is a proper element of damages.⁶⁶

§ 531. Damages proportioned to the injury—Relationship legal and actual of deceased to beneficiaries—Support and dependency.—The legal and actual relations between the deceased and those entitled to damages are important factors in arriving at the amount to be awarded for the death. But they are not exclusively determining elements. Thus a widow or a mother, son or daughter, may be entitled to recover for a husband or father's death, even though he may have separated and is living apart from them, especially in case of a widow who has not by any act of hers lost her legal right to support.⁶⁷ But

Blake v. Midland Ry., 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562.

⁶⁴ Galveston, H. & S. A. R. Co. v. Worthy, 87 Tex. 459, 466, 467; 29 S. W. 376. See next following note.

⁶⁵ Missouri Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. 857. See Galveston, H. & S. A. R. Co. v. Gormley (Tex. Civ. App.), 27 S. W. 1051; Gulf C. & S. F. R. Co. v. Hamilton (Tex. Civ. App.), 28 S. W. 900.

⁶⁶ Bradshaw v. Lancashire & Yorkshire Ry., 44 L. J. C. P. 148; L. R. 10 C. P. 189; 31 L. T. 847; 23 W. R. 310.

⁶⁷ But the appellant's sixth prayer contained a proposition which we think is not sustained either by reason or authority. It asks the court for instruction that if they find that the decedent had been separated from his family for a period of about twelve years immediately preceding his death, and that he had contributed nothing to the support of his wife or infant child during that period, that then the plaintiff was only

entitled to nominal damages. In this we do not concur. The marital relation still continued to exist between the parties at the time of the death of the husband and whilst they had not for the period stated lived together as man and wife, her legal rights had suffered no change or impairment. It is very clear from the testimony in the record that the wife had not by her own wrong forfeited her right to a decent support from her husband in accordance with her station in life. The marital relation created this right, and it continued to exist in law to the death of her husband, and this too without reference to the will or wishes of the husband." Baltimore & O. R. Co. v. State, Chambers, 81 Md. 371, 389; 32 Atl. 201, per Roberts, J. So in an action by a widow for the benefit of herself and mother, there was evidence showing some estrangement between the wife and husband and the court said that while deceased may have left his wife for a year or

a wife may, by separating from her husband and entering a house of prostitution, forfeit her right to his support and consequent damages for his death, especially so where her immoral conduct is not justified by his misconduct.⁶⁸ And a husband who has quarreled with and separated from his wife, living apart from and holding no communication with her for years, can recover nothing for her death even though she would have been absolutely entitled to a large sum of money had she survived her aged mother.⁶⁹ So a father who has abandoned his family and has contributed nothing to their support for years and has held no communication with them, and who has never

more before his death and after leaving her may have had no further communication with her and may have intended never to return to her or contribute to her support, yet so long as the marital relation existed, without reference to the will of the husband, the wife not being shown to have forfeited her right thereto by her own wrong, she was entitled to a decent support in accordance with their station in life, from her husband. The marital relation created this right and it would have continued to exist so long as the relationship continued and so without reference to the will of her husband. There is no legal presumption that such relation would ever have been dissolved prior to the time when one of the parties thereto in the ordinary course of events would have died. *Dallas & Wichita R. Co. v. Spicker*, 61 Tex. 427, 431; 48 Am. Rep. 297, per Stayton, Assoc. J. See *S. C.*, 60 Tex. 435. See *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; 55 S. W. 538, where there was a divorce and remarriage by husband, and son by first marriage recovered. *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922, holding that a minor daughter could recover for her fa-

ther's death even though he had been divorced from her mother with whom she was living.

⁶⁸ *Ft. Worth & D. C. R. Co. v. Floyd* (Tex. Civ. App.), 21 S. W. 544. At the trial of an action brought by the plaintiff as the widow of the deceased under the provisions of Lord Campbell's Act (9 and 10 Vict. ch. 93), S. 2, against the defendants for negligence which caused the deceased's death, it appeared that the plaintiff was at the time of her husband's death and had for many years previously, been living apart from him in adultery with another man. During the time they were so living apart the deceased did not support the plaintiff, though he occasionally gave her small sums of money. Held that the action was not maintainable, inasmuch as the plaintiff had lost her legal right to support by reason of her adultery and had no reasonable expectation of pecuniary advantage by the deceased remaining alive which could be taken into account by a jury. *Stimpson v. Wood*, 57 L. J. Q. B. 484; 59 L. T. 218; 36 W. R. 734; 52 J. P. 822. See 10 Mew's Eng. Dig. (1898) p. 105.

⁶⁹ *Harrison v. L. N. W. Ry.*, 1 Cab. & E. 540.

been assisted or aided by his son, has sustained no such pecuniary injury by the latter's death as entitles him to damages, for while the relationships named in the statute give the right of action, they do not of themselves give the right of recovery.⁷⁰ While, however, legal relationship and consequent legal obligations are to be considered as a basis of pecuniary benefit and of reasonable expectation of advantage,⁷¹ nevertheless, the damages are not to be given with reference merely to the loss of a legal right, but should be calculated with reference to the reasonable expectation of pecuniary benefit as of right, or otherwise, from the life of deceased had he not been killed.⁷² Again,

⁷⁰ *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 222-224; 12 S. W. 828.

⁷¹ *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655; *Sykes v. North-eastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473; *Dalton v. South-eastern Ry.*, 4 C. B. (N. S.) 296; 27 L. J. C. P. 227; 4 Jur. (N. S.) 711; 6 W. R. 574; *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271, 281; *Lilly v. Charlotte, C. & A. R. Co.*, 32 S. C. 142; 10 S. E. 932, holding that an allegation of dependency upon deceased by a widow and children is not a sufficient allegation of necessary relationship. *St. Louis, Ark. & T. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per Gaines, Assoc., J., declaring that a husband's duty is to support his family, etc., and that it was the duty of the husband of a surviving daughter to support her. *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520; 50 S. W. 135, writ of error denied, 51 S. W. 329, holding that where the relationship is denied evidence that deceased supported plaintiffs is admissible to show that he was their husband and father. See also additional cases cited under notes to this section. *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922, where petition al-

leged relationship, etc., and was held sufficient, holding that a minor daughter has a legal right to support. *Winnt v. International & G. N. R. Co.*, 74 Tex. 32-35; 11 S. W. 907; 5 L. R. A. 172, holding that the right of action is confined to the persons named in the statute where exemplary damages are sought.

⁷² *Franklin v. Southeastern Ry.*, 3 H. & N. 211; 4 Jur. (N. S.) 565; 6 W. R. 573. Not necessary to prove that persons described in the statute had a claim upon deceased for support or services, which amounted to a legal right but proof of reasonable expectation, etc., sufficient. *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 135, 145, per Robinson, J. Not merely for loss of a legal right. *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271, 281. The damages are such as the jury think are proportioned to the injury and are not confined to the deprivation of some legal claim so that it need not appear that children, as in the case of adults, had any legal claim upon deceased for support. *Mason v. Southern Ry.*, 58 S. C. 70, 77; 36 S. E. 440; 79 Am. St. Rep. 826, per Gary, J. *Petrie v. Columbia & G. N. R. Co.*, 29 S. C. 303; 7 S. E. 515. Damages are not restricted to loss of benefits to which plaintiff had a legal right.

in some jurisdictions the parent has by statute an action against a child for support, but apart from any such enactment there is certainly an indisputable, natural obligation for a child to care for a necessitous parent.⁷³ And it has been asserted that a mother has such a legal claim upon her son for support as coupled with actual assistance given, that her claim to damages is valid; but even if there was no legal obligation on a child to maintain a parent, it is declared that the imperfect moral obligation of a son who was his mother's only support would constitute a sufficient basis for the claim.⁷⁴ In those jurisdictions, however, where the law does not impose upon a child any legal duty to care for necessitous parents, the reasonable expectation, irrespective of legal right resulting from the condition of the child, coupled with his ability and disposition to aid and bestow upon them pecuniary benefits in obedience to filial duty or otherwise, constitutes a valid basis of damages, especially where there has been such assistance on the part by the child and a promise of continued future aid, even though such promises cannot be legally enforced.⁷⁵

Texas & P. R. Co. v. Wilder (U. S. C. C. A. 5th C. Tex.), 35 C. C. A. 105; 92 Fed. 953, 955, 956; 13 Am. & Eng. R. Cas. N. S. 520, per Parlance, Dist. J. Are not to be given with reference to the loss of a legal right, etc. *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, per Maxey, J., charging jury.

⁷³ *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C. Tex.), 35 C. C. A. 105; 92 Fed. 953, 955, 956; 13 Am. & Eng. R. Cas. N. S. 520, per Parlance, Dist. J.

⁷⁴ *Weems v. Mathieson*, 4 Macq. H. L. 215.

⁷⁵ *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, per Maxey, J., charging the jury; *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C. Tex.), 35 C. C. A. 105; 92 Fed. 953, 955, 956, per Parlance, Dist. J. See *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex.

536, 542; 15 S. W. 104, per Gaines, Assoc. J.; *Dallas & Wichita R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297. See *S. C.*, 60 Tex. 435. In such a case it would be proper to show the reasonable expectation of benefit which the parent would have received had the child not been killed, and in the absence of legal right to benefit prior to the death of the child this would depend on the will and ability of the child to confer benefit on the parent. In such a case evidence throwing light on these matters would be proper, and should be considered by the jury under a proper instruction. In this case evidence was introduced to enable the jury to ascertain the ability of the deceased, had he lived, to contribute pecuniary aid to his wife and mother, and the fact that the damage given to the mother is very small furnishes no ground of com-

§ 532. **Same subject continued.**—The law distinguishes as to the legal right and reasonable expectation of advantage between the cases of a parent's right to damages and the measure thereof for the death of a minor or an adult child.⁶ But it is error to charge the jury that the measure of damages for the death of a son is the amount, if any, in the way of pecuniary aid such son would have contributed to his parents, or which they would have received from him had he not been killed. Such a charge assumes that such amount is fixed by law as the measure of damages, and takes from the jury the right to consider whether or not a less sum paid now would compensate the parents for the loss of the aid which their son would have rendered, as he would probably have rendered it during the rest of their lives. And in this connection it is error to refuse a request to charge that if the jury should find that the plaintiff "would have received pecuniary aid from the deceased, what do you find to be the reasonable compensation or value of the same?" since the question for the jury would be whether the present value of such periodical future contributions was their sum or a less amount.⁷ Necessarily, therefore, the questions of dependency and of the amount and extent of

plaint to the appellant, it not appearing that the judgment in favor of the wife is excessive." *Id.* 431, 432, per Stayton, Assoc. J., cited in *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 35, 36; 11 S. W. 907; 5 L. R. A. 172, per Hobby, J. In *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640, the son had declared his purpose to remain with and provide for his father. In *Galveston, H. & S. A. R. Co. v. Bonnett* (Tex. Civ. App.), 38 S. W. 813, disposition of adult son to aid father was considered. See also *Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. Civ. App. 468; 23 S. W. 301, *aff'd* 23 S. W. 1019.

⁶ *Dallas & Wichita R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297. See *S. C.*, 60 Tex. 435. *Examine San Antonio Tract. Co. v. White*

(Tex. Civ. App. 1900), 60 S. W. 323, *rev'd* (Sup. 1901), 61 S. W. 706.

⁷ *Fort Worth & Denver City R. Co. v. Morrison*, 93 Tex. 527; 56 S. W. 745. In this case the action was by the father and mother to recover damages from the appellant railway company occasioned by the death of their 20-year old son, who was employed by said company as a stenographer. He received \$30 a month, \$20 of which he gave to his parents monthly towards their support, they being poor and 64 years old and in bad health, and the evidence also showed other benefits of a pecuniary value. The court upon review said: "The charge given required the jury only to find the amount of the pecuniary aid which the plaintiffs would have received from their son if he had not been killed, and as-

the aid and assistance rendered affect the reasonable expectation of pecuniary benefit, and are most important elements in determining the sum to be assessed as damages for the negli-

sumed that such amount was fixed by law as the measure of damages. This took from the jury the right to consider the question whether or not a less sum paid now would compensate the parents for their loss of the aid which their son would have rendered, as he would probably have rendered them during the whole of their lives. The right of the plaintiffs was to recover compensation for the loss sustained, and such loss was of the aid or benefits which their son would have bestowed upon them. They are therefore to be compensated for the value of these, but are not to receive them as they would have received them from him from time to time throughout their lives, but in a lump sum paid now. Whether or not a less sum than that to which the son's whole contributions would have amounted to would compensate the plaintiffs for the loss of such contributions as he would have made them, was a question which should not have been taken from the jury by a charge which assumed that the compensation must necessarily consist of a sum equal in amount to that of such contributions. The jury should have been left free to determine under all the circumstances the sum which would compensate plaintiffs for the loss of the benefits having a pecuniary value which the son would have rendered to his parents. The charge given without the submission of a further inquiry was therefore insufficient and erroneous. The special instruction, though not so fully expressed as it might have been, sought to have the jury pass upon the ques-

tion of compensation, which was the true one, and with the general charge standing as it did should have been given. This is not as intended by the appellee, an application of the rule of annuities, sometimes insisted upon, nor of any mathematical rule for the ascertainment of damages. On the contrary, it leaves the determination of amount to the jury acting upon all proper considerations, of which a possible difference in value between an amount paid in present and the same amount paid in contributions made at intervals through a period of time is one. It has often been said that the measure of damages in this class of cases is 'a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from the child had he not died.' *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 503; *City of Galveston v. Barbour*, 62 Tex. 174. In those cases the court had no occasion to consider or discuss such a question as that now before us. All of the authorities recognize the proposition that compensation is the fundamental measure, and with the idea of compensation in mind the statement of the measure in the cases referred to is correct and means equality in compensation, not necessarily in amount but in value." *Per Williams, Assoc. J.* And it is also held in *Ft. Worth & D. C. R. Co. v. Morrison* (Tex. Civ. App. 1900), 58 S. W. 931, that only the present value of such benefits is recoverable, and not the reasonable amount of pecuniary aid the parents would have received.

gent killing of children,⁷⁸ or of a parent or husband or both.⁷⁹ The petition need not, however, specially aver the nature of the aid extended in the lifetime of a deceased mother to each of the

⁷⁸ *Agricultural & Mechanical Association v. State*, Carty, 71 Md. 86; 18 Atl. 37; 17 Am. St. Rep. 507; *Baltimore & R. T. R. Co. v. State*, 71 Md. 573; 18 Atl. 884; *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 89 Fed. 18 per Maxey, J., charging jury, *International & G. N. R. Co. v. Knight*, 91 Tex. 680; 45 S. W. 556, rev'g 45 S. W. 167; *Missouri P. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828; *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56; 12 S. W. 955; *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 35, 36; 11 S. W. 907; 5 L. R. A. 172, per Hobby J.; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 502, 503; 7 S. W. 857, per Walker, Assoc. J.; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 305. In this last case deceased had at one time contributed some property and had at sometime contributed two thirds his wages, but there was no evidence of his pecuniary circumstances or of what his wages had been or then were, although such testimony was easily accessible. "Without such evidence the verdict of the jury could have been but little more than a merely speculative one and the court had no standard by which to determine its correctness." *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; 56 S. W. 204, holding that the amount of earnings contributed to the parent's support and the probable duration of such support are proper elements. *Brush Elec. L. & P. Co. v. Lefevre* (Tex. Civ. App. 1900), 55 S. W. 396, holding that the aid and assistance rendered and reasonably to be expected are evidential facts. *Galveston, H. & S. A. R. Co. v. Power*

(Tex. Civ. App. 1899), 54 S. W. 629; *Galveston, H. & S. A. R. Co. v. Ford* (Tex. Civ. App. 1899), 54 S. W. 37; *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640; *Texas & Pac. R. Co. v. Spence* (Tex.), 52 S. W. 562; *Gulf C. & S. F. R. Co. v. Royall*, 18 Tex. Civ. App. 86; 43 S. W. 815; *Galveston, H. & S. A. R. Co. v. Bonnett* (Tex. Civ. App.), 38 S. W. 813; *Gulf C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.), 30 S. W. 592; *International & G. N. R. Co. v. McNeel* (Tex. Civ. App.), 29 S. W. 1133; *Gulf C. & S. F. R. Co. v. Hamilton* (Tex. Civ. App.), 28 S. W. 906; *Mexican Nat. R. Co. v. Finch* (Tex. Civ. App.), 27 S. W. 1028; *Galveston, H. & S. A. R. Co. v. Arispe*, 5 Tex. Civ. App. 611; 23 S. W. 928, rehearing denied 5 Tex. Civ. App. 617; *Simmons v. White* (C. A.), 68 L. J. Q. B. N. S. 507 (1899), 1 Q. B. 1005. See this case also as to parents being "in part dependent." *Hetherington v. Northeastern Ry.*, 51 L. J. Q. B. 495; 9 Q. B. D. 160; 30 W. R. 797; *Franklin v. Southeastern Ry.*, 3 H. & N. 211; 4 Jur. (N. S.) 565; 5 W. R. 573; *Condon v. Great Southern & Western Ry.*, 16 Iv. C. L. 415; *Van Wart v. New Brunswick Ry.*, 27 Sup. Ct. Jud. (N. B.) rev'd on App. to Sup. C. C. In *Bourke v. Cork & Macroom*, 4 L. R. Ir. 282, the father was independant of his son's earnings.

⁷⁹ An instruction is sufficiently restrictive which directs the jury to exclude all damages to adult children unless they find they were dependent upon their father for support and maintenance by reason of some want of ability to support and

children who were plaintiffs. The fact that deceased during her life contributed to the support of her children may be considered by the jury in an action for damages occasioned by her wrongful death, and perhaps, where the children are adults and no longer reside under the parental roof, some evidence of like character or effect may be necessary to justify an award of dam-

maintain themselves. *Baltimore & O. R. Co. v. State*, Hauer, 60 Md. 449, 468. Support of family should be considered. *Baltimore & O. R. Co. v. State*, Kelly, 24 Md. 271. Wife and children were entirely dependent upon deceased's labor for support. *Galveston, H. & S. A. R. Co. v. Worthy*, 87 Tex. 459, 465; 29 S. W. 376. Divorced husband never contributed to support of wife or son, so that son recovered damages. *Gulf C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; 55 S. W. 538. See as to allegation of support, *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922. In this last case however there was no proof of support, but child was a minor and recovered. Deceased supported his mother, wife and child. *Chicago, R. I. & T. R. Co. v. Porterfield*, 19 Tex. Civ. App. 225; 46 S. W. 919; 4 Am. Neg. Rep. 461, *aff'd* 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 383. Deceased devoted the greater part of his wages to the support of his wife and 5 children. *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826. Widow entitled to probable amount of contributions to her maintenance, etc. *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152. Adult sons not entitled to recover where they have received no pecuniary aid or support from deceased and expected none. *Texas & N. O. R. Co. v. Brown*, 14 Tex. Civ. App. 697; 39 S. W. 140. Widow and children

entitled to such sum as they might have received from the assistance or earnings of deceased. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829; 1 Am. Neg. Rep. 354. Where adult son and married daughters had received and expected nothing from deceased except occasional presents and were independent of his support, there can be no recovery. *St. Louis, S. & W. R. Co. v. Bishop*, 14 Tex. Civ. App. 504; 37 S. W. 764. Deceased gave his entire salary to support his wife and children. *Tyler S. E. R. Co. v. McMahon* (Tex. Civ. App.), 34 S. W. 796. Widow and children had been entirely dependent upon deceased's professional earnings for their maintenance. *Sanderson v. Sanderson*, 36 L. T. 847. The fact that a deceased husband and father had sent his wife and child but two small sums of money may be accounted for by the fact that he had been out of employment, and that at his death his employer owed him about three months' wages. As to the other beneficiaries, there was no evidence that deceased had contributed anything to their support and he had nothing with which to support himself. *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per *Gaines, Assoc. J.* It was also said in this case that the circumstances repelled the idea that the latter named beneficiaries had any just grounds to expect pecuniary assistance from deceased.

ages. But such facts are not in themselves substantive facts which justify a judgment, and being mere matters of evidence need not be pleaded either in detail or with any great degree of particularity. Therefore an allegation is not vague and indefinite which sets forth that the deceased mother "during her lifetime aided in the support and maintenance of each one of the plaintiffs, cared for them in time of sickness and at other times, and that her house was their home whenever they desired to make it such, and that each had every reasonable expectation that if said mother had lived she would have continued to aid and assist in the support and maintenance of each of them as aforesaid, and they aver that by her death each of them has been deprived of her motherly care and assistance and her said support and maintenance, all in their damage," etc.⁸⁰ Again, evidence of a daughter is not irrelevant upon the issue of pecuniary loss that the deceased mother had in her lifetime aided in the support of all her adult children, and that her house was their home whenever they desired to make it so; that three of said children lived with her when not away from home; that she furnished one of the latter with money for her support and to pay for medicine and medical attention when needed; that she also remitted money at different times to another daughter and to a son; that she aided one of the sons, who lived with her, with money and also assisted him in the support of his children by giving them clothes, etc., and that deceased was a woman of simple tastes and habits, and was always ready to aid her children with her means whenever they needed it. And pecuniary benefits are not limited to the results of a mother's mental and bodily labor, since evidence is admissible that she had an income from the rents of property and interest on loans, and that she devoted it to the support of herself and children. But a question and answer upon the point whether the children had any expectation of continuance of support during the life of deceased, and asking for the facts upon which such expectation is based, are inadmissible in so far as they seek for and elicit the witnesses's opinion, and to this extent should be excluded.⁸¹ In

⁸⁰ San Antonio & A. P. R. Co. v. Long, 87 Tex. 148, 152; 27 S. W. 113; 47 Am. St. Rep. 87.

⁸¹ San Antonio & A. P. R. Co. v. Long, 87 Tex. 148, 152, 153; 27 S. W. 113; 47 Am. St. Rep. 87; 19 Tex.

addition the actual relations sustained between the parties are material. Thus that deceased was kind, affectionate and indulgent to his family has been declared to be competent evidence,⁸² although it cannot be shown in mitigation of damages that he was a negro, upon the theory that in that race the family ties are not strong.⁸³ But the fact whether the deceased and the survivors lived apart or under the same roof, whether the survivors were married or unmarried and the character of the services or aid rendered, if any, are factors entering into the determination of damages.⁸⁴

Civ. App. 649; 48 S. W. 599. In this case the mother was a woman whose superior business management of her estates enabled her to provide for her children in an increasing degree even to the extent of furnishing them a home.

⁸² *Missouri P. R. Co. v. Bond* (Tex. Civ. App.), 30 S. W. 930. See also *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271; *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, *aff'd* 54 S. W. 240.

⁸³ *Texas & P. R. Co. v. Moody* (Tex. Civ. App.), 23 S. W. 41.

⁸⁴ Deceased made her permanent home with her daughter—one of the plaintiffs. She attended to the housework and looked after the children while the daughter was away at work. These services enabled the daughter to work out constantly and when so at work she earned \$6 a week, and since her mother's death she had been unable to go out to work because she had no one to take care of the house and children. It was declared that such services were a pecuniary benefit which the daughter had a right to expect from the continuance of the mother's life and such value was to be assessed by the jury and was not what the daughter might earn by going out to work, because by hiring some one else she might still go out to work. In the

same case there were also two sons as plaintiffs; one was 26 years old, married and had one child, the other 28 years old, married and had two children. The mother although she made her home at her daughter's was in the habit of assisting the sick members of her two sons' families. How often she went, how long she remained and what was the value of her services did not appear nor was there any evidence to show that in case of sickness the sons were obliged to employ some one else. Held that there was no evidence legally sufficient of pecuniary loss. "To attempt to assess damages under such circumstances would be to indulge in mere conjecture or speculation." *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 136, 146, 147. Three of the plaintiffs had resided with their mother for whose death recovery was sought. *San Antonio & A. R. Co. v. Long*, 87 Tex. 148, 153, 158, 159; 27 S. W. 113; 47 Am. St. Rep. 87. Son's knowledge of father's business affairs admissible. *Galveston, H. & S. A. R. Co. v. Davis*, 22 Tex. Civ. App. 335; 54 S. W. 909. That one of the beneficiaries was a married woman was considered. *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, *per Gaines, Assoc. J.* So the business relations of the parties are

§ 533. **Same subject concluded.**—Again, it is decided in a recent case in Texas that the statute does not impose the condition precedent to a recovery of damages, that deceased must have contributed to the support of the beneficiaries, and therefore a married daughter can recover for her father's negligent killing.⁸⁵ And it is determined in the same decision, that even though the aid furnished was gratuitous and given at irregular intervals, nevertheless she was damaged by said death. Under the English Workmen's Compensation Act of 1897, which prescribes a scale of compensation payable to the dependents of a workman, "where death results from the injury," it is held that the defendants are entitled to compensation on that scale if death results in fact from the injury, even though at the time of the injury it could not be reasonably expected as the probable consequences thereof.⁸⁶ And where an employee, a son of fourteen, had turned over all his wages to his parents, receiving from them such pocket money as they thought right, and he had been employed for five weeks before his death, it was held that such parents were "in part dependent" on such employee, under the English Workmen's Compensation Act.⁸⁷ Again, the pecuniary damage requisite is shown, although the assistance rendered the father by his son extended only over a period of about six months when the former was out of work, and no aid

factors as where the son assisted his father in business although in this case it was held that there was no pecuniary loss. *Sykes v. Northeastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473. In an action for a stepmother's death, her earnings, their application to the support of the family, that plaintiff resided with her father and and stepmother up to the time of the accident were considered, but it was held that there was no evidence of pecuniary loss. *Johnston v. Great Northern Ry.*, 26 L. R. Ir. 691. Deceased mother resided with plaintiff and was lodged and maintained by her and assisted her daughter as laundress, in house-keeping, cooking and serving meals. It did not appear that the value of

her services exceeded the cost of keeping her and verdict for plaintiff was set aside. *Hull v. Great Northern Ry.*, 26 L. R. Ir. 289.

⁸⁵ *Texas & P. R. Co. v. Martin* (Tex. Civ. App. 1901), 60 S. W. 803; Sayle's Civ. Stat. arts. 3021-3027. See also *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303; 7 S. E. 515.

⁸⁶ *Syllabus to Dunham v. Clare*, 71 L. J. K. B. 683; C. A. under 60 and 61 Vict. ch. 37, Schedule I, 1 (A.); *English Work. Comp. Act*, 1897.

⁸⁷ *Simmons v. White* (C. A.), 68 L. J. Q. B. N. S. 507 (1899), 1 Q. B. 1005. Under *English Workmen's Compensation Act* of 1897, sec. 7, subd. 2, son received \$17 per week on the average.

had been given for five or six years. It also appeared, however, that the plaintiff's ability to work had decreased, that he was physically injured, and was also nearly blind, although he was only fifty-nine years old.⁸⁸ So the jury may consider the fact of the probable increase of the son's earning capacity and also that he would have contributed some of his earnings to his widowed mother's support, and this even though said son had never earned any money at the time of his death.⁸⁹ But it is also decided that there must be evidence of some pecuniary assistance rendered.⁹⁰

§ 534. Damages proportioned to the injury—Contract relation.—If the only pecuniary benefit to the survivors entitled to sue is derived from a contract which they had entered into with deceased, they are not entitled to recover.⁹¹

§ 535. Damages proportioned to the injury—Reasonable expectation of pecuniary benefit.—The reasonable expectation of pecuniary benefit or prospective advantage to the beneficiary had the deceased remained alive should be considered whether resulting as of right or otherwise, and this expectation may be shown by acts in the past or by evidence of actual or legal relations, although it is not dependent upon the latter. In certain cases no recovery can be had where there is no proof of the loss of a reasonably probable pecuniary expectation or advantage.⁹²

⁸⁸ *Hetherington v. North Eastern Ry. Co.*, 9 Q. B. D. 160.

⁸⁹ *Condon v. The Great S. W. R. Co.*, 16 Irish L. R. N. S. 415, son was 14 years old.

⁹⁰ *Bourke v. Cork & M. R. Co.*, 4 L. R. Irish, 682.

⁹¹ *Sykes v. Northeastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473.

⁹² The reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury and damages may be given in respect of that expectation being disappointed and the probable pecuniary loss thereby occasioned. *Dalton v.*

South Eastern Ry., 4 C. B. (N. S.) 296; 27 L. J. C. P. 227; 4 Jur. (N. S.) 711; 6 W. R. 574; 10 Mew's Eng. Dig. (1898) p. 108. Damages should be calculated with reference to a reasonable expectation of pecuniary benefit as of right or otherwise from a continuance of the life of deceased. *Franklin v. South Eastern Ry.*, 3 H. & N. 211; 4 Jur. N. S. 566; 6 W. R. 573; 10 Mew's Eng. Dig. (1898) p. 108. Reasonable expectation should be considered. *Pym v. Great Northern Ry.*, 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. N. S. 199; 8 L. T. 734; 11 W. R. 922; *Weems v. Mathieson*, 4 Macq. H. L. 215. Such probability may be increased by evi-

Such advantages, however, should be such only as might reasonably be expected under all the circumstances and do not

dence of past acts. *Condon v. Great Southern & W. Ry.* 16 Ir. C. L. R. 415, not necessary to show pecuniary advantage; sufficient if there is reasonable expectation of future pecuniary benefit in case of death of minor child. *Ricketts v. Markdale* (Can. 1900), (Div. Ct.) 31 Ont. 610; *Rombough v. Balch*, 27 Ont. App. 32. Proof is sufficient to warrant a recovery where there is evidence of pecuniary benefit, the continuance of which a surviving daughter had a right to expect. *Baltimore & O. R. Co. v. State*, *Mahone*, 63 Md. 135, 145, 146, per *Robinson, J.*, citing *Baltimore & O. R. Co. v. State*, *Hauer*, 60 Md. 449, which applies the rule to adult children in the case of their father's death, and also holds that it includes past and prospective losses suffered as a direct consequence of the death, and this last case follows *Baltimore & O. R. Co. v. State*, *Woodward*, 41 Md. 268. See also *Agricultural & M. Assoc. v. State*, *Carty*, 71 Md. 86; 18 Atl. 37; 29 Cent. L. J. 250. Reasonable expectation of continuance of pecuniary advantage from a son's continued life is a proper element. *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C. Tex.), 92 Fed. 953, 955, 956; 35 C. C. A. 105; 13 Am. & Eng. R. Cas. N. S. 520; *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18; *Fort Worth & Denver City R. Co. v. Morrison*, 93 Tex. 527; 56 S. W. 745. This case is cited in *San Antonio Tract. Co. v. White* (Supr. Ct. Tex. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323; *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148; 27 S. W. 113; 24 L. R. A. 687; 47 Am. St. Rep. 87; case reverses 26 S. W. 114, holding also that amount of benefits should be shown with some degree of accuracy. *Id.* 159. Pecuniary advantage reasonably to be expected must be shown. *McGown v. International & G. N. R. Co.*, 85 Tex. 289; 20 S. W. 80. Loss of prospective pecuniary benefits recoverable in case of son's death. *Gulf Colo. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 67. Must show expected pecuniary benefit from son. *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 35, 36; 11 S. W. 907, per *Hobby, J.* Measure of damages is a sum equal to the reasonable expectation of pecuniary benefit. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 502, 503; 7 S. W. 857, per *Walker, Assoc., J.*; *City of Galveston v. Barbour*, 62 Tex. 172, 174; 50 Am. Rep. 519, per *Stayton, Assoc. J.*; *Galveston, H. & S. A. R. Co. v. Hughes* (Tex. Civ. App. 1899), 54 S. W. 264. Proper to show such reasonable expectation. *Dallas & Wichita R. Co. v. Spicker*, 61 Tex. 427, 431, 432; 48 Am. Rep. 297, per *Stayton, Assoc., J.* See *S. C.*, 60 Tex. 435. Charge to jury should not exclude consideration of such expectation. *Galveston, H. & S. A. R. Co. v. Power* (Tex. Civ. App. 1899), 54 S. W. 629. As to reasonable expectations of contributions from son, see *San Antonio Tract. Co. v. White* (Tex. Civ. App.), 61 S. W. 706, rev'g (Tex. Civ. App. 1900), 60 S. W. 723. The proof of past support, etc., shows such reasonable expectation. *Galveston, H. & S. & R. Co. v. Ford* (Tex. Civ. App. 1899), 54 S. W. 37. Evidence inadmissible to enhance damages may be given to show such reason-

cover all benefits which might possibly have been received.⁶⁵ And in an English case it was held that there was such a reasonable expectation of pecuniary benefit as would sustain an action by a widow and children of deceased, where he died intestate and his income ceased with his death, even though there was a jointure and certain settlements secured to the survivors, and although it was a matter of uncertainty whether deceased would have saved or accumulated anything from his income to provide for the beneficiaries at his death, and it was also uncertain what disposition deceased would have made of his income in connection with his family's social and domestic advantages.

able expectation. *Galveston, H. & S. A. R. Co. v. Bonnett* (Tex. Civ. App.), 38 S. W. 813.

What proof required—What constitutes reasonable expectation. Though pecuniary loss required to sustain such an action may be evidence by proof of a reasonable expectation of pecuniary benefit, yet there must be some evidence from which a jury shall be able to arrive, otherwise than by guess or speculation at the conclusion that there was such reasonable expectation, and this involves (1) a reasonable expectation that profit would be made from the continuance of the life; (2) a reasonable expectation that some part of the profit so made would become the property of the person on whose behalf damages are claimed, either as of bounty or of right. *Bourke v. Cork & Macroom Ry.*, L. R. Ir. 282, per Pallas, C. B.; 10 Mew's Eng. Dig. (1898) pp. 107, 108. In a case of this description, the plaintiff could not succeed without proof of a state of facts in which pecuniary advantage arose or had formerly arisen, and was likely to again arise to the father, and the continuance or renewal of which pecuniary advantage the father might have reasonably expected if the son's

life had continued. *Id.*, per Dowse, B. The action was by a father for the death of a minor son, and it was held that there was no evidence of deprivation of reasonable expectation of pecuniary advantage.

When proof insufficient, no recovery. If the proof does not show a reasonable prospect or expectation of pecuniary benefit, there can be no recovery, *Harrison, L. & N. W. Ry.*, 1 Cab. & E. 540. Action for wife's death, parties were living apart. *Mason v. Bertram*, 18 Ont. R. 1 Chy. D. Action for death of son, who had just reached majority. *Baltimore & O. R. Co. v. State, Mahone*, 63 Md. 135, 147. Action for mother's death. Two of the beneficiaries were adult married sons, who were denied recovery. *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104. No reasonable expectation shown, sufficient to entitle two of the beneficiaries, a son near majority and a married daughter, to recover. *Texas & N. O. R. Co. v. Brown* (Tex. Civ. App.), 39 S. W. 140. Adult sons proved no reasonable expectation of aid from deceased.

⁶⁶ *Fort Worth & D. C. R. Co. v. Hyatt* (Tex. Civ. App.), 34 S. W. 677. An action for death of a minor child.

It was, however, declared that the jury should consider all the contingencies and uncertainties and whether there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money.⁹⁴

§ 536. *Same subject continued.*—In Maryland it is held that in case of a son's death, the reasonable expectation of pecuniary benefit from the continuance of his life after majority constitutes no ground of recovery in favor of a parent.⁹⁵ But prospective benefits to children may be estimated up to majority, and a widow is entitled to prospective pecuniary damages.⁹⁶ Again, in case of the death of a husband and father, it is no objection to the recovery of a fair compensation that such measure of damages might not be what the plaintiffs had a reasonable expectation of receiving, and an instruction may be refused that the recovery should be limited to a sum representing the present worth of future earnings of deceased, which they had a reasonable expectation of receiving had he survived, where such requested charge also contains the clause that said present worth be calculated upon the basis of six per cent per annum.⁹⁷ Nor should such reasonable expectation be excluded from the jury's consideration.⁹⁸ And the disposition by deceased of his earnings may affect the question of probable aid and of expectation of pecuniary benefit or of continued support.⁹⁹ Although

⁹⁴ *Pym v. Great Northern Ry. Co.*, 2 Best & S. 759; 8 Jur. N. S. 819; 6 L. T. N. S. 1537; 31 L. J. Q. B. 249; 10 Wkly. R. 737, aff'd 4 Best & S. 396; 10 Jur. N. S. 199; 32 L. J. Q. B. 377; 11 Wkly. R. 922. Pecuniary advantage derived from a minor child need not be shown. It is sufficient that the evidence justifies a reasonable expectation of future pecuniary benefit capable of being estimated. *Ricketta v. Markdale* (Div. Ct.), 31 Ont. 610; *Rombough v. Balch*, 27 Ont. App. 32.

⁹⁵ *Agricultural & M. Assoc. v. State*, Carty, 71 Md. 86; 18 Atl. 37; 29 Cent. L. J. 250; *Baltimore & O. R. Co. v. State*, 60 Md. 449.

⁹⁶ *Baltimore & R. T. R. Co. v. State*, 71 Md. 573; 18 Atl. 884.

⁹⁷ *Galveston & S. A. R. Co. v. Johnson* (Tex. Civ. App. 1901), 58 S. W. 622.

⁹⁸ *Galveston, H. & S. A. R. Co. v. Power* (Tex. Civ. App. 1899), 54 S. W. 629, a case of death of son.

⁹⁹ *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640. Deceased son gave his earnings to his father in this case. *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, aff'd 54 S. W. 240. Deceased provided a comfortable home for and supported his family in this case.

the fact, that no proof was offered of what sum would be sufficient to purchase the equivalent of the pecuniary benefit which the widow and children might have reasonably expected from deceased's life, will not be a ground for disturbing a verdict as excessive where the other facts in evidence justify its sustaining such verdict.¹⁰⁰ But where the value of all the prospective benefits that would have accrued to the beneficiary, except for the death, is exceeded by the amount received by him from the estate of the decedent, there can be no recovery under a statute providing for a separate recovery by each beneficiary of a specified class of relatives and giving damages only for the pecuniary injury.¹

§ 537. Damages proportioned to the injury—Physical and financial condition, age, number of family, etc., of beneficiaries.—In considering whether or not evidence of the character indicated by the above headlines is admissible under statutes permitting the recovery of damages proportioned to the injury, it may be stated as an abstract, independent proposition that it is a technical general rule of law that evidence of this nature will be rejected when offered for the single or express purpose of enhancing or mitigating damages, although even this rule has been subject to exceptions and qualifications. On the other

¹⁰⁰ Ft. Worth & R. G. R. Co. v. Kime, 21 Tex. Civ. App. 271; 51 S. W. 558, *aff'd* 54 S. W. 240.

¹ San Antonio & A. P. P. R. Co. v. Long (Tex.), 27 S. W. 113; 24 L. R. A. 637, *rev'g* 26 S. W. 114. Widow may recover for husband's death probable amount which he would have contributed to her maintenance and support had he lived. Missouri, K. & T. R. Co. v. Hines (Tex. Civ. App.), 40 S. W. 152. In case adult sons had received and had no expectation of receiving pecuniary aid, no damages can be recovered. Texas & N. O. R. Co. v. Brown, 14 Tex. Civ. App. 697; 39 S. W. 140. Evidence is admissible to show what aid a child could expect to receive from a mother's

continued life, so declared in Gulf, Colorado & S. F. R. Co. v. Younger, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378, per Brown J. As to instruction concerning reasonable expectation of pecuniary assistance from deceased husband and father, see San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229; 38 S. W. 829. As to reasonable expectation of pecuniary aid from deceased adult son, see Galveston, H. & S. A. R. Co. v. Bonnett (Tex. Civ. App.), 38 S. W. 813. Adult son and married daughter cannot recover where the evidence fails to show a reasonable expectation of pecuniary assistance. St. Louis S. W. R. Co. v. Bishop, 14 Tex. Civ. App. 504; 37 S. W. 784.

hand the statute may, by specifying the class entitled to recover, necessitate proof of the age, mental and physical condition, dependency and number of beneficiaries that, under a different designation of those entitled to damages, might be inadmissible. Again, the undoubted tendency of the decisions is that all the circumstances should be considered which are legally admissible on any relevant ground, and which might aid in reaching a proper conclusion. Thus the reasonable expectation of future benefit or advantage from the continued life of the person killed may depend largely upon evidence of the above character. Again such testimony may be necessary, material and relevant for the purpose of explaining, showing, or tending to show the admissibility or relevancy of other relevant evidence. In addition, the appellate courts have not hesitated when the evidence is before them, to consider age, physical and financial condition, dependency, etc., of beneficiaries in order to determine whether the damages are excessive or inadequate, except, perhaps, where the question of the admissibility of such testimony is directly in issue for review. The force of the above remarks will be evident from the appended citations wherein facts have been considered relating to the physical and financial condition of beneficiaries, their age, the number and state of the family, their dependency and surroundings, and in certain cases, the amount of earnings of survivors, their occupation and ability or inability to work, whether they were in humble life or otherwise, and their life expectancy. This especially applies to parents or children who survive.² Again, evidence of the financial condi-

² In connection with what we have stated in the text and with the appended citations as well as with those of like character throughout this title, and without advocating the admissibility or inadmissibility of evidence of the character above noted, we fail to see why if such evidence is inadmissible in any given case, the appellate courts can consistently review the factors of age, etc., of beneficiaries in any case where it should have been rejected in the court below. We except of

course those cases where such evidence is before the court by consent of parties. Author's remarks. *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369; 41 L. Ed. 193; 16 Sup. Ct. Rep. 1171. Action by widow under *Ariz. Rev. Stat.* 1887, tit. 36, secs. 2145-2155. Deceased left a widow and four children. *Baltimore & Reisterstown Twp. v. State*, Grimes, 71 Md. 573; 18 Atl. 884. Widow's life expectancy and joint life expectancy with deceased will be considered. *Baltimore & O. R. v. State*, Mahone,

tion of the head of the family at the time of the wife's death is admissible where the action is in behalf of said husband and his minor daughter, to show what aid the child could expect to re-

63 Md. 135. Surviving daughter's earnings on account of being able to go out to work because the deceased had remained at home and cared for the household, and also the age of two surviving sons, and that both were married and had children were considered. *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271. Proof of age and condition of health of deceased and members and state of family sufficient for more than nominal damage. *Lilly v. Charlotte C. & A. R. Co.*, 32 S. C. 142; 10 S. E. 932. Allegation of dependency considered not sufficient. *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C.), 35 C. C. A. 105; 92 Fed. 953, 955, 956; 13 Am. & Eng. R. Cas. N. S. 520. Courts avail themselves of all circumstances which may assist them. *Ross v. Texas & P. R. Co.* (U. S. C. C. W. D. Tex.), 44 Fed. 44. Plaintiffs were poor, father was 56 years old and wife 52, and kept hotel at time of son's death. *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18. In charge to jury it was said that the testimony should include the circumstances of the plaintiff (action was for death of son), his age and health, the amount of his property and the duration of his life. The father here was dependent and in feeble health. *Fort Worth & Denver City R. Co. v. Morrison*, 93 Tex. 527; 56 S. W. 745. Jury should consider all the circumstances and aid to parents. Here the parents were poor, 64 years old and in bad health. *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640. Father's poverty may be shown. Same case, 91 Tex. 660; 45 S. W. 556; 4 Am. Neg. Rep. 79; rev'g 45 S. W. 167; *St. Louis, Ark. & T. R. Co. v. Johnston*, 78 Tex. 536, 542; 15 S. W. 104, per *Gaines, Assoc. J.* Age of minor child, and that another beneficiary was married and that a widow and child were left, were considered. *Gulf C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667. Surviving mother's life expectancy need not be proven by other than age and physical condition. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828. Plaintiff was 60 years old; she was in good health, strong and vigorous, and was aided in her support by deceased. *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61; 12 S. W. 838. One of the surviving children was 4 years old and the other was born about a month after the father's death. *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56; 12 S. W. 955. Action by widow for son's death; the fact that her advancing years might create a greater necessity and dependence, proper matters for consideration. *Brunswick v. White*, 70 Tex. 504; 8 S. W. 85. The circumstances of the parents who sue often becomes necessary evidence, not as a basis for increasing or diminishing the amount, but to illustrate the acts of the deceased child as useful or otherwise. In this case all the family worked and were poor people, engaged in the dairy business. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; 7 S. W. 857. Plaintiff's age and life expectancy are proper factors. It may be shown that one of the plaintiffs was a cripple in an action by the widow and children, under *Sayle's*

ceive from the continuance of the mother's life in the given state of circumstances surrounding them. This rule does not, however, entitle the child to recover more or less damages because

Civ. Stat. art. 3027, Texas Midland R. Co. v. Crowder (Tex. Civ. App. 1901), 64 S. W. 90. So evidence that the parents were very poor and had no means, may be admitted in an action for the son's killing, where the jury were told at the time that such evidence should not be considered as a basis for increasing or diminishing the damages, but only to show the child's usefulness. Citizens R. Co. v. Washington (Tex. Civ. App. 1900), 58 S. W. 1042; Houston & T. C. R. Co. v. White, 23 Tex. Civ. App. 280; 56 S. W. 204. Pecuniary condition of parents of deceased adult may be shown and also plaintiffs' ages. Gulf, C. & S. F. R. Co. v. Delaney, 22 Tex. Civ. App. 427; 55 S. W. 538. That there were no children by second marriage of deceased was considered. Galveston, H. & S. A. R. Co. v. Davis, 22 Tex. Civ. App. 335; 54 S. W. 909. Surviving father's age and pecuniary ability are competent evidence. Galveston, H. & S. A. R. Co. v. Ford (Tex. Civ. App. 1899), 54 S. W. 37. Surviving parents and 8 other children and were aided by deceased. Texas & P. R. Co. v. Spence (Tex.), 52 S. W. 562. Plaintiff's age in case of son's death considered. Ft. Worth & R. G. R. Co. v. Kime, 21 Tex. Civ. App. 271; 51 S. W. 558, *aff'd* 54 S. W. 240. Deceased left a widow and two small children; there was no proof of the wife's life expectancy. Chicago, R. I. & T. R. Co. v. Porterfield, 19 Tex. Civ. App. 225; 46 S. W. 919; 4 Am. Neg. Rep. 461, *case aff'd* 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 383. Surviving father was decrepit and

dependent. Gulf, C. & S. F. R. Co. v. Royall, 18 Tex. Civ. App. 86; 43 S. W. 815. Surviving mother's age and life expectancy and dependency considered. Galveston, H. & S. A. R. Co. v. Bonnett (Tex. Civ. App.), 38 S. W. 813. That father was very poor, admissible to show reasonable expectation of pecuniary benefit but not for the purpose of increasing damages. Galveston, H. & S. A. R. Co. v. Gormley (Tex. Civ. App.), 35 S. W. 488. Financial condition of deceased admissible. Ft. Worth & D. C. R. Co. v. Hyatt (Tex. Civ. App.), 34 S. W. 677. Surviving mother's age and number of her children admissible. Gulf, C. & S. F. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592. In action by child for mother's death the child's surroundings should be considered. International & G. N. R. Co. v. McNeel (Tex. Civ. App.), 29 S. W. 1133. The surviving mother was a widow and dependent. Austin Rapid-Trans. R. Co. v. Cullen (Tex. Civ. App.), 29 S. W. 256, rehearing denied 30 S. W. 578. Plaintiffs (parents) were poor. San Antonio & A. P. R. Co. v. Vaughn, 5 Tex. Civ. App. 195; 23 S. W. 745. Evidence admissible of the parent's wealth or poverty to show whether plaintiffs were guilty of contributory negligence in permitting the child to go unattended on a railroad track. Sanderson v. Sanderson, 36 L. T. 847. Deceased left a widow and four infant children dependent. Hetherington v. Northeastern Ry., 51 L. J. Q. B. 495; 9 Q. B. D. 160; 30 W. R. 747. Father's age, that he was nearly blind and injured in his leg and

of the fact that the family was rich or poor. But the circumstances surrounding a mother and child are different in wealthy and poor families and, therefore, such facts may be proven for the purpose above specified.³ And the husband's financial condition during his illness preceding his death has been admitted

hands and comparative inability to work, and that he did sometimes work and also that he had been out of work were considered. *Sykes v. Northeastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473. The surviving father's occupation to show loss of deceased's assistance was considered. *Rowley v. London & N. W. Ry. Co.*, L. R. 8 Ex. 221; 42 L. J. Ex. 153; 29 L. J. 180; 21 W. R. 869. Mother's age considered in connection with annuity right. *Pym v. Great Northern Ry.*, 4 P. & S. 396; 32 L. J. Q. B. 377; 10 Jur. (N. S.) 199; 8 L. T. 734; 11 W. R. 922. The loss of the comforts and conveniences of life owing to the father's condition in life were considered. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655. The father's condition in life was that of a workingman. *Franklin v. South Eastern Ry.*, 3 H. & N. 211; 4 Jur. (N. S.) 565; 5 W. R. 573. Surviving father was old and growing infirm; his condition in life was also poor. *Johnston v. Great Northern Ry.*, 26 L. R. Ir. 691. Plaintiff was in humble life; her earnings, that she worked in a factory, and her inability to work from weakness and poor health were considered. *Hull v. Great Northern Ry.*, 26 L. R. Ir. 289. Plaintiff received lodging and maintenance and assisted her deceased mother. *Bourke v. Cork & Macroom Ry.*, 4 L. R. Ir. 282. Plaintiff's (the father's) condition in life was that of tradesman and he was independent of deceased

son's earnings. See *Dalton v. South Eastern R. Co.*, 4 C. B. N. S. 296.

³ *Gulf, Colo. & S. F. R. Co. v. Younger*, 90 Tex. 387, 391, 392; 38 S. W. 1121; 1 Am. Neg. Rep. 378, per *Brown, Assoc. J.* The evidence in controversy was that the father was a man of means, president of a bank, worth from \$30,000 to \$50,000. The testimony was offered for the purpose as stated to the trial court of enabling the jury to intelligently and properly pass upon the question of damages because it is a matter of common knowledge that children of poor and indigent parents are more dependent upon their parents, particularly upon their mother, for training and culture and nurture than are children of parents better circumstanced; that while children, particularly daughters, of people of very moderate circumstances were almost entirely dependent upon their mother for training, nurture, education, educational advantages, etc.; that ordinarily persons of moderate competence, moderate means and well to do, when their daughters reached the age of Della Younger, 14 years, sent their daughters off to boarding school, procured for them teachers and tutors and gave them better opportunities than people of moderate means were able to furnish their children and thereby to a large extent removed them from immediate dependence upon their mother for nurture, training, etc., and therefore measured by the ordinary conduct of men, the loss of a mother to a minor daughter was greater where

to show imposition and duress in obtaining a release which has been pleaded in bar.⁴

§ 538. Damages proportioned to the injury—Expenses of sickness, funeral, etc.—Under the English statute compensation for the funeral expenses or for family mourning,⁵ or for medical expenses incurred by the injured person is not recoverable.⁶ But where a railway passenger is injured and thereafter dies, medical expenses and loss occasioned during his lifetime may be recovered by his executrix in an action for damages to his personal estate arising from breach of the carrier's contract for safe carriage.⁷ In South Carolina funeral expenses paid are a proper

parents were in moderate circumstances than where they were in better condition financially; that the defendant was entitled to show the financial condition of the plaintiff, Dr. Younger, that the jury might intelligently pass upon the extent of damage that the plaintiff's daughter, Della Younger, had sustained by the death of his wife. On appeal the court per Brown, Assoc. J., *id.* 392, quotes from *Tilly v. Ry. Co.*, 24 N. Y. 476, as to the duty of nurture, intellectual, etc., training owing from parents, especially the mother, to children, and as to the loss thereof through death, being a pecuniary injury as distinguished from injuries to the feelings and sentiments and says in addition: "In the absence of proof a jury might assess damages in such a case based upon a common knowledge of the manner in which mothers usually perform such duties (*Gainesville H. & W. R. Co. v. Lacy*, 86 Tex. 244, 24 S. W. 269). It is true, however, that these duties are discharged and rendered to children in various degrees according to the temperament, education and other circumstances of the different mothers and it is always proper to inform the jury of every fact and circumstance

which will assist them to determine what aid the child would in all probability have received from the mother in the particular case if she had lived. By this means we approach as near as practicable the actual pecuniary injury sustained by the death of a parent," citing several cases.

⁴ *Price v. Richmond & D. R. Co.*, 38 S. C. 377; 17 S. E. 732; same case, 33 S. C. 556; 12 S. E. 413; 26 Am. Rep. 700.

⁵ *Dalton v. Southeastern Ry.*, 4 C. B. (N. S.) 296; 27 L. J. C. P. 227; 4 Jur. (N. S.) 711; 6 W. R. 574.

⁶ *Pulling v. Great Eastern Ry.*, 9 Q. B. D. 110. In *Osborn v. Gillett*, 42 L. J. Ex. 53; 8 Ex. 88; 28 L. T. 197; 21 W. R. 409, damages were claimed, including burial expenses paid for by plaintiff, and an answer was held good as a bar to recovery of any damages, that the death was instantaneous.

⁷ *Bradshaw v. Lancashire & Yorkshire Ry.*, 44 L. J. C. P. 148; L. R. 10 C. P. 189; 31 L. T. 847; 23 W. R. 310. See 10 Mew's Eng. Dig. (1898) pp. 107, 111, 115. See cases cited in note headed "When does not bar action" under sec. 523, herein, as to statutes.

element of damage,⁸ and in Texas medical and other like expenses may be included in an action for a minor child's death.⁹ So funeral expenses incurred by a husband by reason of his wife's death are part of the damages,¹⁰ but evidence of the value of a physician's services cannot be given unless specially pleaded.¹¹

§ 539. Damages proportioned to the injury—Annuity.—

It has been said that perhaps the nearest measure of damages, approximating reasonable certainty, would be such a sum as would purchase an amount equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case, reasonably accessible in evidence and including the probable duration of life.¹² But it is also decided that the jury are restricted too closely in estimating damages by an instruction which directs the finding of a sum which would purchase such an annuity.¹³ And in Canada the measure of damages for the benefit of a mother for the death of her son is held to be a sum which would purchase an annuity equaling the fair and moderate value of the maintenance which she had a reasonable expectation of receiving from him for the rest of her life, and since she has a legal recourse against any one of her children alone for her maintenance, the fact that she has surviving children cannot operate to reduce the amount so recoverable.¹⁴

⁸ *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303; 7 S. E. 515.

⁹ *Brunswick v. White*, 70 Tex. 504; 8 S. W. 85. See also *id.* 512. When "necessarily incurred." *City of Galveston v. Barbour*, 62 Tex. 172, 174; 50 Am. Rep. 519, per Stayton, Assoc. J. Incidental expenses accruing from the injury and death of a son may be recovered even though the mother may be improperly joined as to that item. *Missouri, K. & T. R. Co. v. Evans*, 16 Tex. Civ. App. 68; 41 S. W. 80.

¹⁰ *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.), 30 S. W. 592.

¹¹ *Gulf, C. & S. F. R. Co. v. Younger* (Tex. Civ. App.), 40 S. W. 423.

¹² *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 304, per Bonner, Assoc. J.

¹³ *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826.

¹⁴ *Bernard v. Grand Trunk R. Co.* *Rapports Judic. De Quebec*, 11 Cour. Super. 9. The following is the syllabus of a frequently cited English decision: At the trial of an action under 9 and 10 Vict. ch. 93, brought for the benefit of the mother, widow and children of R,

§ 540. Damages proportioned to the injury—Life expectancy—Annuity, etc., tables.—We have considered generally the subject of life expectancy as one of the general elements of

claiming damages from the defendants for having by their negligence caused the death of R., it was proved that deceased was under a covenant to pay his mother an annuity of £200 during their joint lives. A witness was then called by the plaintiff, who stated that he was an "accountant" and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence after referring to certain tables used by insurance offices called the "Carlisle Tables" as to the average duration of life of two persons of the ages of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by defendants and was ruled to be admissible. In summing up the learned judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of £200 for a person of her age, according to the average duration of human life; and that in calculating the widow's and children's damages, they might, if they thought proper, take as a guide the probable duration of life of a person of the age of the deceased. On the argument of the bill of exceptions tendered to the ruling of the learned judge in admitting the evidence and to his direction to the jury, held first (by Blackburn, Keating, Grove and Archibald, JJ.), that the witness was competent to give evidence as to the probable duration of life and

the price of the annuity, although not an actuary, and (Brett, J., dissenting) that the evidence was relevant and properly admitted. Secondly, by the whole court, that the direction to the jury as to the calculation of the mother's damages was wrong. By Blackburn, Keating, Archibald and Honyman, JJ. The direction was erroneous in not noticing the circumstance that the annuity of the mother was on the joint lives of herself and son, and that it was only secured by the personal covenant of her son. By Honyman, J. The direction was also erroneous in authorizing the jury to find the term for which an annuity is to be purchased solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant. By Brett, J. The only legal direction to the jury would have been that they ought not to attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they considered under all the circumstances a fair compensation; and the direction was, therefore, erroneous, inasmuch as it left it open to the jury to give as damages the utmost amount which they might think was an equivalent for the pecuniary mischief done. Thirdly (by Blackburn, Keating, Grove and Archibald, JJ., Brett, dissenting), that the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable

damages,¹⁵ but it may be stated here that in an action for the death of the husband, the reasonable probability of the continuance of life of the deceased and of the widow may be factors, or as it has been more exactly expressed, in estimating damages to the widow the probable duration of the joint lives of herself and husband should be considered, and this probability is such as the jury may find reasonable under the circumstances.¹⁶ So the life expectancy of a deceased child and of the parent are important,¹⁷ and it may be given in evidence without being specially pleaded.¹⁸ Nor does plaintiff's failure to prove the same preclude recovery, for although the evidence of experts is admissible in proof thereof, it is not necessary. The statute con-

duration of the life of a person of the same age and in the same circumstances as the deceased was an element to be taken into the calculation of the jury with the rest of the evidence and being so construed was correct. The facts of the case were these: The deceased was an attorney and by articles of partnership between his father and himself, he covenanted to pay his mother an annuity of £200 during the joint lives of himself and mother. He was 40 years old at the time of his death, and his mother 61 years old at that time. *Rowley v. London & N. W. Ry. Co.*, L. R. 8 Ex. 221; 42 L. J. Ex. 153; 29 L. J. 180; 21 W. R. 869.

¹⁵ See sec. 528, herein.

¹⁶ *Baltimore & Reistertown Twp. v. State*, Grimes, 71 Md. 573, 583, 584; 18 Atl. 884, per Robinson, J., citing *Philadelphia, W. & B. R. Co. v. State*, Bitzer, 58 Md. 372; *Cumberland & P. R. Co. v. State*, Hogan, 45 Md. 234; *Baltimore & O. R. Co. v. State*, Woodward, 41 Md. 268; *Baltimore & O. R. Co. v. State*, Trainor, 33 Md. 542. See also *Paschal v. Owen*, 77 Tex. 583; 14 S. W. 203, where the life expectancy of deceased was considered. *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex.

Civ. App. 271; 51 S. W. 558, aff'd 54 S. W. 240, where the deceased's life expectancy was 35 years. *Tyler, S. E. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185; 34 S. W. 794; 3 Am. & Eng. R. Cas. N. S. 376, husband's life expectancy was 35 years. *Rowley v. London & N. W. Ry.*, 42 L. J. Ex. 153; L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R. 869. See digest of this case in full under sec. 539, herein.

¹⁷ *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, per Maxey, J., charging the jury. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 502, 503; 7 S. W. 857, per Walker, Assoc. J. *Missouri K. & T. R. Co. v. Gilmore* (Tex. Civ. App. 1899), where it was admitted that a minor child had an expectancy of life until majority. *International & G. N. R. Co. v. McNeel* (Tex. Civ. App.), 29 S. W. 1138. The surviving mother's expectancy of life was over 28 years. *Mexican Nat. R. Co. v. Finch* (Tex. Civ. App.), 27 S. W. 1028. Surviving mother's expectancy was 13½ years.

¹⁸ *International & G. N. R. Co. v. Knight*, 91 Tex. 660; 45 S. W. 556; 4 Am. Neg. Rep. 79, rev'g 45 S. W. 167.

templates that the jury shall judge of this upon evidence of age and physical condition.¹⁹ So mortuary tables included in an insurance manual are admissible upon being shown to be reliable and standard authority with insurance men; and American experience tables published in the United States,²⁰ and mortality tables are properly admitted even though they do not consider the vocations of men,²¹ and even though plaintiff is in poor health.²² So a life insurance agent, familiar with mortuary tables and having had experience thereunder, is a competent witness.²³ But annuity tables do not govern in estimating the value of deceased's life, for the jury must give what they consider fair damages.²⁴ And however useful such evidence may be, courts cannot hold juries bound by statistics or calculations of life expectancies.²⁵ Again, a book containing tables of expectation of years cannot be shown in evidence in the absence of proof of its correctness where it is not one of those standard works of which courts take judicial notice and recognize as authority.²⁶

§ 541. Damages proportioned to the injury—Nominal damages.—In England the action does not lie merely for nominal damages,²⁷ and the right thereto is not given by mere proof of

¹⁹ *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667. See also *Armsworth v. Southeastern Ry.*, 11 Jur. 758.

²⁰ *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826. Life tables are admissible to show a deceased husband's life expectancy, even though they have no reference to the widow's age. *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152. Properly authenticated life tables used by insurance companies are admissible. *Gulf, C. & S. F. R. Co. v. Smith* (Tex. Civ. App.), 26 S. W. 644. Deceased's life expectancy as shown by approved tables is to be considered. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297, 304, per Bonner, Assoc. J.

²¹ *Gulf, C. & S. F. R. Co. v. Johnson* (Tex. Civ. App.), 31 S. W. 255.

²² *Galveston, H. & S. A. R. Co. v. Leonard* (Tex. Civ. App.), 29 S. W. 955.

²³ *International & G. N. R. Co. v. Kuehn* (Tex. Civ. App.), 21 S. W. 58.

²⁴ *Armsworth v. Southeastern Ry.*, 11 Jur. 758.

²⁵ *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56, 61; 12 S. W. 955, per Henry, Assoc. J.

²⁶ *Galveston, H. & S. A. R. Co. v. Arispe*, 81 Tex. 517; 17 S. W. 47; 48 Am. & Eng. R. Cas. 350. In this case plaintiffs introduced in evidence a book entitled "A Million of Facts; Conkling's Handy Manual of Useful Information and Atlas of the World, all for twenty-five cents."

²⁷ *Boulter v. Webster*, 11 L. T. 598; 13 W. R. 298.

the death and the relationship of the parties, since actual damages must have accrued from the death.²⁸ In Arizona the defendant may object to a remittitur reducing the verdict to nominal damages, where they have been unlawfully fixed by the plaintiff of record and the defendant is thereby left open to the danger of another suit by some of the persons entitled.²⁹ In Maryland it is decided that the recovery is not limited to a nominal sum merely because of the separation of deceased from his family and noncontribution to their support,³⁰ and in that state proof of age, etc., is not necessary to warrant such a recovery.³¹ Again, the fact that the deceased had contributed nothing to the support of his wife or child for about twelve years, during which time he had been separated from them, is held not to prevent the recovery of more than nominal damages for their benefit.³² In South Carolina it is not required to prove pecuniary damages in an action for an infant's death.³³ But in Texas the statute limits the recovery, and where there is no proof of the value of services of a deceased wife, nor of any expectation of pecuniary benefit, the doctrine of nominal damages does not apply.³⁴ Opposed, however, to this decision, is an earlier case in which it is declared that if the killing of a child was wrongful, etc., the parents are entitled to recover at least a nominal sum,³⁵ al-

²⁸ *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. N. S. 630; 7 W. R. 656; 10 Mew's Eng. Dig. (1898) p. 111. See also *Bourke v. Cork & Macroom Ry.*, 4 L. R. Ir. 282, where there was no evidence of reasonable expectation of pecuniary benefit, although the death and certain other facts were proven, yet judgment was for defendant. That it is not necessary to show pecuniary advantage in case of death of minor child, see *Ricketts v. Markdale* (Div. Ct.), 31 Ont. 610; *Rombough v. Balch*, 27 Ont. App. 32.

²⁹ *Southern P. R. Co. v. Tomlinson*, 163 U. S. 369; 41 L. Ed. 193; 16 Sup. Ct. Rep. 1171, under Ariz. Rev. Stat. 1887, secs. 2145, 2155.

³⁰ *Baltimore & O. R. Co. v. State*,

81 Md. 371, 389; 32 Atl. 201. See quotation from this case under sec. 531, herein.

³¹ *Baltimore & O. R. Co. v. State*, Kelly, 24 Md. 271, 280.

³² *Baltimore & O. R. Co. v. State*, Chambers (Md.), 32 Atl. 201.

³³ *Mason v. Southern Ry.*, 58 S. C. 70; 36 S. E. 440; 79 Am. St. Rep. 826.

³⁴ *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 293; 20 S. W. 80; *Galveston, H. & S. A. R. Co. v. Gormley* (Tex. Civ. App.), 27 S. W. 1051.

³⁵ *Brunswick v. White*, 70 Tex. 504; 8 S. W. 85, per Walker, Assoc. J.; *id.* pp. 508, 512. See also *Austin Rap. Trans. R. Co. v. Cullen* (Tex. Civ. App.), 29 S. W. 256, rehearing denied 30 S. W. 578.

though it is also decided that it is not necessary to specially plead the fact in order to show generally the services of a wife and that the mere claim of damages is sufficient.³⁵

§ 542. Damages proportioned to the injury—Death of husband—Husband and father.—Outside of the general elements of damages fully considered elsewhere,³⁷ the legal and actual relations sustained by deceased to the other members of the family is important, and this includes the fact whether or not the husband and wife were living together or separately.³⁸ Again, it is the duty of the head of a family to support his wife and children, and the presumption is that he would have continued to discharge that duty.³⁹ So that the consequent, legal and actual dependency should be considered, extent of aid furnished,⁴⁰ as well, also, as the condition in life of deceased.⁴¹ These matters further embrace the reasonable prospect of pecuniary benefit to the survivor or survivors.⁴² Again, the loss of deceased's advice and counsel may, in some cases, be a proper element of damages, although no recovery can be had in an action for the death itself for mental and physical suffering of deceased, nor can damages be had for the loss of his society, nor for mental anguish of the survivors.⁴³ But if the statute specifies the class of beneficiaries entitled to recover, their number, ages and sex become important.⁴⁴ The petition, however, by a widow and child to recover for the negligent killing of their husband and father, need not allege, as against a general demurrer, that they were damaged, where the prayer is for a specified sum as damages and the other allegations, are sufficient to show a cause of

³⁵ *Gulf, C. & S. F. R. Co. v. Younger* (Tex. Civ. App.), 40 S. W. 423; *Chapman v. Rothwell, El. & Bl.* 168; 27 L. J. Q. B. 315; 4 Jur. (N. S.) 1180.

³⁷ See sec. 528, herein.

³⁸ See secs. 531, 554, herein.

³⁹ *St. Louis, Ark. & Tex. R. Co. v. Johnston*, 78 Tex. 536; 15 S. W. 104, per *Gaines, Assoc. J.*

⁴⁰ See sec. 531, herein.

⁴¹ See sec. 528, herein.

⁴² See secs. 535, 536, herein. See

also *Louisiana W. E. R. Co. v. Carstens*, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781; *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826; *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 35 S. W. 829; *Missouri P. R. Co. v. Bond* (Tex. Civ. App.), 30 S. W. 930.

⁴³ See sec. 530, herein.

⁴⁴ See sec. 535, herein.

action.⁴⁵ Again, under an English decision, the representatives may maintain an action for the benefit of the surviving widow and younger children, even though there was a settlement of the bulk of the property of deceased upon the eldest son, and the loss of education and comforts and conveniences of life to them may be considered with reference to their reasonable expectations of pecuniary benefit from his continued life.⁴⁶ So the widow may recover for damages occasioned to deceased's personal estate where he dies after an interval, in consequence of an accident through defendant's negligence.⁴⁷ And there may be a recovery by the widow and children, even though there is no evidence of the life expectancy, nor of the sum which would purchase the equivalent of the pecuniary benefit reasonably to be expected from the continuance of deceased's life.⁴⁸ But where

⁴⁵ So held in *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922. A widow bringing an action as administratrix does not sue in the same right as in an ordinary action, but as trustee for a specific class of persons under the English statute. *Leggott v. Great Northern Ry.*, 45 L. J. Q. B. 557; 1 Q. B. D. 599; 35 L. T. 334. As to liberty of father and mother to appear at trial in action by widow and administratrix, see *Steele v. Great Northern Ry.*, 26 L. R. Ir. 96.

Evidence. In an action by a widow for damages for her husband's death brought against the same defendant's as those in the suit by her husband brought during his lifetime, but abating by his death, his examination de bene esse is admissible where he was cross-examined by said defendants (*Erdman v. Walkerton*, 20 Ont. App. 444), but evidence of the cost of raising a child is inadmissible. *International & G. N. R. Co. v. Kuehn* (Tex. Civ. App.), 21 S. W. 58.

⁴⁶ *Pym v. Great Northern Ry.*, 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. N. S. 199; 8 L. T. 734; 11 W. R. 922.

⁴⁷ *Bradshaw v. Lancashire & Yorkshire Ry.*, 44 L. J. C. P. 148; L. R. 10 C. P. 189; 31 L. T. 847; 23 W. R. 310.

Excessive or absurd damages. The court will interfere where the damages awarded the widow and children are excessive (*Secord v. Great Western Ry.*, 15 Q. B. 631 [Ont.]), or where they are so small as to be absurd. *Springett v. Balls*, 6 B. & S. 477. In *Galveston, H. & S. A. R. Co. v. Miller* (Tex. Civ. App. 1900), 57 S. W. 702, \$10,000 in favor of the widow and \$5,000 for each of two children was held excessive. But in *Missouri, K. & T. R. Co. of T. v. Ferris*, 23 Tex. Civ. App. 215, \$10,000 in favor of the wife and children was held not excessive. So in *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, aff'd 54 S. W. 240, \$15,000 in favor of the widow and two small children was held not excessive. See further as to excessive damages, sec. 528, and note herein.

⁴⁸ *Ft. Worth & R. G. R. Co. v. Kime*, 21 Tex. Civ. App. 271; 51 S. W. 558, aff'd 54 S. W. 240.

the husband was accustomed to give his monthly earnings to his wife, an instruction is erroneous which directs the jury to assess her damages in such sum as they believe from the evidence she would probably have received in a pecuniary way from deceased, since the jury may infer that the sums she would have probably received from said earnings was the measure of damages.⁴⁹ Again, it is decided that a deceased husband's earnings do not limit the widow's recovery,⁵⁰ since she is entitled to such a sum as will compensate her for the loss of the pecuniary benefits she would have probably received except for her husband's death.⁵¹ But an instruction which directs the jury to assess a widow's damages for killing her husband, in such sum as they believe from the evidence she would probably have received in a pecuniary way from her husband had he lived, is

⁴⁹ *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 51 S. W. 536.

⁵⁰ *Louisiana West. Extension R. Co. v. Carstens*, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781. See also *Missouri & P. R. Co. v. Lehmborg*, 75 Tex. 61; 12 S. W. 838; *Baltimore & O. R. Co. v. State, Chambers*, 81 Md. 371; 32 Atl. 201; *State, Grice, v. County Commrs.*, 54 Md. 426; *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 276, 280-282; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829. See also sec. 528, herein.

⁵¹ *Louisiana West. Exten. R. Co. v. Carstens*, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781. See further as to damages recoverable by widow or widow and children. *Baltimore & Reistertown Twp. v. State, Grimes*, 71 Md. 573; 18 Atl. 884; *Baltimore & O. R. Co. v. State, Woodward*, 41 Md. 268; *Baltimore & O. R. Co. v. State, Kelly*, 24 Md. 271; *Strother v. South Car. & G. R. Co.*, 47 S. C. 375; 25 S. E. 272; 5 Am. & Eng. R. Cas. N. S. 430; *Galveston, H. & S. A. R. Co. v.*

Worthy, 87 Tex. 459; 29 S. W. 376; *St. Louis, Ark. & T. R. Co. v. Johnston*, 78 Tex. 536; 15 S. W. 104; *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61; 12 S. W. 838; *International & G. N. R. Co. v. McDonald*, 75 Tex. 41; 12 S. W. 860; *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 51 S. W. 536; *Louisiana West. Ext. R. Co. v. Carstens*, 19 Tex. Civ. App. 190; 12 Am. & Eng. R. Cas. N. S. 781; *Chicago, R. I. & T. R. Co. v. Porterfield*, 19 Tex. Civ. App. 225; 46 S. W. 919, aff'd 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 383; 4 Am. Neg. Rep. 461; *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826; *Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152; *Hicks v. Newport, A. & H. Ry.*, 4 B. & S. 403 n.; *Rowley v. London & N. W. Ry.*, L. R. 8 Ex. 221; 42 L. J. Ex. 153; 29 L. J. 180; 21 W. R. 869. See this case under sec. 539 herein as to annuities. *Pym v. Great Northern Ry.*, 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. (N. S.) 199; 8 L. T. 734; 11 W. R. 922.

erroneous, when his disposition of his earnings was to give them all to her, since the jury might well infer that they should ascertain what sums she would probably have received from such earnings.⁵² Again, where the parents have in fact no right to recover and it is alleged by a widow in an action for her husband's death that such parents are joined merely for a final adjudication of their rights, and that they resided in a foreign country, and did not receive and would not have received any pecuniary aid from the deceased, such petition does not show a want of good faith in suing for the benefit of all the parties entitled to recover under the Texas statute.⁵³

§ 543. Damages proportioned to the injury — Death of wife.—In determining the husband's right to damages for his wife's death, not only their actual and legal relations should be considered,⁵⁴ but also his reasonable expectation of pecuniary benefit;⁵⁵ and he can recover not only for the actual injury resulting to him from her death,⁵⁶ but he is entitled to the pecuniary value of her services less the cost of suitably and properly maintaining her,⁵⁷ and he sustains a substantial loss where he is obligated to replace her household services by hired labor. Again if there are children, the mother's care and moral training should be considered.⁵⁸ But where a husband and child survive, it does not necessarily follow that he has sustained damage

⁵² *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 51 S. W. 536. Deceased was a brakeman and widow was held entitled to recover for the loss of the pecuniary benefits she would have received. *Louisville Western Ex. R. Co. v. Carstens*, 19 Tex. Civ. App. 190; 47 S. W. 36; 12 Am. & Eng. R. Cas. N. S. 781.

⁵³ *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829.

⁵⁴ *Harrison v. L. & N. W. Ry.*, 1 Cab. & E. 540. See also sec. 531 herein.

⁵⁵ *Harrison v. L. & N. W. Ry.*, 1 Cab. & E. 540; *McGown v. International & G. N. R. Co.*, 85 Tex. 289;

20 S. W. 80. See also secs. 535, 536, herein.

⁵⁶ *Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 583, 584; 15 S. W. 573; *McGown v. International & G. N. R. Co.*, 85 Tex. 289; 20 S. W. 80; *St. Lawrence & Ottawa R. W. Co. v. Lett*, 11 S. C. R. (Ont.) 422, aff'g 11 A. R. 1, which rev'd Q. B. D. (1 O. R. 54). See sec. 530, herein,

⁵⁷ *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.), 30 S. W. 592.

⁵⁸ *St. Lawrence & Ottawa R. W. Co. v. Lett*, 11 S. C. R. (Ont.) 422, aff'g 11 A. R. 1, which rev'd Q. B. D. (1 O. R. 545). As to evidence of services see sec. 539, herein.

because the child is damaged by the killing of the wife and mother.⁵⁹

§ 544. Damages proportioned to the injury—Death of parent.—What we have said elsewhere in regard to the death of the husband and father applies here.⁶⁰ Primarily it is the duty of a father to support his minor children,⁶¹ but this legal right of minors does not preclude an action by an adult child for the parent's death.⁶² And a child unborn or a posthumous child is within the word "children" and is a surviving child under the Texas statute, giving the right to sue for a parent's death.⁶³ So a minor daughter who is living with her mother, from whom her father is divorced, is entitled to damages for his negligent killing, where the decree of divorce failed to provide for such child, and it does not appear that he had aided in her support.⁶⁴ It may, however, be generally stated that in assess-

⁵⁹ *Kerry v. England* (P. C.), (1898) A. C. 742; 67 L. J. P. C. N. S. 150. *Examine Davies v. Thompson* (Tex. Civ. App.), 50 S. W. 1062. See sec. 526, herein.

⁶⁰ See sec. 542, herein.

⁶¹ *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922; *Linskie v. Kerr* (Tex. Civ. App.), 34 S. W. 765, also holding that such support must be given out of the father's property, and not out of the child's, unless absolutely required. *St. Louis, Ark. & Tex. R. Co. v. Johnson*, 78 Tex. 536; 15 S. W. 104, per *Gaines, Assoc. J.*

⁶² *Petrie v. Columbia & G. R. Co.*, 29 S. C. 308; 7 S. E. 515. A case of a mother's death. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 648, 653; 11 S. W. 127, holding that an adult is included within the word "children," for the statute makes no distinction upon the ground of age. The action here was for the death of a mother.

⁶³ *Texas & P. R. Co. v. Robertson*, 82 Tex. 657; 17 S. W. 1041; 27 Am.

St. Rep. 929; *Nelson v. Galveston, H. & S. A. R. Co.*, 78 Tex. 621; 14 S. W. 1021; 22 Am. St. Rep. 81; 11 L. R. A. 391. And under Lord Campbell's Act a child in ventre sa mere may recover after its birth for a father's death prior to such birth. *The George & Richard, L. R.* 3 Adm. 466; 24 L. T. 717; 20 W. R. 246. In *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61; 12 S. W. 838, one of the children was born a month after his father's death, but the question was not discussed. See secs. 522, 523, herein as to statutes.

⁶⁴ *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922. But the petition in behalf of a minor child should allege directly or state inferential facts showing that he is a child of the deceased wife (*Gulf, C. & S. F. R. R. Co. v. Younger* (Tex. Civ. App.), 29 S. W. 948), although a mother as next friend is entitled to recover damages for the father's death, but if the recovery exceeds \$500, she can only collect the same upon qualifying

ing the sum to be awarded minor children, they should be given such pecuniary damages as will compensate them for what they have suffered, or will suffer as the direct consequence of the parent's death.⁶⁵ And every parent has for his children a pecuniary value, beyond the amount of his earnings.⁶⁶ So in the case of both minor and adult children, the reasonable expectation of pecuniary benefit should be considered, including past and prospective losses or benefits.⁶⁷ And in the case of adults especially, this expectation must be based largely upon the legal and actual relations sustained between them and deceased, and also upon their dependency and the aid and assistance rendered of necessity or otherwise. These last two questions are, however, fully considered herein under their respective headings.⁶⁸ In Texas where a minor daughter had a legal right to support,

as guardian. *International & G. N. R. Co. v. Sein*, 11 Tex. Civ. App. 386; 33 S. W. 558, under *Sayle's Tex. Civ. Stat. art. 1211a*, as am'd by act of February 11, 1893. Where damages were awarded on an improper basis for the death of a parent, and there was no cross appeal to sustain the verdict, the action was dismissed with costs in *City of Montreal v. Labelle*, 14 S. C. R. (Ont.) 741.

⁶⁵ *Baltimore & R. Twp. v. State*, Grimes, 71 Md. 573, 583, 584; 18 Atl. 884, per Robinson, J. Action was for use of widow and infant children.

⁶⁶ *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61, 67, 68; 12 S. W. 838, per Henry, Assoc. J.

⁶⁷ *Baltimore & O. R. Co. v. State*, Mahone, 68 Md. 135, 145, per Robinson, J.; *Baltimore & O. R. Co. v. State*, Hauer, 60 Md. 449; *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387; 38 S. W. 1121; *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148, 152, 153; 27 S. W. 113; 47 Am. St. Rep. 87; *Texas & N. O. R. Co. v. Brown*, 14 Tex. Civ. App. 697; 39 S. W. 140; *St. Louis, S. & W. B. Co. v. Bishop*, 14 Tex. Civ. App. 504; 37 S. W. 764; *Pym v. Great Northern Ry.* 4 B. &

S. 396; 32 L. J. Q. B. 377; 10 Jur. N. S. 199; 8 L. T. 734; 11 W. R. 922.

⁶⁸ See secs. 531, 534, herein. See further as to death of parents generally, *State, Grice, v. County Commrs.*, 54 Md. 426; *International & G. N. R. Co. v. McDonald*, 75 Tex. 41; 12 S. W. 860; *International & G. N. R. Co. v. Ormond*, 64 Tex. 485; *Davies v. Thompson* (Tex. Civ. App.), 50 S. W. 1062; *San Antonio & A. P. R. Co. v. Long*, 19 Tex. Civ. App. 649; 48 S. W. 599; *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; 41 S. W. 826; *International & G. N. R. Co. v. Kuehn* (Tex. Civ. App.), 21 S. W. 58; *Kerry v. England* (P. C.) (1898), A. C. 742; 67 L. J. P. C. N. S. 150; *Appleby v. Horsely Co.* (No. 1) (C. A.), 68 L. J. Q. B. N. S. 892 (1899); 2 Q. B. 521; *Condill v. Condill*, 29 L. T. 83; 22 W. R. 325; *Springett v. Balls*, 6 B. & S. 477; *Pym v. Great Northern Ry.*, 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. (N. S.) 199; 8 L. T. 734; 11 W. R. 922; *Hull v. Great Northern Ry.*, 26 L. R. Ir. 289; *Shallow v. Vernon, Ir. R.*, 9 C. L. 150; *Morley v. Great Western Ry.*, 16 Q. B. (Ont.) 504; *Secord v. Great Western Ry.*, 15 Q.

of which her father's death had deprived her, it was held that she was entitled to recover for his negligent killing, even though it was not proved that he had contributed to her support, and although her mother with whom she was living had been divorced. No provision, however, had been made for the daughter in the decree.⁶⁹ And where the mother, whose income was derived solely from her estate, had been able by reason of her superior management to provide in an increasing degree for not only the present but possible necessities of her children, even to the extent of furnishing them a home, and she was willing to furnish such aid although her estate would go to them upon her death, yet such facts were held to constitute a basis for pecuniary damage to them, consequent upon her negligent killing.⁷⁰ Again, a married daughter can recover damages for her father's death.⁷¹

§ 545. **Damages proportioned to the injury—Death of parent—Care, training, etc., of children.**—A mother owes to her children the duty of nurture, and of intellectual and moral and physical training, and of such instruction as only can proceed from her, and these are elements which relate to their future welfare and success in life, and in the absence of proof a jury might assess damages in such cases based upon the common knowledge of the manner in which mothers commonly perform such duties, although the temperament and education of the mother and other circumstances may affect the manner of rendering such aid to children. Again, the wealth or poverty or the surroundings of the child or mother may affect the question of the aid, culture, moral and intellectual training of a child. Therefore these facts may all be considered and this would also include as an element of damages in an action for a mother's death, the financial condition of the husband as head of the family.⁷² So under an English decision it is declared that the

B. (Ont.) 631. As to death of father and stepmother, see *Johnston v. Great Northern Ry.*, 26 L. R. Ir. 691.

⁶⁹ *International G. W. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; 46 S. W. 922.

⁷⁰ *San Antonio & A. P. R. Co. v. Long*, 19 Tex. Civ. App. 649; 48 S. W. 599.

⁷¹ *Texas & P. R. Co. v. Martin* (Tex. Civ. App. 1901), 60 S. W. 803.

⁷² *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378, per Brown, J.; *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.), 30 S. W. 592; *St. Lawrence & Ottawa R. W. Co. v. Lett*, 11 S. C. R. (Ont.) 422, aff'g 11

loss of advantages to minor children, as well also as of the greater comforts and conveniences of life, depends on the possession of pecuniary means to procure them, and where the father's income ceases with his life, a pecuniary injury is sustained.⁷³

§ 546. Damages proportioned to the injury—Death of parent—Children's majority.—In Maryland where the action was for the use of the widow and her infant children, the court instructed the jury that as to the latter, prospective damages could be estimated to their majority,⁷⁴ and this instruction followed a prior decision in the same state which limited such recovery to said period.⁷⁵ But in Texas the contrary rule has been asserted.⁷⁶

§ 547. Damages proportioned to the injury—Death of children—Generally.—In Texas the father and mother may join in an action for the death of their child.⁷⁷ So where a

A. R. 1, which rev'd Q. B. D. (1 O. R. 545), holding that loss to the children of the care and moral training of their mother are grounds of damages.

⁷³ *Pym v. Great Northern Ry. Co.*, 2 Best & S. 759; 31 L. J. Q. B. 249; 10 Wkly. R. 787, per Cockburn, C. J., aff'd 4 Best & S. 396; 32 L. J. Q. B. 377; 11 Wkly. R. 922.

⁷⁴ *Baltimore & R. Twp. v. State*, Grimes, 71 Md. 573; 18 Atl. 884, and cases cited.

⁷⁵ *Baltimore & O. R. Co. v. State*, Trainor, 33 Md. 542.

⁷⁶ *Tyler S. & E. R. Co. v. Rasberry*, 13 Tex. Civ. App. 185; 34 S. W. 794; 3 Am. & Eng. R. Cas. N. S. 376.

⁷⁷ *Texas & P. R. Co. v. Hall* (Tex.), 19 S. W. 121. And a stepfather may be joined after suit brought by the mother of deceased. *San Antonio St. R. Co. v. Cailloute*, 79 Tex. 341; 15 S. W. 390. So a widow suing for her husband's death may sue also for the use and benefit of her husband's parents, even though they

have no knowledge thereof, where such suit is for the purpose of final adjudication of their rights notwithstanding such parents could not recover. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; 38 S. W. 829. As to right of father to have his name added as a party to the record and liberty granted to appear by counsel, and put in evidence at the trial, see *Johnston v. Great Northern Ry.*, 20 L. R. 4, and see *Van Wart v. New Brunswick Ry.*, 27 Supr. Ct. Jud. (N. B.) 59, rev'd on App. to Sup. C. C. Vol. 17, p. 35. Where a child sues for his own personal injuries and dies after verdict but before judgment signed, a new trial was refused. *Kramer v. Waymark*, 4 H. & C. 427; 35 L. Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N. S.) 395; 14 L. T. 368; 14 W. R. 659. An unmarried man having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time

husband had abandoned his wife and contributed nothing to her support for many years and she brought an action in her own name, without joining her husband, to recover for the loss by the negligent killing of her son who had supported her, nevertheless, if the husband had received any pecuniary benefit from the son during his life, the damages should be apportioned between them for the amount both would have received, but otherwise, in absence of a finding of any such benefit received by the father.⁷⁸ If the child is legitimate,⁷⁹ the measure of damages for its death is based primarily upon the value of the child's services, combined with the reasonably probable pecuniary benefit which the parent or parents would have received except for the killing. This necessarily involves a consideration of the child's age, health, strength, mental and physical capabilities by way of usefulness, ability to earn a livelihood and to render aid, assistance or support to his parents, coupled also with the fact of what the child has done in that connection. Other considerations are also involved and are considered elsewhere herein, such as legal and actual relations between deceased and the survivors, and the general elements of damages so far as applicable to children of deceased's age; and the dependency of parents is a material element.⁸⁰ Again,

was brought by the paternal grandfather and grandmother of the deceased, and the second by his mother who had obtained letters of administration to his estate after the bringing of the first action upon a motion by the mother to stay one or the other of the actions. Held that while the grandfather and grandmother could legally proceed with their action under Rev. St. Ont. 1897, ch. 166, although brought within six months of the death, so long as there was no executor or administrator, yet, an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it and the first action was the one to be stayed. *Lampman v. Township of Gainsborough* (1888), 17 Ont. R. 191, and *Hol-*

leran v. Bagnell (1879), 4 L. R. Ir. 740, explained and followed. Held also that the administrator would have the right in her action to claim damages sustained by the personal estate of the deceased. *Leggott v. Great Northern R. Co.* (1876), 1 Q. B. D. 599, followed; syllabus to *Mumery v. Grand Trunk R. W. Co.*; *Whalls v. Same*, 1 Ont. L. R. 622.

⁷⁸ *Missouri P. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828.

⁷⁹ See as to illegitimate children, sec. 523, herein and notes.

⁸⁰ In *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496; 7 S. W. 857, deceased was the oldest son of his widowed mother. He was sober, industrious and economical. He worked for his mother and aided her with advice and counsel. His devotion to her

in determining whether or not the parent has sustained damages by her daughter's death, the loss none the less exists, because the deceased's means of aiding her mother were derived from her husband.⁵¹ But there must be some showing of a pecuniary loss actually sustained according to the English decisions; thus, although there was a deprivation of the son's assistance, and an inability of the father to take contracts which

was such that the neighbors could testify to repeated declarations that he would support her as long as she lived. He was a farm hand, working for wages and his mother was a renter. The idea given in the testimony of this boy's character, habits, and person, was that of a prospective useful and prosperous citizen from whom the mother, but for his being killed, would have received assistance greater probably than that given her by the verdict. *Id.* 503, per Walker, Assoc. J., who also said (*id.* 502, 503): "The measure of damages given by the court is 'such sum as you may under the circumstances reasonably believe plaintiff might have received from the assistance of Robert E. Lee (the deceased) had he not been killed by the train of defendant, and you may in estimating such sum, if any, consider under the evidence before you, the age of said deceased, the time he might have lived, the age of the plaintiff, the time she may probably live and any other evidence tending to show what damages, if any, she may have suffered by the killing of said Robert E. Lee. . . . You will find for plaintiff such damages under the instructions hereinbefore given as you may think will compensate her for the loss, if any, she may have sustained by the killing,' etc. We do not believe the word 'might' instead of 'would' could have misled the jury as descriptive of the pecuniary benefits antici-

pated, nor does it appear that the enumeration of subjects of consideration necessarily or even probably extended the limits of investigation by the jury beyond what, from the testimony, plaintiff reasonably would have received had her son lived, nor is the further clause as to compensation misleading, for express reference is made to the preceding part of the charge. The true measure is 'a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died.' *City of Galveston v. Barbour*, 62 Tex. 172, 741; *International & G. N. R. Co. v. Ormond*, 64 Tex. 485, 490; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293; *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19; *Rev. Stat.* 2609." See also as supporting the last clause in the above opinion as to "true measure," etc., *Galveston, H. & S. A. R. Co. v. Hughes* (Tex. Civ. App. 1899), 54 S. W. 264. See further as supporting the above text, *Galveston, H. & S. A. R. Co. v. Ford* (Tex. Civ. App. 1899), 54 S. W. 37; *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640; *Chicago, Rock Isl. & T. R. Co. v. Porterfield*, 19 Tex. Civ. App. 225; 46 S. W. 919; 4 Am. Neg. Rep. 461, *aff'd* 49 S. W. 361; 12 Am. & Eng. R. Cas. N. S. 383. See secs. 531, 534, *herein*.

⁵¹ *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.), 30 S. W. 592.

he had taken during his son's lifetime, yet, where such son had received from his father the wages of a skilled laborer, it was determined that there was no pecuniary loss.⁸² Again, where the mother of deceased was one of the plaintiffs, the fact that she had been allowed an annuity of £200, during their joint lives under a personal covenant was a factor.⁸³ Again, the legal or moral obligation of a child to support his parent has been considered.⁸⁴

§ 548. Damages proportioned to the injury—Death of minor children.—The loss of services of a minor child constitutes a ground of action by the parents,⁸⁵ or by the mother as sole surviving parent,⁸⁶ and the husband and wife may recover jointly, since they are equally entitled in case of their child's death.⁸⁷ Again, in determining the value of such minor's services, the fact that she was bright and intelligent and rendered such aid in the household duties as enabled her mother to use her time to a pecuniary advantage will be evidential facts and the question of such value is for the jury.⁸⁸ And although such

⁸² *Sykes v. Northeastern Ry.*, 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473. See sec. 525 herein, as to pecuniary interest.

⁸³ *Rowley v. London & N. Ry. Co.*, L. R. 8 Exch. 221.

⁸⁴ *Weems v. Mathleson*, 4 Macq. H. L. 215. See sec. 531, herein.

⁸⁵ *Sternenberg v. Mailhos* (U. S. C. C. A. 5th C. E. D. Tex.), 99 Fed. 43. See *Gulf, C. & S. F. R. Co. v. Beall*, 91 Tex. 310; 42 S. W. 1054; 41 L. R. A. 807, and note. See *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 431; 48 Am. Rep. 297, per *Stayton, Assoc., J.*, quoted from in sec. 550 herein as to adults. It is error to submit the issue to the jury of defendant's liability where the minor was in defendant's employ without the parent's consent. *Gulf, C. & S. F. R. Co. v. Vieno* (Tex. Civ. App.), 28 S. W. 230.

⁸⁶ But the petition should allege the value of the child's services to

recover exemplary damages, even if the statute allows such damages. *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667. See *State, Coughlin, v. Baltimore & O. R. Co.*, 24 Md. 84, 107; 87 Am. Dec. 600, per *Bowie, C. J.*; *Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 225; 7 S. W. 709, per *Stayton, C. J.* But a mother has no standing in the maritime court of Ontario not having sued as personal representative of the child. In re *The Garland*; *Mona-ghan v. Horn*, 7 S. C. R. (Ont.) 409.

⁸⁷ *Brunswick v. White*, 70 Tex. 504, 512; 8 S. W. 85.

⁸⁸ *Brunswick v. White*, 70 Tex. 504, 508-512; 8 S. W. 85, per *Walker, Assoc., J.* In this case deceased was 6 years old, was in good health, with the exception of a few chills, and was of great assistance in the household, caring for the baby, helping to wash dishes and sweep and rendering other important services.

minor is of tender years, the facts that he had begun to be of some service, that he was well grown, kind and dutiful, of fine mind and able-bodied, have been considered. So notwithstanding an absence of evidence of actual earnings, and although it is not reasonable to suppose that a very young child could find employment by which wages might be earned, still it cannot be said that the parents have suffered no pecuniary injury by its death.⁸⁹ So the habits and energy of deceased are proper elements.⁹⁰ And a value may be placed upon a child's services even though he has never earned wages. So the probability may be considered that he would have devoted a part of such earnings to his widowed mother's support, and the deceased's past filial conduct will increase such probability.⁹¹ Under the English

See quotation from opinion in this case in note to sec. 527 herein. In *Wolfe v. Great Northern Ry.*, 26 L. R. Ir. 548, the deceased daughter was 10 years old and rendered such services to her parents as enabled them to dispense with a servant, they having employed one two years before. But after the child's death they were again obliged to employ hired help. The exact value of the child's services was not proven. It was declared however that there was sufficient evidence for a finding of some pecuniary value for deceased's services. But in *Bourke v. Cork & Macroom Ry.*, 4 L. R. Ir. 282 (10 Mew's Eng. Dig. 1898, pp. 107, 108), the action was by a father for the death of a son, aged about 14 years. It did not appear that the plaintiff had ever received from the deceased benefits or services which could in any sense be regarded as of any pecuniary value. It was, however, proved that the child was, up to the time of his death, a strong, intelligent and well-disposed boy, that he had been receiving a school education for mercantile pursuits and that in a few years, if he had lived, his services would have been worth a sub-

stantial sum in the plaintiff's own shop or a similar establishment. The plaintiff himself was a respectable salesman and his position rendered him independent of any earnings which his son might have been afterwards competent to gain. Held that there was no evidence to enable the jury to say it was reasonably probable that pecuniary benefit would have resulted to the father from the continuance of the child's life and that defendants were entitled to judgment.

⁸⁹ *Ross v. Texas & Pac. R. Co.* (U. S. C. C. W. D. Tex.), 44 Fed. 44, 47, 48, 49, per Maxey, J.

⁹⁰ *Missouri, K. & T. R. Co. v. Gilmore* (Tex. Civ. App. 1899), 53 S. W. 61. In this case deceased was 7 years old. He helped his father farm, worked willingly, was obedient, brought wood and water, was sound in mind and body and learned well at school. In *Austin Rapid-Transit R. Co. v. Cullen* (Tex. Civ. App.), 29 S. W. 256, rehearing denied, 30 S. W. 578, the child was 25 months old, obeyed his mother, understood what was said to him and was just beginning to talk.

⁹¹ *Condon v. Great Southern & W.*

Workmen's Compensation Act recovery may be had for a minor's death, although he had been employed only a short time before he was killed, where he turned over all his earnings to his parents and received from them such pocket money as they deemed right.⁸² But where the evidence was only of trifling household services, rendered incapable of estimation on a pecuniary basis, damages were denied.⁸³ In addition, much the same elements of damage enter into the amount recoverable for a minor child's death as we have stated under the last preceding section, the principal factor being the prospective pecuniary benefit which might have accrued to the parents had the child survived.⁸⁴ If the minor has reached an age where he can be of service to his parents, that should be considered, together with his ability, condition and disposition to aid them, evidenced by actual acts coupled with the parent's right to claim service, or, perhaps, the filial obligations of the child irrespective of legal claim may be of importance, at least as a guide in connection with other testimony, as where the son had promised to aid his parents. In such case that fact has been considered even though limited by an instruction that such promise could not be legally enforced. The child's age, etc.,⁸⁵ and that of the parents'⁸⁶ are important, and it has been said that the contingency of the son's marriage should be considered as affecting the fulfillment of his promises and ability in that respect.⁸⁷ Another factor also en-

Ry., 16 Ir. C. L. R. 415. See *Wolfe v. Great Northern Ry.*, 26 L. R. Ir. 548.

⁸² *Simmons v. White* (C. A.), 68 L. J. Q. B. N. S. 507 (1899); 1 Q. B. 1005, under act 1897. sec. 7, subd. 2.

⁸³ *Holleran v. Bagnell*, 6 L. R. Ir. 333; child here was 7 years old.

⁸⁴ See cases next cited. See sections 531, 535, herein.

⁸⁵ See cases cited in third following note. See section 528, herein.

⁸⁶ See section 537, herein.

⁸⁷ *Hall v. Galveston, H. & S. A. R. Co.* (U. S. C. C. W. D. Tex.), 39 Fed. 18, where the charge of Maxey, J., to the jury, covers in an exhaustive manner the elements of damage in an

action for the killing of a son, including also all the above points in the text. See also *Ft. Worth & Denver City R. Co. v. Morrison*, 93 Tex. 527; 56 S. W. 745 (Tex. Civ. App.), 56 S. W. 931, fully considered under sec. 531 herein. This case is cited in *San Antonio Tract. Co. v. White* (Tex. Supr. Ct. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323, and the court, per Williams, J., said: "The true measure of damages is compensation for the loss sustained by plaintiff from the death of her son." See further as to pecuniary benefits, *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667; 13 S. W. 667; *City of Galveston v. Bar-*

ters into the estimation of damages for the death of a minor child, especially where such minor is of very tender years, and that is the expense of rearing or maintaining and educating such child.⁹⁸ But it should likewise be considered that the father is entitled to all his son's earnings while he remains a minor under his control.⁹⁹

§ 549. Damages proportioned to the injury—Death of children—Minority and majority.—It is declared that in an action to recover for the wrongful, etc., death of a minor child, employee of a railroad company, the only respect in which his minority can be considered would be upon an inquiry whether or not the employer had used such care towards him as his years or inexperience would make necessary. But that if the action is for loss of services of such child, the rule would be different,¹⁰⁰ and the jury may consider the disposition and ability of the son, both before and after majority, to aid the father.¹ But not all the possible benefits which might have been received after majority should be considered, the damages being limited to such pecuniary advantages as might be reasonably expected after such period commenced.² And under a Federal decision

bour, 62 Tex. 172, 174; 50 Am. Rep. 519; *Hetherington v. Northeastern Ry.*, 51 L. J. Q. B. 495; 9 Q. B. D. 160; 30 W. R. 797; *Bourke v. Cork & Macroom Ry.*, 4 L. R. Ir. 282.

⁹⁸ *Ft. Worth & D. C. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435; 34 S. W. 677; 3 Am. & Eng. R. Cas. N. S. 397. See *Wolfe v. Great Northern Ry.*, 26 L. R. Ir. 548; *San Antonio Tract. Co. v. White* (Supr. Ct. Tex. 1901), 61 S. W. 706; 9 Am. Neg. Rep. 616, rev'g 60 S. W. 323. In *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N. S.) 630; 7 W. R. 655, there was no evidence of the cost of boarding and clothing the deceased son, and a verdict for £ 50 was retained. In *Brunswick v. White*, 70 Tex. 504, 512; 8 S. W. 85, *Walker, Assoc. J.*, said: "It is insisted also that the court should have limited

the value to probable net proceeds, excluding expenses of nurture, education, etc. We do not think that a jury of ordinary intelligence would need such a caution from the judge." See *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667, 674, 675; 13 S. W. 667.

⁹⁹ *Bonnett v. Galveston, H. & S. A. R. Co.*, 89 Tex. 72; 33 S. W. 334. And see as to obligation to support children, *Linskie v. Kerr* (Tex. Civ. App.), 34 S. W. 765.

¹⁰⁰ *Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 225; 7 S. W. 709, per *Stayton, C. J.*

¹ So held in *Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. Civ. App. 468; 23 S. W. 301, aff'd 23 S. W. 1019.

² *Ft. Worth & D. C. R. Co. v. Hyatt* (Tex. Civ. App.), 34 S. W. 677. See as to what is sufficient evidence of

the pecuniary benefits are not limited to those which the parents might have received during minority.⁸

contributions which the parent had a reasonable expectation of receiving after the son's majority, *San Antonio Tract. Co. v. White* (Tex. Civ. App. 1900), 60 S. W. 323, rev'd (Sup. 1901), 61 S. W. 706.

⁸ The damages are not restricted to such benefits as the plaintiffs might have received from the services of the son up to majority. The jury had a right to consider what reasonable expectations the plaintiff had of pecuniary benefits after majority was reached. The statutes provide for full pecuniary compensation for the parents for the loss of a son, and this is not restricted to the loss of benefits to which plaintiffs had a legal right. Much difficulty arises in assessing damages, and courts must avail themselves of all circumstances which may assist them in reaching a proper conclusion. In this case the son was over 18, was dutiful and evinced willingness to assist his parents by freely giving his earnings to his mother, and it was plainly proper to instruct as to reasonable expectation, that son would continue to assist after majority. *Texas & P. R. Co. v. Wilder* (U. S. C. C. A. 5th C. Tex.), 92 Fed. 953, 955, 956; 35 U. S. C. C. A. 105; 13 Am. & Eng. R. Cas. N. S. 520, per Parlance, Dist. J., citing *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350; *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667. See principal case also as to allegations of complaint. In the last cited case (75 Tex. 667; 13 S. W. 607), the deceased son was 18 years old and was employed with plaintiff's consent in defendant's shops and was sent out as a fireman, and was killed in a collision. It was

decided that a mother, who is a sole surviving parent, is entitled to services of son during his minority and is therefore entitled to recover, if at all, damages not only for the loss of such services during such period, but also for the loss of any prospective pecuniary benefits after he would have attained majority, for her right to recover is not restricted to minority and it is not error to refuse to charge that the measure of damages is limited to the value of services from death to the age of 21, less the cost of maintenance and support for said time. See this last case also as to allegations in action by mother. But see *Brunswick v. White*, 70 Tex. 504, 508-512; 8 S. W. 85, where the court seems in one part of its opinion to limit the recovery to the child's minority. There is an extended quotation from this case in an note to sec. 527, herein, and see *San Antonio Tract. Co. v. White* (Tex. Civ. App.), 60 S. W. 323; rev'd 61 S. W. 706; 9 Am. Neg. Rep. 616. Contra, in *Agricultural & M. Assoc. v. State*, Carty, 71 Md. 86; 18 Atl. 37; 17 Am. St. Rep. 507, it was decided that there could be no consideration of any expectation of pecuniary advantage beyond child's minority even though the son was emancipated 2 years before he was killed, and was working for himself, and had aided his father each year out of his wages, giving him over one half thereof, and it was also held that vague declaration or promise to aid after minority was too slight to base any reasonable expectation of advantage thereon. See also *State, Coughlan, v. Baltimore & O. R. Co.*, 24 Md. 84, 107; 87 Am. Dec. 600, per *Bowie, C. J.*

§ 550. Damages proportioned to the injury — Death of children—Adults.—There is a distinction between a suit by a parent for the negligent killing of a minor and that of an adult child. The law gives to the father the right in the former case to the services and the proceeds of his labor, and the probability that the minor would remain in the service of the parent during minority, or would have permitted the parent to have the proceeds of his labor, is said to be unimportant. But where the deceased was an adult, the above rule does not apply, for the right to services no longer exists. And in an action by the mother, she must allege something more than the amount of damages.⁴ The measure of recovery, therefore, depends in such

⁴ *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 35, 36; 11 S. W. 907; 5 L. R. A. 172, per Hobby, J., who also says, "In such a suit should be shown the reasonable expectation of benefit the parent would have received had the adult child not been killed and in the absence of legal right to his services this would depend upon the ability and will of such child to confer the benefit on the parent. *Dallas & W. R. Co. v. Spicker*, 61 Tex. 429, 431; 48 Am. Rep. 297 (per Stayton, Assoc. J.). See also *International & G. N. R. & M. P. R. Cos. v. Kindred*, 57 Tex. 498. There are no allegations in the petition which would authorize any proof upon this point to support the claim for actual damages. The averments were that by his death so occasioned, she, 'as his sole surviving parent, had been damaged \$10,000, actual damages.' It did not follow that she had been so damaged by reason of the death of her son, alleged to have been over 21 years of age, as a necessary consequence. In the absence of some averment showing that he supported or contributed to her support, or that there was some expectation of benefit of a pecuniary character to

be derived by the plaintiff from the services of her son, there could be no presumption of law arising from the mere fact that she had been damaged by the death of her adult son." Only necessary to the alleged amount of damage. *International & G. N. R. Co. v. Knight*, 91 Tex. 660; 45 S. W. 556; 4 Am. Neg. Rep. 79, rev'g 45 S. W. 167. The father is not a necessary party to an action for the death of an adult son. *St. Louis, A. & T. R. Co. v. Taylor*, 5 Tex. Civ. App. 688; 24 S. W. 975. In the *Dallas*, etc., v. *Spicker* case above cited the court, per Stayton, Assoc. J., said (*id.* p. 431), that in so far as the claim to damages might be based upon the services of a minor "child before majority, the will of the child to render its services to the parent or to permit the parent to have the proceeds of its labor would be an unimportant inquiry, for the law gives the parent the right to both. Hence, an inquiry as to the probability that the child during minority would have remained in the service of the parent, or would have permitted the parent to have the proceeds of its labor rendered in the service of others, would be likewise

cases upon the pecuniary injury sustained and rests solely upon the doctrine of compensation with reference to the deprivation by the death of prospective benefit, and this includes as a principal factor the loss of contributions, aid or assistance, the reasonable probability of the continuance thereof, the disposition and ability of deceased to render such aid, the dependency of the parents and other elements, such as age, etc., of deceased, and of the survivors which are fully considered elsewhere herein, under appropriate headings.⁵

unimportant and irrelevant unless it was shown that the child had in some way been emancipated by its parent. The same rule would not apply where no legal right to benefit existed as in the case of a suit by the parent for injury to a child after majority which resulted in death." After majority, a father is not entitled to his son's earnings and this should be considered in determining what elements enter into the estimation of damages for the death of adult children. *Bonnett v. Galveston, H. & S. A. R. Co.*, 89 Tex. 72; 33 S. W. 334 (Tex. Civ. App.); 38 S. W. 813. See also as to mother's right to services, *State, Coughlin, v. Baltimore & O. R. Co.*, 24 Md. 84, 107; 87 Am. Dec. 660, per *Bowie, C. J.*

⁵*Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. 828, holding also that the statute expressly authorizes a suit by the mother without accounting for the nonjoinder of her husband, provided she bring the action for the benefit of all parties concerned, and in good faith prosecutes it for the benefit of all. In case she sues for the benefit of herself and husband, it is proper to instruct the jury that if it was shown that the father of deceased and husband of plaintiff would have received any pecuniary benefit from the son during his lifetime, then to return a

verdict for the amount the father and mother would both have received from the deceased son had he lived, and apportion that amount between them according to the sum each would have received, and if the father would not have received any pecuniary benefit from the son, if he had lived, then they would not find any amount for him. See as to adult child's death. *Texas & Pac. R. Co. v. Lester*, 75 Tex. 56; 12 S. W. 955; *Winnt v. International & G. N. R. Co.*, 74 Tex. 32; 11 S. W. 907; 5 L. R. A. 172; *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 297; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; 56 S. W. 204; *Galveston, H. & S. A. R. Co. v. Power* (Tex. Civ. App. 1899), 54 S. W. 629; *Galveston, H. & S. A. R. Co. v. Bonnett* (Tex. Civ. App.), 38 S. W. 813; 89 Tex. 72; 33 S. W. 334; *International & G. N. R. Co. v. McNeel* (Tex. Civ. App.), 29 S. W. 1133; *St. Louis, A. & T. R. Co. v. Taylor*, 5 Tex. Civ. App. 668; 24 S. W. 975. All the above cases are considered fully herein under their appropriate headings as to reasonable expectations of pecuniary benefit, aid and assistance rendered and dependency, the general elements of damage, etc. In *Mason v. Bertram*, 18 Ont. R. 1 Chy. D. deceased had just attained majority when he was killed. He had been temporarily employed as a ma-

§ 551. Damages proportioned to the injury—Evidence—Generally.—Inasmuch as evidence and its admissibility or rejection is a question which runs through and affects the measure of damages in all its various phases relating to a recovery for the injury occasioned by death by negligence, we shall only consider under this section such general points as affect the recovery. Thus it has been asserted that while damages in actions of this nature are necessarily indeterminate, and while much must be left to the sound sense of the jury in every case, it does not follow that plaintiffs need not prove with a reasonable degree of certainty the data from which their compensation is to be assessed, when it is practicable to do so. And where it is within the power of a beneficiary to show with some degree of accuracy the amount of benefits received by him, his failure to testify specifically to the facts ought to be a circumstance against him sufficient to justify setting aside an excessive verdict.⁶ It is also true, however, that damages do not admit of exact proof and cannot be made a question of mathematics.⁷ If the deceased was an adult son, it is not error to exclude testimony as to the receipts of the father from his son's wages, before the latter arrived at age. Such evidence does not tend to prove what the child would have given him after his earnings became his own to be disposed of at his will, and although it had been testified that the deceased, just before his death, was preparing himself to become a machinist, evidence cannot be given as to the wages ordinarily received by machinists and engineers, the probability being too remote, contingent and speculative, to show the son's probable future earnings, and also being calculated to

chinit. Prior thereto he had attended school and worked on his father's farm without wages. It was also intended that he should, during vacations, while pursuing a medical course, also work on the farm as usual. The expense to his father of such professional education would be about \$1,000, the course being from three to four years. In an action by his father for his death, a nonsuit was ordered as there could

be no reasonable expectation of pecuniary benefit.

⁶ San Antonio & A. P. R. Co. v. Long, 87 Tex. 148, 159; 27 S. W. 113; 47 Am. St. Rep. 87; 24 L. R. A. 637, per Gaines, Assoc. J. See Missouri Pac. R. Co. v. Lehmborg, 75 Tex. 61, 67, 68; 12 S. W. 838, per Henry, Assoc. J.

⁷ St. Louis, Ark. & Tex. R. Co. v. Johnston, 78 Tex. 536, 542; 15 S. W. 104, per Gaines, Assoc. J. See also

mislead the jury.⁸ Again, pecuniary injury must be proven,⁹ although it is also determined that in case of a minor child's death it is sufficient that there is evidence of a reasonable expectation of benefit capable of estimation, and that it is unnecessary to prove a pecuniary advantage except for the killing.¹⁰ But the evidence in this class of cases cannot furnish the measure of damages with any certainty and accuracy, especially in case of young children, where the age and undeveloped state of the child precludes any accurate approximation of the value of the child's services, although as the age increases and the faculties and ability develop, testimony as to actual services can and should be produced, even though their value is indefinite as to amount.¹¹ The statements of deceased that he could support his mother are admissible.¹² So the son's knowledge of his father's business and plans and his ability to carry them out may be proven.¹³ Again, a mother's conclusions that the cause of the death of her three months' old child was exposure, will be admissible in connection with other evidence as to the infant's previously healthy condition, the mother's age and the large number of offspring she had had, and that immediately after such exposure the child contracted a cold which grew worse until he died.¹⁴

Ross v. Texas & Pac. R. Co. (U. S. C. C. W. D. Tex.), 44 Fed. 44, 48, 49, per Maxey, J.

⁸ *Bonnett v. Galveston, H. & S. A. R. Co.*, 89 Tex. 72, 76, 77; 33 S. W. 334.

⁹ *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 224; 12 S. W. 828, per Acker, P. J. See *Winnt v. International & G. N. R. Co.*, 74 Tex. 32, 35, 36; 11 S. W. 907; 5 L. R. A. 172, per Hobby, J.; *Hetherington v. Northeastern Ry.*, 51 L. J. Q. B. 495; 9 Q. B. D. 160; 30 W. R. 797.

¹⁰ *Ricketts v. Markdale* (Div. Ct.), Ont. 610; *Romburgh v. Balch*, 27 Ont. App. 32.

¹¹ *Brunswick v. White*, 70 Tex. 504, 508-512; 8 S. W. 85, per Walker, Assoc. J. In *Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 225; 7 S. W. 709, it is declared, per Stayton, C. J., that in an action by a mother

for the death of her minor son, it is incumbent on her to show such facts as would have entitled her son to have recovered had he lived. But evidence of the value of the services of a farm hand is admissible even though not alleged. *International & G. N. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640.

¹² *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 503; 7 S. W. 857; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; 56 S. W. 204. See also *Electric L. & P. Co. v. Lefevre* (Tex. Civ. App. 1900), 55 S. W. 396. But see *State, Coughlan, v. Baltimore & O. R. Co.*, 24 Md. 84, 107; 87 Am. Dec. 600, per Bowie, C. J.

¹³ *Galveston, H. & S. A. R. Co. v. Davis*, 22 Tex. Civ. App. 335; 54 S. W. 909.

¹⁴ *Ft. Worth & D. C. R. Co. v.*

§ 552. Damages proportioned to the injury—Excessive and inadequate damages—Generally.—The verdict will not be reversed merely because the damages awarded are larger than the evidence might probably justify,¹⁵ although it will be set aside where it is greatly in excess of what is shown to be warranted.¹⁶ So a new trial may be granted where the damages are manifestly too small.¹⁷

Hyatt (Tex. Civ. App.), 34 S. W. 677.

¹⁵ Missouri Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. 857.

¹⁶ Plaintiff's son lived with her and gave her all his wages of about \$30 a month, reserving only enough to buy clothes. Her expectancy of life was only 13½ years—\$6,000 reduced to \$3,000. Mexican Nat. R. Co. v. Finch (Tex. Civ. App.), 27 S. W. 1028. Son was a young man who lived with his father and assisted him in carrying coals around the wards of a hospital, for which the father was paid a small allowance. The son earned also good wages, but as the father was not in need the son did not aid him in any other way, than as above stated; £ 75, was held excessive. Franklin v. Southeastern Ry., 3 H. & N. 211; 4 Jur. (N. S.) 565; 5 W. R. 573.

When damages not excessive. \$870 in favor of parents, aged 68 and 67 years, even though deceased was dissipated and a spendthrift, but was 35 years old and aided with the other children in supporting the plaintiffs. Texas & P. R. Co. v. Spence (Tex.), 52 S. W. 562. \$2,000 for death of 7 years old son. Missouri, K. & T. R. Co. v. Gilmore

(Tex. Civ. App. 1899), 53 S. W. 61. \$10,000 in favor of widowed mother for death of son 23 years old, unmarried, industrious, sober and healthy and who contributed from \$30 to \$50 a month to his mother's support out of earnings of \$65 monthly. The son was qualified for a locomotive engineer, at which his wages would have been from \$108 to \$125 monthly. International & G. N. R. Co. v. McNeel (Tex. Civ. App.), 29 S. W. 1133. \$2,000 in favor of mother; son had a life expectancy of over 36 years, earned from \$60 to \$70 a month, and gave his mother from \$20 to \$35 monthly; she was 69 years old. Gulf, C. & S. F. R. Co. v. Royall, 18 Tex. Civ. App. 86; 43 S. W. 815. \$5,000—son was 7 years old, healthy, industrious bright and intelligent—verdict was in favor of mother. Taylor B. & H. R. Co. v. Warner (Tex. Civ. App.), 31 S. W. 66. \$6,000, deceased son was a month over 2 years old; he was healthy, stout and sensible. Austin Rapid-Transit R. Co. v. Cullen (Tex. Civ. App.), 29 S. W. 256, rehearing denied 30 S. W. 578. \$5,000 in favor of mother for son 18 years old, who gave her \$20 a month and had good habits and was industrious, and

¹⁷ Deceased husband was 28 years old and widow 29 years of age; contributed \$300 a year to her support; earned from \$1.50 to \$1.75 per day and was constantly employed. He

was also in perfect health; \$500 held insufficient. Under Rev. Stat. art. 1452, a new trial was granted. Burns v. Merchants & P. O. Co. (Tex. Civ. App. 1901), 63 S. W. 1061.

sessed an income of £4,000 a year was killed, and there was a settlement upon the oldest son of the bulk of the property, a part being reserved for the benefit of his wife and younger children, it was decided that even though the family in general was benefited by deceased's estate, nevertheless the widow and younger children were entitled to damages as a compensation for the loss of their reasonable expectations of pecuniary benefit consequent upon his death.²³ But the right which the wife has of an absolute inheritance in case she survives her mother, does not constitute a reasonable expectation of pecuniary benefit such as will entitle the husband to recover where the wife and he live separately and she dies before the mother.²⁴

§ 556. Damages proportioned to the injury—Marriage and remarriage.—Evidence of the marriage of the husband after the

p. 391, said: "In that case it was claimed that the income of the deceased from which she aided her children was derived chiefly from her property, and this court held that the evidence was admissible to be considered by the jury in determining the pecuniary loss sustained by the children through the death of their mother. The court, speaking by Judge Gaines, discussed a number of propositions bearing more or less directly upon the question before it, and passing from these questions finally announced its conclusion as follows: 'But however that may be the case is very different when the only aid which the beneficiaries have received from the deceased during his life has been a part of the income of his property, and when upon his death the title to the corpus of such property absolutely vests in them, and we are therefore of the opinion that in a case involving similar facts they should be admitted in evidence to be considered by the jury,' and after discussing another proposition of law contended for by the parties before the court, the

judge said: 'The rule thus announced is doubtless correct as applied to the facts of the particular case, and it may be applicable generally under the statute of Pennsylvania. It does not apply under the statute of this state to a case like the present in which the prospective aid was mainly if not wholly from the income of property, and in which upon the death some of the beneficiaries take by bequest all the estate and others get none.' To the extent that the aid given by the mother to the children was derived from income of property, which the heirs received at the mother's death, such aid was not lost by the mother's death. But the fact that the children received property at the death of the mother constitutes no defense against the claims of such children to be compensated by the pecuniary loss sustained by death."

²³ Pym v. Great Northern Ry., 4 B. & S. 396; 32 L. J. Q. B. 377; 10 Jur. N. S. 199; 8 L. T. 734; 11 W. R. 922.

²⁴ Harrison v. L. & N. W. Ry., 1 Cab. & E. 540.

wife's death is properly rejected as it cannot operate to mitigate the damages.²⁵ So the contingency of a widow's remarriage will, it is determined, not be considered.²⁶ And it has also been decided that the remarriage of a widow pending suit does not preclude her right of action, although in that case it evidently affected the verdict as less damages were awarded to her than were given to each of the children.²⁷ Again, a common-law marriage entitles the widow and the issue by such marriage to recover damages sustained by the husband's death.²⁸ But if the marriage is after the husband's injury, the cause of action for damages therefor is not community property and does not survive to her after the husband's death.²⁹

§ 557. Damages proportioned to the injury—Defenses—Prescribing medicine for own family.—In an action by parents for the death of a minor daughter caused by negligence of a druggist in selling morphine instead of quinine, which plaintiffs without knowledge of the poisonous nature thereof

²⁵ *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387; 38 S. W. 1121 (citing *Davis v. Guarnieri*, 45 Ohio St. 470; *Railway Co. v. Garr*, 57 Ga. 277; *Phillip v. Ry. Co.*, 34 Atl. 856; *Diminy v. Ry. Co.*, 27 W. Va. 32). The action in the principal case was by the husband in his own behalf and that of his minor daughter for death of the wife and mother, killed by defendant's train in operation by its servants. And *Brown, Assoc. J.*, said, "If the plaintiff's wife was killed through the negligence of the defendant, he then lost the value of her life as a wife, and the fact that her place has been supplied by a subsequent marriage does not in any manner operate to mitigate the damages for which the wrongdoer was responsible." In *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; 55 S. W. 538, the deceased had remarried after a divorce, but had no children thereby. His minor son by the first marriage recovered. Under

the Texas Stat. 1895, art. 3027, the right to damages is not affected by remarriage. *Mexican Nat. R. Co. v. Slater* (U. S. C. C. A. 5th Cir.), 115 Fed. 593.

²⁶ *Baltimore & O. R. Co. v. State, Trainor*, 33 Md. 542.

²⁷ *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582, 587; 8 S. W. 484, holding also that the fact that the second husband acts as next friend to the minor children is not error, where he was not interested in the suit by them. *Id.* 587. If the action is by a widow for her son's death, and she remarries pending suit, the second husband should be made a party on suggestion of the marriage. *San Antonio St. Ry. Co. v. Cailloutte*, 79 Tex. 341; 15 S. W. 390.

²⁸ *Galveston, H. & S. & R. Co. v. Cody*, 20 Tex. Civ. App. 520; 50 S. W. 135, writ of error denied 51 S. W. 329.

²⁹ *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; 39 S. W. 1112.

administered to said daughter, the court said: "How much of nonexpert medical practice may be indulged in is not for the courts to determine. Only in case of alleged injury are such matters brought before the courts. It may be that many men are their own physicians, prescribing for themselves and families," but this will not excuse negligence which causes death.²⁰

§ 558. Damages proportioned to the injury—Self-defense—Justification.—If self-defense or justification is relied on, it must be established by a preponderance of evidence as in civil cases.²¹

²⁰ *Brunswick v. White*, 70 Tex. 504, 512; 8 S. W. 85, per Walker, Assoc. J.

²¹ *Tucker v. State*, *Johnson*, 89 Md. 471, 475, 485; 43 Atl. 778; 44 Atl. 1004; 46 L. R. A. 181. In this case *Boyd, J.*, said: "This is the first time this court has been called upon to review a case in which the death, which is the foundation of the suit, was occasioned by the discharge of a loaded pistol at the person killed. Our statute . . . provides that the action is to be brought in the name of the state for the benefit of the wife, husband or parent and child of the deceased 'whenever' . . . If the plaintiff's testimony had presented any facts from which justification or legal excuse for the shooting was shown, or could properly be inferred, then the case would have been different, but it did not and the defendant sought to excuse himself by trying to convince the jury that he believed Reynolds was in imminent danger; that the only way to protect him was to shoot at or towards Johnson, and that he had good grounds for that belief and acted on it. It was not a question as to whether Johnson was still beat-

ing Reynolds when defendant fired which, as we have seen, was the real difference between the witnesses, but the defense depended mainly upon the belief of the defendant, his object in shooting and the necessity for it. He thus set up distinct affirmative matters of defense which under all the rules of evidence applicable to such cases, he was required to establish by preponderating evidence to meet the case proved by the plaintiffs of the wrongful killing of Johnson." This court cited *Broks v. Haslan*, 65 Cal. 421, and dis'd *Nichols v. Winfrey*, 79 Mo. 545; *March v. Walker*, 48 Tex. 377. See also as to liability in damages of one who kills another while the latter is fleeing, *Stephens v. Wallace* (Tex. Civ. App.), 30 S. W. 1099. That evidence is inadmissible as to a criminal action having been instituted or not against the one who did the killing, see *Croft v. Smith* (Tex. Civ. App.), 51 S. W. 1089. See further *Garcia v. Sanders*, 90 Tex. 103; 37 S. W. 314, rev'g 35 S. W. 52, as to self-defense and killing while attempting arrest, and see as to burden of proof of self-defense, *Croft v. Smith* (Tex. Civ. App.), 51 S. W. 1089.

CHAPTER XXVI.

DEATH—"FAIR AND JUST COMPENSATION FOR THE PECUNIARY INJURY."

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| <p>§ 559. "Fair and just compensation for the pecuniary injury"
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§ 559. "Fair and just compensation for the pecuniary injury"—Statutes and constitution—Generally.—The New York Code¹ provides that in actions for death caused by negli-

¹ 2 Stover's Ann. Code Civ. Proc. (ed. 1898) sec. 1904, as am'd, ch. 946 of 1895, took effect January 1, 1896.

gence, etc., the damages to be awarded shall be a "fair and just compensation for the pecuniary injuries resulting from decedent's death,"² and this is the language of the North Carolina Code with a slight difference in the wording.³ The earlier New York statutes⁴ limited the amount of damages, but the New York constitution⁵ provides that the amount recoverable in such actions shall never be subject to statutory limitations and the right of action shall never be abrogated.⁶ This provision, however, does not authorize the recovery of any except actual damages sustained in excess of the limit which theretofore prevailed. Nor does it call for the affirmance of a verdict clearly in excess of the pecuniary loss.⁷

§ 560. "Fair and just compensation for the pecuniary injury"—Pecuniary loss only.—The measure of damages under this statutory provision as to "fair and just damages for the pecuniary injury" existing in New York and North Carolina is the pecuniary loss sustained by the negligent death, and the recovery is limited thereto,⁸ for the interest which the next of

² "The damages awarded to the plaintiff may be such a sum as the jury, upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or referee deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death, to the person or persons for whose benefit the action is brought." Interest on the sum awarded from the decedent's death is included. N. Y. Code Civ. Proc., sec. 1904.

³ N. C. Code, 1883, sec. 1499. "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." See Rev. Code, 1855, ch. 1, secs. 8-11, p. 65; Battle's Rev. Code, secs. 121-123, p. 414.

⁴ N. Y. Stat. 1847, ch. 450, sec. 1, 2, am'd Stat. 1849, ch. 256, sec. 14; Code Civ. Proc. (Banks, 1888) sec. 1904.

⁵ Art. 1, sec. 18, adopted 1894, in effect January 1, 1895.

⁶ This constitutional provision is prospective only. *Isola v. Weber*, 147 N. Y. 329; 69 N. Y. St. Rep. 691; 41 N. E. 704, citing and adopting the reasoning of the opinion by Follett, J., in *O'Reilly v. Utah, N. & C. Stage Co.*, 87 Hun (N. Y.), 406; 68 N. Y. St. R. 432; 34 N. Y. Supp. 358, rev'g 13 Misc. (N. Y.) 97; reargument denied 148 N. Y. 736. See *Weber v. Third Ave. R. R. Co.*, 12 App. Div. (N. Y.) 512; 42 N. Y. Supp. 789; 76 N. Y. St. R. 789; *Smith v. Metropolitan St. R. Co.*, 15 Misc. (N. Y.) 158; 70 N. Y. St. R. 687; 35 N. Y. Supp. 1062. But examine *Burns v. Houston, West St. & P. F. R. Co.*, 15 Misc. (N. Y.) 19; 36 N. Y. Supp. 774.

⁷ *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613.

⁸ *Etherington v. Prospect Park &*

kin have in the life is pecuniary.⁹ And if any pecuniary injury be shown, the jury are at liberty to give such damages as they shall deem a fair and just compensation,¹⁰ with reference to the pecuniary injuries resulting from such death.¹¹ But the statute does not confine the recovery to the immediate loss of money or property; it contemplates damages or advantages of a pecuniary nature occasioned by the death as opposed to those for injuries to the sentiments or affections.¹²

§ 561. "Fair and just compensation for the pecuniary injury"—Nature of action and proof of damages—Nominal damages.—As a preliminary statement it is important to remember that the statute has been held in New York to create a new cause of action for the benefit of the husband or wife and next of kin of a decedent, and it also deals with remote and uncertain damages not recoverable at common law.¹³ The statute is also applicable to the case of any person where death ensues, who could himself if living have maintained the action and is not limited to the cases of a wife, for the loss of a husband or children of parents,¹⁴ and the cause of action is

C. I. R. Co., 88 N. Y. 641, aff'g 24 Hun (N. Y.), 235; Tilley v. Hudson R. R. Co., 29 N. Y. 252; 24 N. Y. 471; 23 How. (N. Y.) 363; Whitford v. Panama R. Co., 23 N. Y. 465, 469; Dickens v. New York C. R. Co., 23 N. Y. 158; 1 Keyes, 23; 1 Abb. Dec. 504. See *id.* 28 Barb. (N. Y.) 41; Oldfield v. New York & Harlem R. Co., 14 N. Y. 310; Bierbauer v. New York C. & H. R. R. Co., 15 Hun (N. Y.), 559, aff'd 77 N. Y. 588; Green v. Hudson R. R. Co., 32 Barb. (N. Y.) 25, aff'd 30 How. (N. Y.) 593 n.; Lehman v. Brooklyn, 29 Barb. (N. Y.) 234; Wise v. Teerpenning, 2 Edm. S. C. (N. Y.) 112. See *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613; Keller v. New York C. R. Co., 17 How. Pr. (N. Y.) 102; Pickett v. Wilmington R. Co., 117 N. C. 616; Kesler v. Smith, 68 N. C. 154. See secs. 561, 562, herein.

⁹ *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234.

¹⁰ *Cornwall v. Mills*, 44 N. Y. Supr. (12 J. & S.) 45; *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641. See cases in next note. See cases considered in note to sec. 562, herein, as to discretion of jury, etc.

¹¹ *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Dickens v. New York C. R. Co.*, 1 Abb. Dec. 504; 1 *Keyes* (N. Y.), 23.

¹² *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471; *Bierbauer v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.), 559, aff'd 77 N. Y. 588. See secs. 565-567, herein.

¹³ *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62, 63, per Bartlett, J.

¹⁴ *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310, 316, per the court (under Laws of 1847, ch. 450).

the death and not the injury.¹⁵ Again the pecuniary loss to be considered and which a party is entitled to recover may consist of special damages, that is of actual and definite loss capable of admeasurement and of prospective general damages, incapable of being accurately estimated. The former should be shown to have been sustained and their amount proven, while the latter depend as a basis of computation upon the existence and proof of certain general elements of damages such as age, etc., elsewhere noted.¹⁶ But evidence of specific pecuniary loss to the next of kin is unnecessary to justify an award of substantial damages, proof of the above noted general elements being sufficient.¹⁷ And it is the rule that affirmative proof of actual, definite, pecuniary damage need not be given to justify an award of some or nominal damages.¹⁸ So the fact that the

This language of the court is quoted in *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62, per Bartlett, J.

¹⁵ *Smith v. Metropolitan St. R. Co.*, 15 Misc. (N. Y.) 158; 35 N. Y. Supp. 1060. *Examine Whitford v. Panama R. Co.*, 23 N. Y. 465, 484; *Dibble v. New York & E. R. Co.*, 25 Barb. (N. Y.) 183. The statutory liability accrues only by reason of the death. *Stuber v. McEntee*, 142 N. Y. 200, 203, per O'Brien, J.

¹⁶ *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, rev'g 28 Hun (N. Y.), 407; 15 Week. Dig. 522. Future as well as past consequences will be considered. *Ganiard v. Rochester City & B. R. R. Co.*, 50 Hun (N. Y.), 22; 18 N. Y. St. R. 692; 2 Y. N. Supp. 470, case aff'd 121 N. Y. 661; 24 N. E. 1092. See *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Mitchell v. New York C. & H. R. R. Co.*, 2 Hun (N. Y.), 535; 5 T. & C. (N. Y.) 122, aff'd 64 N. Y. 655. See secs. 560, 563, herein.

¹⁷ *Lustig v. New York, L. E. & W. R. Co.*, 65 Hun (N. Y.), 547; 48

N. Y. St. R. 916; 20 N. Y. Supp. 477.

¹⁸ *Kelly v. Twenty-Third St. R. Co.*, 14 N. Y. St. R. 699; 14 Daly, 418; 27 Wkly. Dig. 572, aff'd 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. Y. St. R. 130; 18 N. E. 108, aff'g 41 Hun, N. Y. 404; 3 N. Y. St. R. 133; 25 Wkly. Dig. 46; *Ihl v. Forty-Second St. R. Co.*, 47 N. Y. 317; *Prendergast v. New York Cent. R. Co.*, 58 N. Y. 652. See *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153 N. Y. 680; *Gorham v. New York Cent. R. Co.*, 23 Hun (N. Y.), 449; *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 E. D. Smith, 103; *Keller v. New York C. R. Co.*, 2 Abb. Dec. (N. Y.) 480; 24 How. (N. Y.) 172, aff'g 17 How. (N. Y.) 102; *Safford v. Drew*, 3 Duer (N. Y.), 627; *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25.

result in ascertaining the probable pecuniary benefit is somewhat subject to chance, does not prevent a recovery nor limit it to nominal damages,¹⁹ since the recovery is not restricted to such pecuniary loss as is susceptible of definite proof.²⁰ And in this connection it is expressly declared that the theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed and the value of this interest is the amount for which the jury are to give their verdict, and the statute imputes to them a direct pecuniary loss from the negligent killing of one whose life has a greater or less value.²¹ Again in the case of collateral relatives it is declared that it is difficult to see how a pecuniary loss results and if so to what extent, but nevertheless damages may be recovered in such case, and the jury's discretion in awarding the same will not be disturbed, where no principle of law has been violated, since the law does not require direct and exact proof upon this subject.²² But it is also held that under the New York Act of 1847, the complaint must aver that deceased left a widow or next of kin who sustained a pecuniary loss by his death.²³ So in another case it is decided that in actions for negligent death, the plaintiff must show a pecuniary damage or loss.²⁴

¹⁹ *Thomas v. Utica & Black River R. Co.*, 6 Civ. Proc. (N. Y.) 353, *aff'd* 34 Hun (N. Y.), 626, *aff'd* 98 N. Y. 49.

²⁰ *Oldfield v. New York C. & H. R. Co.*, 14 N. Y. 310, *aff'g* 3 E. D. Smith (N. Y.), 103; *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25, and cases in last preceding note. See secs. 559, 560, herein. See *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, 526, *aff'g* 20 Wkly. Dig. 341; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234. Case of nominal damages, *Keller v. N. Y. Cent. R. Co.*, 17 How. Pr. (N. Y.) 102.

²¹ *Quin v. Moore*, 15 N. Y. 432, 435, per Comstock, J. As to allegation of damages and nominal damages, see *Kenney v. New York C. R. Co.*, 49 Hun (N. Y.), 535; 15 Civ. Proc. (N. Y.) 347; 18 N. Y. St. R. 441; 2 N. Y. Supp. 512; 54 Hun (N. Y.),

143; 26 N. Y. St. R. 636; 7 N. Y. Supp. 255, *aff'd* 125 N. Y. 422; 35 N. Y. St. R. 447; 26 N. E. 626. See *Safford v. Drew*, 3 Duer (N. Y.), 627; 12 N. Y. Leg. Obs. 150, noted *post*. in this section.

²² *Dickens v. New York C. R. Co.*, 1 Abb. Dec. (N. Y.) 504; 1 Keyes, 232; 28 Barb. (N. Y.) 41, which was *rev'd* 23 N. Y. 158. Case was decided before *amd't* Laws, 1870, ch. 78. See *Kelly v. Twenty-Third St. R. Co.*, 14 Daly (N. Y.), 418; 14 N. Y. St. R. 699; 27 Wkly. Dig. 572, *aff'd* 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878.

²³ *Safford v. Drew*, 3 Duer (N. Y.), 627; 12 N. Y. Leg. Obs. 150.

²⁴ *Mitchell v. New York C. R. Co.*, 2 Hun (N. Y.), 535; 5 Supr. Ct. (5 T. & C.) (N. Y.) 122, case *aff'd* 64 N. Y. 655; *Staal v. Grand St. & N.*

And in an action for the death of a married woman it is determined that some pecuniary injury must be proven, to enable the husband to maintain the action, although very slight evidence is sufficient.²⁵ Again it is declared that the jury "are required to judge and not merely to guess, and therefore such basis for their judgment as the facts naturally capable of proof can give should always be present and is rarely if ever absent."²⁶ And where a widowed mother was suing to recover damages for her child's death and was examined as a witness before the jury, so that they might approximately determine her age, the failure to prove her age was held not to preclude a recovery of more than nominal damages, where it was in evidence that she had young children and her circumstances and condition in life were proven.²⁷ So damages are implied from an allegation of the wrongful act.²⁸

§ 562. "Fair and just compensation for the pecuniary injury"—Damages for jury—Excessive or inadequate damages.

—The amount of damages upon the evidence is for the jury and rests largely upon their sound sense, judgment and discretion. This does not mean an arbitrary, unlimited discretion, nor can they base their verdict upon any mere inference or guess, for they are to judge the amount of recovery within the limits of a fair and just compensation for the pecuniary injury sustained. But the discretion to be exercised may be liberal, although just, especially where, as in case of prospective general damages, the plaintiff is unable to show, direct, specific, pecuniary loss, or even though the proof may be unsatisfactory and the damages quite uncertain and contingent. The jury, in brief, must take those elements of damages properly in evidence before them and make the best estimate they justly can within the terms of the statute.²⁹

R. Co., 107 N. Y. 625; 1 Silv. C. A. 516; 11 N. Y. St. R. 352; 25 Wkly. Dig. 241, rev'g 36 Hun (N. Y.), 208.

²⁵ *Cornwall v. Mills*, 44 N. Y. Supr. Ct. (12 J. & S.) 45.

²⁶ *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 225, per the court, quoted in *Serensen v. Northern Pac. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407, 410.

²⁷ *Moskovitz v. Lighte*, 68 Hun (N. Y.), 102; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732.

²⁸ *Kenney v. New York C. & H. R. R. Co.*, 2 N. Y. Supp. 512.

²⁹ The verdict should not be of such an amount as to clearly more than cover the pecuniary loss to the next of kin. *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y.

And the protection against excessive verdicts is found in the power of courts in some of the modes allowed by law to revise or set aside such verdicts.³⁰ This rule would also apply to protection against inadequate verdicts.³¹ The above rule, however,

Supp. 820; 2 Am. Neg. Rep. 608. Jury should not give damages clearly in excess of the pecuniary loss. *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613. Measure of damages in such a case (where deceased was adult and left widowed mother and adult brothers and sisters) must usually be left to the jury, there being no well-defined rule by which it can be determined. *Kane v. Mitchell Trans. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153 N. Y. 680. Jury cannot base its verdict on any inference or guess. *Eastwood v. Retsofs Mining Co.*, 86 Hun (N. Y.), 91; 68 N. Y. St. R. 38; 34 N. Y. Supp. 196, case aff'd 152 N. Y. 651; 47 N. E. 1106. Amount of damages for death of young child is for determination of jury. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. Y. St. R. 130; 18 N. E. 108, aff'g 41 Hun (N. Y.), 404; 3 N. Y. St. R. 133; 10 Civ. Proc. R. (N. Y.) 52. In but few cases can direct, specific pecuniary loss be shown. Jurors must make best estimate they can from proof furnished, although proof unsatisfactory and damages uncertain and contingent. *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523. Jury are not to guess the amount but must judge the same. *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 219, case reverses 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522. There is no way to ascertain mathematically what the pecuniary loss is. It is to a great extent speculative and amount must be left to good judg-

ment of jury, which there is nothing to control or fix except their discretion and the statutory limitation of the amount (then limited by statute of 1847). *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, aff'g 24 Hun (N. Y.), 235. Jury has a liberal discretion. *Dickens v. New York C. R. Co.*, 1 Abb. Dec. (N. Y.) 504; 1 Keyes, 232; 28 Barb. (N. Y.) 41, rev'd 23 N. Y. 158. Damages must be somewhat indefinite and must depend upon good judgment of jury. *Green v. Hudson R. R. Co.*, 32 Barb. 25, 32, case aff'd 30 How. (N. Y.) 593 n. For jury's discretion where enough evidence of pecuniary injury, see *Cornwall v. Mills*, N. Y. Super. Ct. (12 J. & S.) 45.

³⁰ *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, per Earl, J. See *Houghkirk v. Delaware & H. C. Co.*, 92 N. Y. 219.

³¹ See as to the general rule applicable to excessive or inadequate verdicts, *Kennedy v. Rochester City & B. B. R. Co.*, 54 Hun (N. Y.), 183; 26 N. Y. St. R. 871; 7 N. Y. Supp. 221, rev'd on different grounds, 130 N. Y. 654; 3 Silv. C. A. 591; 41 N. Y. St. R. 329; 29 N. E. 141; *Le Frois v. Monroe Co.*, 88 Hun, 109; 68 N. Y. St. R. 535; 34 N. Y. Supp. 612; *Hempenstall v. N. Y. Cent. & H. R. Co.*, 82 Hun (N. Y.), 285; 64 N. Y. St. R. 70; *Rowe v. New York C. & H. R. R. Co.*, 82 Hun (N. Y.), 153; 63 N. Y. St. R. 753; *Pineo v. New York C. R. Co.*, 34 Hun (N. Y.), 80, aff'd 99 N. Y. 644; *Tisdale v. Delaware & H. Can. Co.*, 4 N. Y. St. R. 812; 25 Wkly. Dig. 308, aff'd 116 N. Y. 416; 20 N. Y. St. R. 887;

seems in its application to be largely a matter of discretion as is clearly evidenced by the verdicts that have been sustained, modified or set aside according to what may be designated as the court's sense of justice, based upon the various factors existing in each particular case.³² It is held in North Carolina that a motion to

22 N. E. 700; *Peck v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.), 286; 6 T. & C. 436; 8 Hun (N. Y.), 286, aff'd 70 N. Y. 587; *Potter v. Thompson*, 22 Barb. (N. Y.) 87; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Woodward v. Paine*, 15 Johns. (N. Y.) 493. See cases noted in second following note herein. If the court determines, however, that a verdict is excessive it may order the same to be reversed unless the amount is reduced by a specified sum, in which case it will be affirmed as modified. See *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y. Supp. 820; 2 Am. Neg. Rep. 608; *McCormack v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 333; 46 N. Y. Supp. 230; 2 Am. Neg. Rep. 631, denying rehearing 16 App. Div. (N. Y.) 24; 78 N. Y. St. R. 684; 44 N. Y. Supp. 684.

³² Deceased was a railroad fireman 34 years old. He never earned more than \$2 a day. He left a wife, son and daughter—\$15,000 excessive. *Cooper v. New York, O. & W. R. Co.*, 25 App. Div. (N. Y.) 383; 49 N. Supp. 481. Deceased was a helper on an ice wagon—\$12,000 held excessive "The reason why we reach this conclusion is that the pecuniary loss to the next of kin does not in any fair view reach the amount of the verdict. It scarcely adds to the settlement of any fixed rule to set out our reasons in detail upon this question, as each case must stand upon its own particular facts." *McCormack v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 333; 46 N. Y.

Supp. 230; 2 Am. Neg. Rep. 631, denying rehearing in 16 App. Div. (N. Y.) 24; 78 N. Y. St. R. 684; 44 N. Y. Supp. 684, per Hatch, J. See *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613. Deceased was a laborer 52 years old, earning \$2.50 a day—\$10,000 excessive. *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y. Supp. 820; 2 Am. Neg. Rep. 608. Deceased was a steel and iron worker, 29 years old, earned \$3.50 a day, and had regular employment—\$25,000 reduced to \$15,000. *Schmitt v. Metropolitan L. Ins. Co.*, 13 App. Div. (N. Y.) 120; 77 N. Y. St. R. 318; 43 N. Y. Supp. 318. Deceased was a woman 63 years old, did housework for the family, consisting of husband and three grown sons—\$7,500 reduced to \$5,000. *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613. Death of wife and mother; no pecuniary aid received from her—\$5,000 excessive, \$2,500 sufficient. *Klemm v. New York C. & H. R. R. Co.*, 78 Hun (N. Y.), 277; 60 N. Y. St. R. 231; 28 N. Y. Supp. 861. Deceased was about 48 years old, earning capacity was about \$1 a day and board. She was a seamstress and widow and lived with a married daughter who was one of three surviving children, all of age. She had also assisted in making small articles of clothing for her children. She left no property—\$3,500 reduced to \$1,000. *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App.

set aside a verdict, because excessive, rests in the discretion of the trial court, and such discretion is not reviewable by the supreme court.³³

1, aff'g 47 Barb. (N. Y.) 515. Deceased was 60 years old and was a strong, healthy woman. She did all the housework and drove a milk wagon for her husband—\$150 insufficient. *Meyer v. Hart*, 23 App. Div. (N. Y.) 131; 48 N. Y. Supp. 904. Deceased was 61 years old, actively engaged in business and enjoyed good health—\$10,000 not excessive. *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. St. R. 642. Deceased was a member of the police force of New York city; salary was \$1,250 a year; age 43. He left, dependent upon him for support, five children, the oldest a daughter 21 years old and the youngest a son 10 years old—\$9,000 not excessive. *Wallace v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 57; 55 N. Y. Supp. 132; 5 Am. Neg. Rep. 215. Deceased was a laborer 33 years old, married, of temperate habits, good health and sole support of family—\$5,000 not excessive. *Felice v. New York C. & H. R. R. Co.*, 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922. Deceased was a daughter in good health and comfortably supporting her father, who was 82 years old, with a life expectancy of ten years and was penniless and dependent—\$3,000 not excessive. *Purcell v. Lauer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988. Action by father 106 years old, for death of industrious son 27 years old—\$800 not excessive. *Burke v. Witherbee*,

18 Wkly. Dig. (N. Y.) 369, case rev'd 98 N. Y. 562. Deceased was 72 years old, strong and healthy, and did general housework for herself and two children—\$1,500 not excessive. *Walls v. Rochester R. Co.*, 92 Hun (N. Y.), 581; 72 N. Y. St. R. 250; 36 N. Y. Supp. 1102, aff'd 154 N. Y. 771. Deceased was 26 years old, unmarried, sober and industrious, and earned about \$400 during each season of navigation. There was no evidence that he had ever contributed to the support of the survivors, a widowed mother and adult brothers and sisters—\$3,000 not excessive. *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153 N. Y. 680. Deceased was a woman 63 years old; she did all the housework for her husband and daughter, and was living with them—\$5,000 not excessive. *Lyons v. Second Ave. R. Co.*, 89 Hun, 374; 69 N. Y. St. R. 816; 35 N. Y. Supp. 372, aff'd 152 N. Y. 654; 47 N. E. 1109. Deceased was unmarried, 22 years old, earned \$1.85 a day. He lived with his father, his next of kin, who was 58 years old—\$3,000 not excessive. *Fitzgerald v. New York C. & H. R. R. Co.*, 88 Hun (N. Y.), 359; 68 N. Y. St. R. 762; 34 N. Y. Supp. 762, case rev'd 154 N. Y. 263; 48 N. E. 514. Deceased was 33 years old, unmarried, healthy and lived with his father for whom he made pianos, receiving such amount therefor as

³³ *Benton v. North Carolina R. Co.*, 122 N. C. 1007; 30 S. E. 333. See *Ihl v. Forty-Second St. R. Co.*, 47 N. Y. 317; *Catlin v. Pond*, 101 N. Y. 649; *Williams v. Sargeant*, 46 N. Y. 481;

Link v. Sheldon, 136 N. Y. 1, 5, per Gray, J., citing *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, 321; *Gale v. New York C. & H. R. R. Co.*, 76 N. Y. 594.

§ 563. "Fair and just compensation for the pecuniary injury"—Factors generally to be considered.—The factors to be considered generally are deceased's age, sex, health, strength, and within this element height and weight have been noticed, activity, mental condition, character, qualities and capacity, general intelligence, business qualifications, skill or ability to work or labor, competency or incompetency to fill a better position, occupation, whether regularly employed or not, present or former employment and character thereof, earnings or income, proceeds of business, probable profits, earnings in immediately prior employment, earning capacity and its probability that it may increase or diminish with advancing age, value and character of services in case of a deceased wife or child, disposition of earnings, cost of living, habits of industry, sobriety or otherwise, expenditures and care exercised therein, life expectancy, whether

the father thought proper; prospect of inheritance considered also—\$5,000 not excessive. *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857. No evidence was given as to deceased's earnings or of the value of his life to his next of kin, who were a brother and sister in Ireland and three nephews in New York city, nor did it appear that he ever supported or assisted them in any way—\$1,000 not excessive. *Kelly v. Twenty-Third St. R. Co.*, 14 Daly (N. Y.), 418; 14 N. Y. St. R. 699; 27 Wkly. Dig. 572, aff'd 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878. Deceased daughter was 36 years old, in good health, earned \$8 to \$9 a week for 5 or 6 years prior to her death. In twenty years she had contributed from \$300 to \$400 a year towards her parents' support. Her father was 66 years old and in infirm health; the wife was 58 years old; both were without property—\$4,000 not excessive. *Bowles v. Rome Watertown R. Co.*, 46 Hun (N. Y.), 324; 12 N. Y. St. R. 457,

aff'd 113 N. Y. 643; 22 N. Y. St. R. 997; 21 N. E. 414. Action was for death of sister aged 14; father had not provided for family for years and was not known to be living—\$3,500 not excessive. *Pineo v. New York C. R. Co.*, 34 Hun (N. Y.), 80, aff'd 99 N. Y. 644. Deceased was an engineer, industrious, etc. His mother was his next of kin—\$5,000 not excessive. *Erwin v. Neversink S. S. Co.*, 23 Hun (N. Y.), 573, aff'd 88 N. Y. 184. Deceased did all the housework for her husband and three children, assisted in taking charge of store and sometimes earned as much as \$20 a week sewing. All her earnings were used in family's support. Husband died and his administrator recovered for loss of her earnings and services—\$2,500 not excessive. *Cregin v. Brooklyn Crosstown R. Co.*, 18 Hun, 368. Deceased was 22 years old. He was unmarried, earned \$25 a month. His father, mother, two brothers and a sister resided abroad—\$5,000 not excessive. *Bierbauer v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.), 559, aff'd 77 N. Y. 588.

deceased was married or unmarried and the relation of the survivors to deceased, their age, sex, situation and condition. There are also other elements dependent upon whether deceased was a wife, adult, or minor, etc., which are noted elsewhere herein under appropriate headings.³⁴ But it is unnecessary to prove

³⁴In but few of the cases cited below is there any discussion as to the above factors being elements of damages. They are as a rule merely mentioned as facts which are in evidence or as determining factors in the case, being generally conceded to be such. Life expectancy considered—death of minor. *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348; 64 N. Y. St. R. 813; 40 N. E. 15. Character, qualities, capacity and condition of deceased, age and condition of next of kin. *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, aff'g 20 Wkly. Dig. 341. Age, sex, general health and intelligence of deceased, situation and condition of survivors and their relation to deceased. *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 219, rev'g 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 How. (N. Y.) 328; 4 Month. L. Bull. 65. Life expectancy. *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 50; 23 Am. Rep. 18 aff'g, 6 How. (N. Y.) 446. "What did deceased usually earn?" is a pertinent and material question. *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1, aff'g 47 Barb. (N. Y.) 515. Deceased mother's business capacity and her habitual employments, and value of her earnings to show capacity are admissible. *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; 24 N. Y. 471; 23 How. (N. Y.) 463. Earning capacity of deceased may be shown. *Seifter v. Brooklyn Heights R. Co.*, 66 N. Y. Supp. 1107; 55 App. Div. (N. Y.) 10. That de-

ceased was an active business man in good health, 61 years old, and that exceptional activity promised long life were considered and jury were not bound by decedent's actual earnings during his life, but might consider whether his earning capacity would have increased or diminished. *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. St. R. 642. Evidence of wages not incompetent, although apprenticeship articles did not require them. *Kimmer v. Weber*, 81 Hun 599; 63 N. Y. St. R. 291; 30 N. Y. Supp. 1103. Age, height and weight, health and strength, mental ability. *Morris v. Metropolitan St. R. Co.*, 51 App. Div. (N. Y.) 512; 64 N. Y. St. R. 878; 30 Civ. Proc. R. (N. Y.) 371. Health, youth, industry, earnings and disposition thereof considered. *Twist v. Rochester*, 37 App. Div. (N. Y.) 307; 55 N. Y. Supp. 850. Deceased was a contractor and evidence by a partner as to the amount of capital invested by them, the number of employees and the firm's net income from short duration contracts was held inadmissible to prove earning capacity. *Read v. Brooklyn Heights R. Co.*, 32 App. Div. 503; 53 N. Y. Supp. 209. Deceased never earned more than two dollars a day in the course of his employment and this fact was considered in holding the damages excessive. *Cooper v. New York, O. & W. R. Co.*, 25 App. Div. 383; 49 N. Y. Supp. 481. Age and occupation were also factors in this last case. Age, sex, health, strength, amount of work and char-

all these elements in order to recover damages. Thus failure to prove a widowed mother's age is not fatal to her recovery, beyond nominal damages for the death of her son, where certain other factors are proven and she appears as a witness before the

acter of services, earnings and probable profits considered. *Meyer v. Hart*, 23 App. Div. (N. Y.) 131; 48 N. Y. Supp. 904. Occupation considered. *McCormack v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 333; 46 N. Y. Supp. 230; 2 Am. Neg. Rep. 631. Denying rehearing of case (principal question was that of imputable negligence and negligence), 16 App. Div. (N. Y.) 24; 77 N. Y. St. R. 684; 44 N. Y. Supp. 684. Age, earnings, life expectancy, inability to earn continuously, decrease of same, deduction of living expenses, net earnings considered. *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y. Supp. 820; 2 Am. Neg. Rep. 608. Ages of deceased and surviving father considered. *Seeley v. New York C. & H. R. R. Co.*, 8 App. Div. (N. Y.) 402; 40 N. Y. Supp. 866. That deceased was a woman, was 63 years old and had no source of income, and that she did the general housework for her family was considered. *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613. Age, health, industry, sobriety and average daily earnings considered. *Krulder v. Woolverton*, 11 Misc. (N. Y.) 537; 32 N. Y. Supp. 742. Age, sex and occupation considered. *Henning v. Caldwell*, 45 N. Y. St. R. 373; 18 N. Y. Supp. 339, aff'd 137 N. Y. 553; 50 N. Y. St. R. 931; 33 N. E. 337. Age and good health of wife and mother, and character of new services considered. *Lyons v. Second Ave. R. Co.*, 89 Hun (N. Y.), 374; 69 N. Y. St. R. 816; 35 N. Y. Supp. 372, aff'd 152 N. Y. 654; 47 N. E. 1109. Intemperate

habits is an important factor. *Devor v. Van Vranken*, 29 Hun (N. Y.), 201. Occupation, industry and disposition. *Erwin v. Neversink S. S. Co.*, 23 Hun (N. Y.), 573, aff'd 88 N. Y. 184. Age and relation to deceased appeared, but no evidence of her abilities or condition in life. *Mitchell v. New York, C. & H. R. R. Co.*, 2 Hun (N. Y.), 535; 5 T. & C. 122, aff'd 64 N. Y. 655. Value of support by husband, and father of wife and children, loss of earnings considered. *Althorf v. Wolfe*, 2 Hilt. (N. Y.) 344, aff'd 22 N. Y. 355. Age, sex, life expectancy considered. *McIntyre v. New York C. R. Co.*, 47 Barb. (N. Y.) 515, case aff'd 37 N. Y. 287; 35 How. 36; 4 Trans. App. 1. Loss of services of wife, and whether or not she was an amiable and educated woman may be considered. *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25, aff'd 30 How. (N. Y.) 593 n. Life expectancy and probable gross income are factors. *Russell v. Windsor S. S. Co.*, 126 N. C. 381; 36 S. E. 191. Personal living expenses admissible to show net income and care exercised in the matter, also incompetency of deceased to fill a better position admissible, where it is shown that he had occupied a more remunerative one, and where it was in evidence that he was employed as fireman on defendant's road at the time of his death. Testimony is incompetent as to his occupation, when not on duty, it not appearing that he was remunerated therefor, but it was competent to prove deceased's earnings as engineer which position he had filled prior to

jury and is examined so that they may approximately determine her age.³⁵ So proof of the character, quality, capacity and condition of deceased and of the age, condition and circumstances of the next of kin is sufficient to warrant recovery of substantial damages.³⁶

§ 564. "Fair and just compensation for the pecuniary injury"—Sufferings of person injured not a factor.—The "fair and just compensation for the pecuniary injury" given under the statute in cases of loss resulting from death, represents the pecuniary loss sustained by the beneficiaries for whose benefit the legislature created a new cause of action.³⁷ It is the pecuniary interest which they have in the life of deceased which is the ground of recovery and even though the

that of fireman, there being evidence as to his habits, industry and ability. *Burns v. Asheboro & M. R. Co.*, 125 N. C. 304; 34 So. 495. And where deceased was addicted to drink, and a question arose as to the cause of his death, he having been found dead near defendant's railroad tracks, the case was held properly left to the jury. *Powell v. Southern R. Co.*, 125 N. C. 370; 34 S. E. 530. Cost of living and expenditures, and life expectancy considered. *Mendenhall v. North Carolina R. Co.*, 123 N. C. 275; 31 S. E. 480. Same facts and present value of accumulation of net income considered. *Benton v. North Carolina R. Co.*, 122 N. C. 1007; 30 S. E. 333. Age, habits, industry, means, business qualifications and skill are factors. *Benton v. North Carolina R. Co.*, 122 N. C. 1007; 30 S. E. 333. Cost of living and expenditures, net and gross income, habits of sobriety and condition of health are factors. *Coley v. Statesville*, 121 N. C. 301; 28 S. E. 482. Expectancy of life a factor, also net income. *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616; 23 S. E. 264; 30 L. R. A. 257. Net earnings,

health and habits are factors. *Blackwell v. Moorman*, 111 N. C. 151; 16 S. E. 12; 17 L. R. A. 729. See *Burton v. Wilmington & W. R. Co.*, 82 N. C. 504; 84 N. C. 192; *Kesler v. Smith*, 66 N. C. 154.

³⁵ *Moskovitz v. Lights*, 68 Hun (N. Y.), 102; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732.

³⁶ *Lustig v. New York, L. E. & W. R. Co.*, 65 Hun (N. Y.), 547; 48 N. Y. St. R. 916; 20 N. Y. Supp. 417. See *Pineo v. New York, C. & H. R. R. Co.*, 34 Hun (N. Y.), 80, aff'd 99 N. Y. 644; *Kelly v. Twenty-Third St. R. Co.*, 14 Daly (N. Y.), 418; 14 N. Y. St. R. 699; 27 Wkly. Dig. 372, aff'd 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878. But examine *Ahern v. Steele*, 48 Hun (N. Y.), 517; 16 N. Y. St. R. 24; 1 N. Y. Supp. 259, rev'd 115 N. Y. 203; 26 N. Y. St. R. 295; 22 N. E. 193; *Mitchell v. New York C. & H. R. R. Co.*, 2 Hun (N. Y.), 535; 5 T. & C. (N. Y.) 123, aff'd 64 N. Y. 155; *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.), 116. See further secs. 561, herein, as to nominal damages.

³⁷ *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62, 63, per Bartlett, J.

action can be maintained only in the cases in which it could have been brought by deceased had he survived, nevertheless the damages are given upon different principles and for different causes.³⁸ Again, as we have elsewhere stated, the cause of action is for the death and not for the injury to deceased.³⁹ The recovery therefore to which the beneficiaries are entitled by reason of the death is not the recompense which would have belonged to deceased had he lived and necessarily does not include damages for the pain and suffering of mind and body endured by the injured person, nor for the personal wrong to him, even though had he not been fatally injured he might himself have recovered therefor.⁴⁰ But if it is stipulated that the action by the injured person for his personal injuries shall not abate by his death, then his personal executors may, it is held, recover what he might have done had he lived.⁴¹

§ 565. "Fair and just compensation for the pecuniary injury"—Exemplary or vindictive damages.—Under the New York statute⁴² the measure of damages is, as we have elsewhere stated "such a sum" as is deemed to be "a fair and just compensation for the pecuniary injuries resulting from the death" and so reads the North Carolina enactment.⁴³ And this provision excludes the recovery of exemplary or vindictive damages.⁴⁴

³⁸ *Whitford v. Panama R. Co.*, 23 N. Y. 465, 469. See *Dibble v. New York & E. R. Co.*, 25 Barb. (N. Y.) 183; *Littlewood v. Mayor*, 89 N. Y. 24; 14 Wkly. Dig. 400, case affirms 47 Super. (N. Y.) 547. See secs. 559-560, herein.

³⁹ *Smith v. Metropolitan St. R. Co.*, 15 Misc. (N. Y.) 158; 35 N. Y. Supp. 1062 (1050); 7 App. Div. (N. Y.) 253; 74 N. Y. St. R. 706; 40 N. Y. Supp. 148. "The statutory liability has no existence in his lifetime and accrues only by reason of his death." *Stuber v. McEntee*, 142 N. Y. 200; 31 Abb. N. C. (N. Y.) 246; 58 N. Y. St. R. 455; 36 N. E. 878, per O'Brien, J.

⁴⁰ *Etherington v. Prospect Park*

& C. I. R. Co., 88 N. Y. 641, aff'g 24 Hun, 235; *Whitford v. Panama R. Co.*, 23 N. Y. 465, 469; *Quin v. Moore*, 15 N. Y. 435, per Comstock, J.; *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, case affirms 3 E. D. Smith, 103; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234; *Dorman v. Broadway R. Co.*, 16 N. Y. St. R. 753.

⁴¹ *Cox v. New York C. & H. R. R. Co.*, 11 Hun (N. Y.), 621.

⁴² 2 Stov. Annot. Code (ed. 1896), sec. 1904.

⁴³ Code, N. C. 1883, sec. 1499.

⁴⁴ *Wise v. Teerpenning*, 2 Edw. S. C. (N. Y.) 112. See secs. 564, 569, herein.

So punitive damages cannot be recovered against a physician for malpractice resulting in a wife's death.⁶

§ 566. "Fair and just compensation for the pecuniary injury"—Solatium—Mental suffering not a factor.—The words of the statute are exclusive in so far as mental suffering, anguish or grief of the beneficiaries are concerned, since no recovery can be had therefor nor for any injury whatsoever to the feelings alone; for what has been frequently designated as sentimental damages or injuries to the affections or sentiments cannot be pecuniarily measured.⁶

§ 567. "Fair and just compensation for the pecuniary injury"—Loss of society of deceased.—Nothing can be recovered for loss resulting from the deprivation of the companionship of relatives or for the comfort therefrom, as such loss is incapable of compensation by any recognized measure of value.⁷ And where a husband brought an action for loss occasioned by his wife's injury, it was held that he might recover for loss of comfort from his wife's society, but upon his death that such right ceased as to that element of damages and did not survive to his personal representatives.⁸

⁶ Gray v. Little, 127 N. C. 304; 37 S. C. 270.

⁶ Felice v. New York C. & H. R. R. Co., 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637; Etherington v. Prospect Park & C. I. R. Co., 88 N. Y. 641, aff'g 24 Hun (N. Y.), 235; Tilley v. Hudson R. R. Co., 24 N. Y. 471, 474; 29 N. Y. 252; Oldfield v. New York & Harlem R. Co., 14 N. Y. 310, aff'g 3 E. D. Smith (N. Y.), 103; McIntyre v. New York C. R. Co., 47 Barb. 515, aff'd 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1; Green v. Hudson River R. Co., 32 Barb. (N. Y.) 25, aff'd 30 How. (N. Y.) 593 n; Lehman v. Brooklyn, 29 Barb. (N. Y.) 234.

⁷ Tilley v. Hudson R. R. Co., 24 N. Y. 471; 23 How. 363; Felice v. New York C. & H. R. R. Co., 14 App. Div. (N. Y.) 345; 43 N. Y.

Supp. 922, per the court, case of deceased husband and father; Etherington v. Prospect Park & C. I. R. Co., 88 N. Y. 641, per the court, aff'g 24 Hun (N. Y.), 235; case of deceased daughter; Green v. Hudson R. R. Co., 2 Abb. Dec. (N. Y.) 277; 2 Keyes, 294, aff'g 31 Barb. 200, aff'g 16 How. (N. Y.) 230; 28 Barb. 9; 30 How. (N. Y.) 593, aff'g 32 Barb. 25. See Lehman v. Brooklyn, 29 Barb. (N. Y.) 234; McIntyre v. New York Cent. R. Co. 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1, aff'g 47 Barb. (N. Y.) 515.

⁸ Cregin v. Brooklyn Crosstown R. Co., 83 Hun (N. Y.), 595, rev'g 19 Hun (N. Y.), 349; 38 Am. Rep. 474; 75 N. Y. 192. See Foels v. Tonawanda, 48 N. Y. St. R. 150; 20 N. Y. Supp. 447.

§ 568. "Fair and just compensation for the pecuniary injury"—Relationship, legal and actual, of deceased to beneficiaries.—While a recovery does not in New York depend necessarily upon a legal obligation or duty on the part of deceased but upon the existence of beneficiaries,⁴⁹ nevertheless the relationship, legal and actual, of deceased to the beneficiaries is an important and relevant factor admissible on the question of damages. Thus the legal relation of husband and wife, parent and minor child, are both material upon the points of who are entitled to recover,⁵⁰ and they also affect the measure of damages, since a wife is entitled to her support and the father is obligated to support his children during minority, and the latter are also entitled to a certain degree of personal care, nurture, instruction and training, and in addition this legal relationship entitles him to their earnings and services until majority, as we have elsewhere stated. Again, under certain circumstances an obligation rests upon children to aid their parents.⁵¹ What we have above stated is illustrated by the following decisions. Thus one element in determining the amount of recovery for prospective damages is the relation of the beneficiaries to deceased.⁵² So "recent statutes changing the rule of the common law recognize the ties of kindred, the mutual dependence of parents and children, husband and wife, and of persons standing in other degrees of relationship."⁵³ So the general character of deceased for affection and kindness towards his relatives may be proven, although evidence cannot be given of specific acts.⁵⁴

⁴⁹ See next following section.

⁵⁰ "Husband, wife or next of kin" are the persons entitled under N. Y. Code Civ. Proc. sec. 1902 (Stover's Ann. Code, 1898). As to those entitled under North Carolina Code, see secs. 559, 560, herein.

⁵¹ See next following section.

⁵² *Houghkirk v. Delaware & H. Can. Co.*, 92 N. H. 219, rev'g 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 How. (N. Y.) 328; 4 Month. L. Bull. 65.

⁵³ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 420, per Andrews, Ch. J.;

62 N. Y. St. R. 432; 38 N. E. 454, case rev'd 4 Misc. (N. Y.) 401; 53 N. Y. St. R. 664; 24 N. Y. Supp. 142. The principal point was that of damages resulting from the death of prospective offspring. Case also aff'd 3 Misc. (N. Y.) 453; 30 Abb. N. C. 78; 52 N. Y. St. R. 498; 23 N. Y. Supp. 163. See *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, 316, quoted from by Bartlett, J., in *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62, and considered in text of sec. 569 next following, herein.

⁵⁴ *Quinn v. Power*, 29 Hun (N. Y.), 183. See *Lockwood v. New York*,

And a deceased daughter's long continued voluntary care of her father and mother may be shown.⁵⁵ But as to actual, possible future relations, it is held that the jury may not consider the advice and counsel which the parents might have received from a minor son, since the fact that they might become enfeebled from old age, imbecility or otherwise, and become dependent upon others for advice and counsel, is too remote to constitute a ground of recovery.⁵⁶ Again, this question of legal and actual relations between deceased and the beneficiaries involves other factors, such as the relative condition and circumstances of the parties, the reasonable expectation of the continuance of past benefits, as in case of contribution to support, past gifts and the like, a total absence in the past of any disposition on the part of deceased to render aid, etc.⁵⁷

§ 569. "Fair and just compensation for the pecuniary injury"—Legal duty or obligation of deceased—Legal right of beneficiaries—Support and assistance, dependency.—The questions of the legal duty or obligation of deceased with reference to the beneficiaries, and of any legal rights which they may possess with reference to deceased, in so far as they affect the measure of damages, are involved in the discussion of support, dependency of certain relatives and of prospective damages. But it is held, seemingly as a general proposition of law, that the damages do not necessarily depend upon any legal duty or obligation of deceased had he continued to live, nor upon the loss, impairment or destruction of any established legal right.⁵⁸ It is also held that the right to damages for causing death does not depend upon the right to maintenance, and that a request to charge that there could be no recovery, because the only person dependent upon deceased for support was one whom he was under no legal obligations to support, was properly refused.⁵⁹

L. E. & W. R. Co., 98 N. Y. 523, aff'd 20 Wkly. Dig. 341.

⁵⁵ Bowles v. Rome, Watertown R. Co., 46 Hun (N. Y.), 324; 12 N. Y. St. R. 457, aff'd 113 N. Y. 643; 22 N. Y. St. R. 997; 21 N. E. 414.

⁵⁶ Gill v. Rochester & P. R. Co., 37 Hun (N. Y.), 107.

⁵⁷ See next following section. These points are also elsewhere considered under the proper headings herein.

⁵⁸ Carpenter v. Buffalo, N. Y. & P. R., 38 Hun (N. Y.), 116.

⁵⁹ Palmer v. New York C. & H. R. Co., 5 N. Y. St. R. 436; 26 Wkly.

The statute does not, as has been supposed by some, only create a liability in those cases where the relations of the parties to be indemnified to the person killed were such that the former had a legal right to some pecuniary benefit which would result from a continuance of the life of the latter and which was lost by his death. It is applicable to the case of any person where death ensues, who could himself, if living, have maintained the action.⁶⁰ Again, a recovery was sustained where the only next of kin were a brother and sister and three nephews, and it did not appear that deceased had ever supported or assisted them in any way.⁶¹ So in another case a verdict was sustained as not excessive, although deceased had never contributed anything to the support of his next of kin who were a widowed mother and adult brothers and sisters,⁶² and also where deceased was a wife and mother and no pecuniary aid had been received from her.⁶³ But these decisions, while holding that the recovery does not depend of necessity upon a legal or moral obligation to perform a duty, nor upon a legal right to demand the performance of a like obligation as the material factor which constitutes a basis for damages, nevertheless they do not exclude proof of such duty or right, and in certain cases as is illustrated, by the obligation of a husband, father, mother or child to render support and aid, such factors are most important in determining the measure of damages. Thus in case of the death of a child, under certain circumstances he or she might, after majority, owe the duty of support which could, by legal proceedings, be enforced,⁶⁴ as is evidenced by the Code of Criminal Procedure of New York,⁶⁵

Fig. 26, case aff'd 112 N. Y. 234; 20 N. Y. St. R. 904; 19 N. E. 678. See cases at the end of this section.

⁶⁰ *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, 316. Language of the court in considering the Laws of 1847, ch. 450, quoted by Bartlett, J., in *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62.

⁶¹ *Kelly v. Twenty-Third St. R. Co.*, 14 Daly, 418; 14 N. Y. St. R. 699; 27 Wkly. Dig. 572, aff'd 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878.

⁶² *Kane v. Mitchell Transp. Co.*, 90

Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153 N. Y. 680.

⁶³ *Klemm v. New York C. & H. R. R. Co.*, 78 Hun (N. Y.), 277; 60 N. Y. St. R. 231; 28 N. Y. Supp. 361.

⁶⁴ *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 508; 18 N. Y. St. R. 130; 18 N. E. 108, per Earl, J., case affirms 41 Hun (N. Y.), 404; 3 N. Y. St. R. 133; 25 Wkly. Dig. 46.

⁶⁵ Sec. 914 which provides that "the father, mother and children of sufficient ability of a poor person

although the jury should not be charged that a "father could compel the son to support him in his old age, and the jury had a right to consider that fact," without reference to the condition or inability of the father to support himself and the son's "sufficient ability" or means wherewith to relieve and maintain him as provided by statute, and within the intent thereof, especially so where in the same charge the question is left in doubt as to the father's right to the son's earnings after he became of age.⁶⁵ Again, in the case of infants of very tender years, this duty to support parents after the child reaches majority, and the possibility that the future situation of the parties might bring them within the above decision or statute, would certainly be a factor dependent upon many contingencies and most remote and uncertain.⁶⁶ Although the jury, in estimating the pecuniary value of a child to the next of kin could take into consideration all the probable or even possible benefits which might result to them from such child's life, modified, as in their estimation they should be, by all the chances of failure or misfortune, using their own good sense for their guidance.⁶⁷ And it is also true that the fact of contribution to support, or the rendering of aid and assistance, or the legal and perhaps the moral obligation to render it, or the legal right to demand the same, or that deceased was the sole support of the beneficiary, or the extent of dependency upon deceased for maintenance, or facts showing a reasonable expectation of the continuance of support, contributions thereto, or of aid and assistance, are all admissible in evidence and affect in a greater or less degree the measure of damages. They are also factors which the courts have frequently considered in determining whether the verdict should stand, be set aside, reversed or modified.⁶⁸ The question of support or de-

who is blind, old, lame, impotent or decrepit so as to be unable by work to maintain himself must at their own charge relieve and sustain him."

⁶⁵ *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348; 64 N. Y. St. R. 813; 40 N. E. 15, rev'g 8 Misc. (N. Y.) 601; 60 N. Y. St. R. 831; 29 N. Y. Supp. 325.

⁶⁷ See the somewhat analogous case

of *Gill v. Rochester & Pittsburg R. Co.*, 37 Hun (N. Y.), 107.

⁶⁶ *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 508; 18 N. Y. St. R. 130; 18 N. E. 108, language of Earl, J., case affirms 41 Hun (N. Y.), 404; 3 N. Y. St. R. 133; 25 Wkly. Dig. 46.

⁶⁸ Evidence is admissible as to the extent to which deceased contributed

pendency also involves primarily that of the existence of beneficiaries which is necessary to be shown in New York, even though recovery may be had by them without proof of dependency for support,⁷⁰ as it is not required that the degree of kin-

to the support of his family. *Seifter v. Brooklyn Heights R. Co.*, 66 N. Y. Supp. 1107; 55 App. Div. (N. Y.) 10. Deceased son 19 years old gave wages to his father. *Twist v. Rochester*, 37 App. Div. (N. Y.) 307; 55 N. Y. Supp. 850. Deceased woman 68 years old, dependent to some extent for support upon contributions from her children. *Phalen v. Rochester R. Co.*, 31 App. Div. (N. Y.) 448; 52 N. Y. Supp. 836; 28 Civ. Proc. (N. Y.) 42. Deceased was 33 years old and sole support of family. *Felice v. New York C. & H. R.R. Co.*, 14 App. Div. (N. Y.) 343; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637. Deceased daughter comfortably supported father, a penniless and dependent old man, and she was only child upon whom he could depend for support in his old age. *Purcell v. Laurer*, 14 App. Div. (N. Y.) 83; 43 N. Y. Supp. 988; 2 Am. Neg. Rep. 57. Deceased, a woman 54 years old, had six children more or less dependent upon her for support. *Henning v. Caldwell*, 45 N. Y. St. R. 373; 18 N. Y. Supp. 339, aff'd 137 N. Y. 533; 50 N. Y. St. R. 931; 33 N. E. 337. Deceased son contributed to his mother's support. *Waldele v. New York C. & H. R. R. Co.*, 29 Hun (N. Y.), 35, rev'g 61 How. (N. Y.) 350, rev'd 95 N. Y. 274. Deceased daughter had contributed from \$300 to \$400 a year to her parents' support. *Bowles v. Rome, Watertown R. Co.*, 46 Hun (N. Y.), 324; 12 N. Y. St. R. 457, aff'd 113 N. Y. 643; 22 N. Y. St. R. 997; 21 N. E. 414. Action for death of sister aged 14; father had not provided for family for years.

Pineo v. New York C. R. Co., 34 Hun (N. Y.), 80, aff'd 99 N. Y. 644. Deceased was a wife and mother; all her earnings were used in the family's support. *Oregin v. Brooklyn Crosstown R. Co.*, 18 Hun (N. Y.), 368. Value of support of wife and children by father may be considered. *Althorf v. Wolfe*, 2 Hilt. (N. Y.) 344, aff'd 22 N. Y. 355. See further as to necessity of showing support or dependency, legal duty, etc., *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, aff'g 20 Wkly. Dig. 341; *Quin v. Moore*, 15 N. Y. 432; *Keller v. New York C. R. Co.*, 2 Abb. Dec. (N. Y.) 480; 24 How. (N. Y.) 172, aff'g 17 How. (N. Y.) 102; 28 Barb. (N. Y.) 44 n.

⁷⁰ Under the present New York Code (*Stover's Annot. Code*, 1898), sec. 1902, "the executor or administrator of a decedent who has left him or her surviving a husband, wife or next of kin, may maintain an action," etc., but the former statute read "widow and next of kin," and the action was maintainable where there was next of kin only, and no widow, or where there was a widow only and no next of kin. *McMahon v. Mayor*, 33 N. Y. 642; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 E. D. Smith (N. Y.), 103; *Keller v. New York C. R. Co.*, 2 Abb. Dec. (N. Y.) 480; 24 How. (N. Y.) 172, aff'g 17 How. (N. Y.) 102; 28 Barb. (N. Y.) 44 n. *Safford v. Drew*, 3 Duer (N. Y.), 627; "Next of kin" is defined by section 1905 of the Code of New York as having the same meaning as

dred should be such as to create the duty of sustenance, support or education.⁷¹ But in North Carolina the existence of next of kin seems unnecessary to maintain the action.⁷²

§ 570. "Fair and just compensation for the pecuniary injury"—Reasonable expectation of pecuniary benefit—Prospective damages.—Future proximate results as well as past consequences should be considered, although prospective damages are incapable of being accurately estimated. The compensation for the pecuniary injury includes the deprivation of what reasonably may have been expected, by those for whose benefit the recovery is had, if the deceased had not been killed. The damages may cover those which the jury may believe, and find, will in the future result from the death as the proximate cause thereof. In brief, the money value of the reasonable expectation of pecuniary benefit to the next of kin from the continuance of the life of deceased should be considered.⁷³ And the

that given by *id.*, section 1870, and includes those entitled to share under the law of distribution of personal property, "other than a surviving husband or wife." That existence of beneficiaries necessary, see *Davidow v. Pennsylvania R. Co.* (U. S. C. C. D. N. Y.), 85 Fed. 943; *Dickins v. New York C. R. Co.*, 23 N. Y. 158; *Lucas v. New York C. R. Co.*, 21 Barb. (N. Y.) 245; *Safford v. Drew*, 3 Duer (N. Y.), 627; 12 N. Y. Leg. Obs. 150. Examine *Hegerick v. Keddle*, 99 N. Y. 258; 1 N. E. 787, rev'g 32 Hun (N. Y.), 141; 5 Civ. Proc. 228; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 E. D. Smith (N. Y.), 103; *Keller v. New York C. R. Co.*, 24 How. (N. Y.) 172; 2 Abb. Dec. 102, aff'g 28 Barb. 44 n.; 17 How. (N. Y.) 102; *Yertore v. Wiswall*, 16 How. (N. Y.) 8, 28.

⁷¹ *Tilley v. Hudson R. R. Co.*, 24 N. Y. 474, cited in *Matter of Snedeker v. Snedeker*, 104 N. Y. 58, 63.

⁷² *Warner v. Western N. C. R. Co.*,

94 N. C. 250. This case is cited to the point that the law ordinarily will presume that a deceased person has heirs, and that it is not necessary to name the heirs in *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 342, per *Andrews*, Ch. J. Examine *Kessler v. Smith*, 66 N. C. 154. It is important, however, to note that the North Carolina statute differs from the New York statute as to the persons who are or may become entitled to the amount recovered as damages. See sec. 901. herein as to distribution of damages.

⁷³ *Thomas v. Utica & B. R. R. Co.*, 6 Civ. Proc. (N. Y.) 353, aff'd 34 Hun (N. Y.), 626, aff'd 98 N. Y. 49; *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 50 Hun (N. Y.), 116; *Houghkirk v. Delaware & H. C. Co.*, 92 N. Y. 219, rev'g 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 Horo. (N. Y.) 328; 4 Month. L. Bull. 65; *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348,

statutes recognize the reasonable expectation that pecuniary aid or assistance, even outside of legal obligations, will be extended by relatives to each other in case of necessity, and upon this basis have given a statutory action for the benefit of the widow and next of kin.⁷⁴ So the benefit of the counsel of a husband and father are of pecuniary value.⁷⁵ In New York it is held that it does not follow that damages should be reduced although it does not appear that the next of kin would have been benefited by the continuance of decedent's life.⁷⁶ So the probable earnings which deceased's family would receive after the cost of his own living was deducted, were considered in determining whether a verdict was excessive.⁷⁷

350, 351, per Haight, J.; 64 N. Y. St. R. 813; 40 N. E. 15; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. N. St. R. 130; 18 N. E. 108, aff'g 41 Hun (N. Y.), 404; 3 N. Y. St. R. 133; 25 Wkly. Dig. 46; *Staal v. Grand St. & N. R. Co.*, 107 N. Y. 625; 1 Silv. C. A. 516; 11 N. Y. St. R. 352; 25 Wkly. Dig. 241; *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, aff'g 20 Wkly. Dig. 341; *Ihl v. Forty-Second St. & G. St. F. R. Co.*, 47 N. Y. 317; *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471; 29 N. Y. 252; *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 Ed. Smith (N. Y.), 103; *Johnson v. Long Isl. R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857; *Ganiard v. Rochester City & B. R. Co.*, 50 Hun (N. Y.), 22; 18 N. Y. St. R. 692; 2 N. Y. Supp. 470, aff'd 121 N. Y. 661; 24 N. E. 1092; *Cregin v. Brooklyn Crosstown R. Co.*, 19 Hun (N. Y.), 341, case rev'd 83 N. Y. 595; *Cregin v. Brooklyn Crosstown R. Co.*, 18 Hun (N. Y.), 368; *Kelly v. Twenty-Third St. R. Co.*, 14 Daly (N. Y.), 418; 14 N. Y. St. 699; 27 Wkly. Dig. 572, aff'd 113 N. Y. 628; 22 N. Y. St. R. 994;

20 N. E. 878; *Kesler v. Smith*, 66 N. C. 154. As to jury not being limited to actual damages specifically proven and their right to consider prospective or indefinite damages, see *Countryman v. Fonda, J. & G. R. Co.*, 166 N. Y. 201; 59 N. E. 822, rev'g 54 N. Y. Supp. 1098.

⁷⁴ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 420; per *Andrews, Ch. J.*; 62 N. Y. St. R. 432; 38 N. E. 454.

⁷⁵ *Felice v. New York C. & H. R. R. Co.*, 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637. See *Gill v. Rochester & P. R. Co.*, 37 Hun (N. Y.), 107.

⁷⁶ *Phalen v. Rochester R. Co.*, 31 App. Div. 448; 52 N. Y. Supp. 836; 28 Civ. Proc. (N. Y.) 42. In this case deceased was a woman 68 years old; she was dependent to some extent upon her children and was not in robust health; \$800 was held not excessive notwithstanding sec. 1904, N. Y. Code Civ. Proc.

⁷⁷ *Taylor v. Long Island R. R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y. Supp. 820; 2 Am. Neg. Rep. 608. In this case deceased was a laborer. As to deduction of earning of beneficiaries, see *Althorf v. Wolfe*, 2 Hilt. (N. Y.) 344, case aff'd 22 N. Y. 355. The question is what were the prob-

§ 571. "Fair and just compensation for the pecuniary injury"—Prospect of inheriting.—The jury have the right to consider not only the amount the deceased would have brought to the next of kin while living, but their prospect of inheriting from him after death.⁷⁸ But the prospect that children would upon their father's death and intestacy have received an estate increased by the value of the earnings of a deceased wife and mother does not constitute a proper item of damages in an action for her death, brought by him as administrator of his wife.⁷⁹ So evidence is admissible in an action by a husband as his wife's administrator, as to the amount of her earnings and probable profits, where she had no descendants, and under the Code her husband was entitled to her personal estate.⁸⁰

§ 572. "Fair and just compensation for the pecuniary injury"—Physical and financial condition, age, number of family, etc.—When admissible.—The age, number, sex, physical and financial condition and the circumstances of the next of kin have been considered in numerous cases, either by the court below or by the appellate court in reviewing the case. In most of the decisions, it is true, there has been no discussion as to the admissibility of such evidence, and in some, the relevancy is apparent. Again, even though these factors may

able chances of pecuniary benefit from a continuance of the life under all the circumstances, and that the result may be somewhat subject to chance does not prevent a recovery. *Thomas v. Utica & B. R. R. Co.*, 6 Civ. Proc. (N. Y.) 353, case aff'd 34 Hun (N. Y.), 626, which is aff'd 93 N. Y. 49.

⁷⁸ *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348, 351, per Haight, J.; 64 N. Y. St. R. 813; 40 N. E. 15. This was a case of a minor son's death. It reverses 8 Misc. (N. Y.), 601; 60 N. Y. St. R. 831; 29 N. Y. Supp. 325. The court cites on the above proposition, *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 70 N. Y. St. R. 868;

29 N. E. 357; *Thomas v. Utica & B. R. R. Co.*, 6 Civ. Proc. (N. Y.) 626, case aff'd 34 Hun (N. Y.), 626, aff'd 98 N. Y. 49. See secs. 570, 575, herein. This proposition differs from that involved in *Terry v. Jewett*, 7 Hun (N. Y.), 395; 78 N. Y. 338, as this relates to the right to receive certain benefits as damages, while the *Terry* case merely relates to the reduction of benefits by the inheritance. See sec. 574, herein.

⁷⁹ *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471; 23 How. (N. Y.) 363.

⁸⁰ *Meyer v. Hart*, 23 App. Div. (N. Y.) 131; 82 N. Y. St. R. 907; 48 N. Y. Supp. 904, under N. Y. Code Civ. Proc. sec. 2732 (relating to order of distribution), sec. 2734 (relating to estates of married women).

not be directly material for the express purpose of enhancing or mitigating damages, yet they may be relevant and material as showing or tending to prove certain other relevant, material and competent, evidential facts or elements.⁴¹ Thus that a father is

⁴¹ See *Lockwood v. New York, L. E. & W. R. Co.*, 20 Wkly. Dig. 341, aff'd 98 N. Y. 523; *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 219, rev'g 28 Hun (N. Y.), 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. (N. Y.) 72; 63 How. 328; 4 Month. Law Bull. 63; *Lustig v. New York, L. E. & W. R. Co.*, 65 Hun (N. Y.), 547; 48 N. Y. St. R. 916; 20 N. Y. Supp. 417. Wife was deprived of her home and support. *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. Supp. 642. Ages, number and dependency of children considered in action for father's death. *Wallace v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 57; 55 N. Y. Supp. 132; 5 Am. Neg. Rep. 215. Deceased left a wife, son and daughter. *Cooper v. New York, O. & W. R. Co.*, 25 App. Div. (N. Y.) 383; 49 N. Y. Supp. 481. Deceased left a wife and three children of whom he was the sole support. *Felice v. New York C. & H. R. Co.*, 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637. Deceased left six children more or less dependent upon her. *Henning v. Caldwell*, 45 N. Y. St. R. 373; 18 N. Y. Supp. 339, aff'd 137 N. Y. 553; 50 N. Y. St. R. 931; 33 N. E. 337. Surviving father was a penniless and dependent old man. *Purcell v. Laurer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988; 2 Am. Neg. Rep. 57. Surviving father was 61 years old. *Seeley v. New York C. & H. R. Co.*, 8 App. Div. (N. Y.) 402; 40 N. Y. Supp. 866. Deceased woman's family consisted of a husband 65 years old and

five grown up sons, only three of whom lived at home, and deceased had no source of income. *Medinger v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613. The fact that deceased left a widowed mother and adult brothers and sisters was considered. *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581; aff'd 153 N. Y. 680. Deceased woman's family consisted of husband and daughter for whom she performed the household work. *Lyons v. Second Ave. R. Co.*, 89 Hun (N. Y.), 374; 69 N. Y. St. R. 816; 35 N. Y. Supp. 372, aff'd 152 N. Y. 654; 47 N. E. 1109. Deceased lived with his father, his next of kin, who was 58 years old. *Fitzgerald v. New York C. & H. R. Co.*, 88 Hun (N. Y.), 359; 68 N. Y. St. R. 762; 34 N. Y. Supp. 762, case was rev'd 154 N. Y. 263; 48 N. E. 514, upon insufficient evidence as to cause of death. That parent was aged and infirm and his health and pecuniary circumstances and that he had an aged wife, both of them being without means of support, may be shown where he is suing for an adult daughter's death and is the only next of kin. *Bowles v. Rome, Watertown R. Co.*, 46 Hun (N. Y.), 324; 12 N. Y. St. R. 457; 113 N. Y. 643; 22 N. Y. St. R. 997; 21 N. E. 414. Age and circumstances of next of kin should be shown to sustain a verdict. *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.), 116. So the occupation of the father and circumstances and condition in life of the parents may be considered in

aged, poor and unable to support himself, may be proven in connection with evidence that a deceased son, for whose death the action for damages is brought, might have become of sufficient ability or means to support him, except for the death, and so become obligated for such support.⁸² And logically this decision should, by virtue of the criminal code, extend to the mother and children of sufficient ability of a poor person who is blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself,⁸³ provided such poor person is within the statutory class and "next of kin."⁸⁴ And in this connection it may be stated that the sum to be recovered represents the entire pecuniary loss to each and all the relatives, as a class, who are mentioned in the statute.⁸⁵ Again, in case of children of deceased, their number, ages, sex and condition of health may be proven, also their situations with reference to deceased, whether they are married or unmarried, whether they lived with deceased or away from home, whether they are dependent upon him or self-supporting, and it may also be shown that such children have no property of their own, and the character of services, if any, rendered by them to deceased in

an action for a child's death. *Ihl v. Forty-Second St. & G. St. F. R. Co.*, 47 N. Y. 317, 321. So the fact that the mother had no means of her own may be shown in an action for her son's death. *Waldele v. New York C. & H. R. R. Co.*, 29 Hun (N. Y.), 35, rev'g 61 How. (N. Y.) 350, rev'd 95 N. Y. 274. Three children survived, of whom two were married and lived away from deceased who was a widow about 50 years old, likely to become dependent within ten years. *McIntyre v. New York C. R. Co.*, 47 Barb. (N. Y.) 515, aff'd 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1. In an action for death of her son, the plaintiff was permitted to prove that she was disqualified from working, owing to a malady, and that she had no means at the time of the son's death. *Harlinger v. New York*

C. & H. R. R. Co., 15 Wkly. Dig. (N. Y.) 392, aff'd 92 N. Y. 661.

⁸² *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348; 64 N. Y. St. R. 813; 40 N. E. 15, rev'g 8 Misc. (N. Y.) 601; 60 N. Y. St. R. 831; 29 N. Y. Supp. 325; *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 79 N. Y. St. R. 868; 29 N. E. 857.

⁸³ N. Y. Code Crim. Proc. sec. 914. The complaint showed that deceased left a mother, her next of kin, dependent upon her. *Green v. Hudson R. R. Co.*, 16 How. Pr. (N. Y.) 263, aff'd 31 Barb. (N. Y.) 260, which was aff'd on appeal.

⁸⁴ See sec. 573, herein.

⁸⁵ *Snedeker v. Snedeker*, 164 N. Y. 58, 63, per Bartlett, J., aff'g 47 App. Div. (N. Y.) 471.

return for support, as in the case where an unmarried daughter did the housework; it also appearing that she was afflicted with a disease which incapacitated her from labor.⁸⁸ As we have stated elsewhere, the jury may consider those factors of mental and physical health and condition, etc., of deceased, which show what probable and possible pecuniary benefits the next of kin would have derived from the continuance of life of deceased.⁸⁷ And throughout all the decisions it is apparent that since the pecuniary injury only is to be considered, evidence is admissible as to the factors of pecuniary loss, present and prospective,⁸⁸ and this necessarily involves the consideration of the pecuniary or financial condition of deceased at the time of his death and of his reasonably probable accumulations had he lived.⁸⁹ So that proof is relevant and material which shows the situation, means, circumstances and physical or financial condition of deceased. Thus the fact that the father of a deceased child was prosperous and paid for said son's education and did not rely upon him for a source of income, may be considered in determining the inadequacy of the damages.⁹⁰ And the receipt of an adult son's earnings and the use thereof in paying house rent and supporting a family, of whom deceased was one, may properly be proven.⁹¹ So proof of the mother's financial circumstances is relevant upon the question of her pecuniary damage from the loss of her son.⁹² And evidence of the father's pecuniary condition, in that he required his child's services to maintain his household, is competent.⁹³ Again, the circumstances and condition in life of a widowed mother, suing for the death of her youngest child, and the fact that she had three minor children was considered, not only in deciding that the damages were not excessive, but also as being material in deter-

⁸⁸ *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523; 20 Wkly. Dig. 841.

⁸⁷ See secs. 566, 570, herein.

⁸⁸ See sec. 570, herein.

⁸⁹ See sec. 575, herein.

⁹⁰ *Morris v. Metropolitan St. Ry. Co.*, 51 App. Div. (N. Y.) 512; 64 N. Y. St. R. 878; 30 Civ. Proc. R. (N. Y.) 371.

⁹¹ *Lipp v. Otis Brothers & Co.*, 161 N. Y. 559, 563, per Parker, Ch. J.; 56 N. E. 79, case reverses 28 App. Div. (N. Y.) 228.

⁹² *Fowler v. Buffalo Furnace Co.*, 41 App. Div. (N. Y.) 84; 58 N. Y. Supp. 223, appeal dismissed 160 N. Y. 665.

⁹³ *Pressman v. Mooney*, 5 App. Div. (N. Y.) 121; 39 N. Y. Supp. 44.

mining that the failure to prove her age was not fatal to a recovery,⁹⁴ and evidence is admissible that deceased left no estate and the administratrix may so testify.⁹⁵ And in North Carolina the means, skill and business qualifications, etc., may be considered.⁹⁶ Again, the financial and physical condition of the parents may be proven, as where the mother of the deceased, a son thirteen years old, had no means and was unable to work, because of a malady which she had.⁹⁷ And the admission of proof of financial circumstances has been sanctioned in the case of a mother for the purpose of determining the amount of her pecuniary damage for the loss by death of her son.⁹⁸ But the fact that the parents might by reason of imbecility or feebleness, arising from old age or other causes, possibly become dependent upon others for advice and counsel is too remote to constitute a basis of recovery for the loss by death of a son seventeen years old.⁹⁹

§ 573. "Fair and just compensation for the pecuniary injury"—Physical and financial condition, age, number of family, etc.—When inadmissible.—Evidence is inadmissible as to the poverty, misfortunes or riches, the number of the family, inability to work or of any other fact relating to the situation, condition or circumstances of the brothers, sisters or other relatives of deceased, who are not the next of kin, where an action is brought by a father to recover damages for his adult son's killing, and he is the sole next of kin and entitled to the entire damages which may be recovered.¹⁰⁰ Nor can evidence be

⁹⁴ *Moskovitz v. Lighte*, 68 Hun (N. Y.), 102; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732, aff'd 140 N. Y. 619; 55 N. Y. St. R. 929; 35 N. E. 890. But see sec. 593, herein.

⁹⁵ *Kooserowska v. Glasser*, 8 N. Y. Supp. 197.

⁹⁶ *Benton v. North Carolina R. Co.*, 122 N. C. 1007; 30 S. E. 323.

⁹⁷ *Harlinger v. New York Cent. R. R. Co.*, 15 Wkly. Dig. (N. Y.) 392, aff'd 92 N. Y. 661.

⁹⁸ *Fowler v. Buffalo Furnace Co.*, 41 App. Div. (N. Y.) 84; 58 N. Y.

Supp. 223, appeal dismissed 160 N. Y. 665.

⁹⁹ *Gill v. Rochester & Pitts. R. R. Co.*, 37 Hun (N. Y.), 107.

¹⁰⁰ *Lipp v. Otis Bros. & Co.*, 161 N. Y. 559; 56 N. E. 79 (under N. Y. Code Civ. Proc. secs. 1903, 1904, 2732, subd 7, and sec. 1870), rev'g 28 App. Div. (N. Y.) 228. The court said in that case: "We are unable to agree with the prevailing opinion of the appellate division in so far as it excuses, if it does not fully justify, the course of the plaintiff in calling as

given as to the property of the mother of a deceased wife, and an instruction to disregard such evidence does not render it harmless.¹ Nor can the number of children of deceased be proven in North Carolina.²

§ 574. "Fair and just compensation for the pecuniary in-

his last witness his own son to tell the jury about the children and grandchildren of the plaintiff and thus calling attention to the great opportunities that the plaintiff had to make a charitable use of any surplus moneys he might have after satisfying his own personal necessities. The evidence could serve no other purpose than to arouse the sympathies of the jury, for none of the persons described were next of kin of deceased, nor were their riches or poverty entitled to consideration at the hands of the jury. . . . George Lipp died leaving no wife or children but he left a father, this plaintiff, who was his sole next of kin (Code, sec. 1870 and sec. 2732, subd. 7), and as such entitled to the entire amount of recovery in this action. . . . From the first question to the last, covering nearly three printed pages of the record, the plaintiff's counsel asked of the witness not a question which did not relate to the brothers, sisters and nephews and nieces of the deceased, not one of whom was next of kin of the deceased, who alone were entitled to be taken into consideration by the jury in determining the amount of damages which they should award. . . . The first question asked of the witness after he had testified that he was the son of the plaintiff and a married man was: 'Q. When were you married?' And after objection had been overruled and the exception noted, the answer came, 'I was married ten years ago. Q. Have you a wife and family?

A. I have, and a big family, too.' Other questions related to sisters, both married and unmarried, the last question eliciting the answer that the unmarried sister was not able to work. Every question was objected to and the learned counsel for the plaintiff was fully apprised of the contention of the defendant that the plaintiff had no legal right to have the jury consider the misfortunes or the poverty of the brothers and sisters and nephews and nieces of the dead man, in determining the amount of compensation which should be awarded to the father for the injuries sustained by the death of his son. . . . That the answers elicited from the witness were irrelevant and immaterial to the issues presented for trial by the pleadings is not open to question nor should it, we think, be said it was harmless. . . . The judgment should be reversed and a new trial granted." Id. 562-565, per Parker, Ch. J. It appeared that the deceased son was 30 years old. But see *Moskovitz v. Lighte*, 68 Hun (N. Y.), 102, aff'd 140 N. Y. 619, considered under sec. 572. herein; *Bowles v. Rome*, Watertown R. Co., 46 Hun (N. Y.), 324, aff'd 113 N. Y. 643, considered in first note to sec. 572, herein.

¹ *Malonee v. New York C. R. Co.*, 20 Wkly. Dig. (N. Y.) 252, action by husband.

² *Burton v. Wilmington, etc., R. Co.*, 82 N. C. 504; *Kessler v. Smith*, 66 N. C. 154.

jury”—Financial advantages accruing from death inadmissible to reduce damages.—The jury have no right to consider in reduction of damages the financial advantages accruing to decedent's next of kin in acquiring property of deceased by reason of his negligent or wrongful killing.³

§ 575. “Fair and just compensation for the pecuniary injury”—Probable accumulations.—Inasmuch as the pecuniary loss includes, as we have stated elsewhere, probable and possible prospective benefits, it is evident that probable accumulations are necessarily an important, relevant and material factor, although it is equally self-evident that the net sum which would represent a husband's or parent's earnings during his life expectancy would, in probably a large majority of cases, amount to little or nothing as probable accumulations, such net sum being dependent, of course, principally upon the size of his family or number of dependents, his income and habits of saving and expenditure, although the other factors of age, health, strength, business, qualifications, ability, activity, skill and probable increase or decrease of physical or mental powers are all of weight in determining whether there would be any probable accumulations, and if so, their amount.⁴ In this connection it may be stated that a mother's capacity to conduct business and make money may be considered,⁵ although her earnings and probable accumulations will be affected, in so far as her children's right in and to such probable estate is concerned, by the fact that their father's life intervenes.⁶ Again, the measure of damages is the present value of the net income or net pecuniary worth of deceased, and this is arrived at by ascertaining his gross income and deducting therefrom the cost of his own living and expenditures, and then estimating the present or net value of the accumulations of such net income, based upon his life expectancy.⁷

³ *Terry v. Jewett*, 17 Hun (N. Y.), 395, *aff'd* 78 N. Y. 338.

⁴ See *McIntyre v. New York C. R. Co.*, 37 N. Y. 287. See secs. 570, 571, herein. See last two cases under last note to this section.

⁵ *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252.

⁶ *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471; 23 How. (N. Y.) 36. See as to wife's and mother's earnings, secs. 562, 563, herein and notes.

⁷ *Mendenhall v. North Carolina R. Co.*, 123 N. C. 275; 31 S. E. 490; *Benton v. North Carolina R. Co.*, 122 N. C. 1007; 30 S. E. 333; *Burns v. Ashe-*

And it is also held that a refusal to instruct that the measure of damages would be the present value of accumulations arising from deceased's life expectancy is not cured by a charge that such damage is the net money value of the deceased's life to those dependent upon him.⁸

§ 576. "Fair and just compensation for the pecuniary injury"—Funeral expenses and expenses for sickness, etc.—

Necessary funeral expenses are recoverable where the beneficiaries are legally liable therefor, and this rule does not necessitate a liability for such expenses on the part of all of said beneficiaries,⁹ and a physician's bill and funeral expenses of a child may be recovered.¹⁰ So also may expenses of nursing and medical attendance,¹¹ and the item of expenses so incurred survives the

boro & M. R. Co. (N. C.), 34 S. E. 495; *Burton v. Wilmington & W. R. Co.*, 82 N. C. 504; 84 N. C. 192; *Kessler v. Smith*, 66 N. C. 154. See *Coley v. Statesville*, 121 N. C. 301; 28 S. E. 482.

⁸ *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616; 23 S. E. 264; 30 L. R. A. 257. Net earnings, health and habits are factors. *Blackwell v. Moorman*, 111 N. C. 151; 16 S. E. 12; 17 L. R. A. 729.

⁹ *Murphy v. New York C. & H. R. R. Co.*, 88 N. Y. 445; 14 Wkly. Dig. 150, aff'g 25 Hun, 311; 13 Wkly. Dig. 213. "Under a similar statute in England it has been held that funeral expenses cannot be recovered. *Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296; *Boulter v. Webster*, 13 Weekly Rep. 289. But in this country, so far as I can discover, it has been uniformly held that the plaintiff can recover such expenses if the law imposes upon the relatives for whose benefit the suit is brought the obligation to bear them. *Penn. R. Co. v. Bantom*, 54 Pa. St. 495; *Owen v. Brock-Schmidt*, 54 Mo. 285; *Roeder v. Ormsby*, 22 How. Pr. 276; " *Murphy v. New York*

C. & H. R. R. Co., 88 N. Y. 445, 446, 447, per Earl, J. In this case the action was brought by the husband for the benefit of himself and children, and it was also decided that "it is immaterial that the children were not bound to defray these funeral expenses, and that all of them fell exclusively upon the husband. They form an item of the pecuniary loss caused by the death, and were proper for the consideration of the jury in estimating the damages to be awarded." *Id.* 447, Andrews, Ch. J., dissented. That the funeral expenses were \$120 was considered with other factors in determining that a verdict of \$150 was grossly insufficient for a wife's killing. *Meyer v. Hart*, 23 App. Div. (N. Y.) 131; 48 N. Y. Supp. 904. Funeral expenses are recoverable. *Stuebing v. Marshall*, 2 Civ. Proc. (N. Y.) 77, aff'd 2 Civ. Proc. (N. Y.) 81; 10 Daly (N. Y.), 406. Death of minor child. *Green v. Hudson R. R. Co.*, 16 How. Pr. (N. Y.) 203, aff'd 31 Barb. 263.

¹⁰ *Pack v. Mayor, etc.*, 3 N. Y. (3 Comst.) 489.

¹¹ *Stuebing v. Marshall*, 2 Civ.

death of a husband pending an action for negligent injury occasioning the wife's death.¹² But only such expenses are recoverable as are necessary and reasonable, although these facts need not be averred, and in an action for an infant's killing, an allegation that the father was compelled to pay a certain specified sum of money for medical attendance, funeral and other expenses caused by the death is sufficient on demurrer.¹³ In connection with the allowance of such expenses it is held that the value of a physician's services is not necessary to be proven, since the bill is sufficient evidence.¹⁴

§ 577. "Fair and just compensation for the pecuniary injury"—Funeral and medical expenses, support, etc., paid by defendant—Mitigation of damages.—The fact that defendant has paid for the support, maintenance and medical expenses of deceased from the time of his injury to his death, and also for his burial cannot be shown in mitigation of damages.¹⁵ With all due respect to the learned court, it is difficult to reconcile so much of this decision, as relates to medical and funeral expenses, with those cases elsewhere noted herein, which permit the recovery thereof, for logically if such expenses are a proper element of damages, it should make no difference whether the defendant paid them voluntarily before the death or by way of a judgment and as part of the damages after death. But it is not, however, intended by this criticism to convey the idea that such payment by defendant should operate other than as a reduction of the damages to the amount so paid. We are encouraged somewhat in making this criticism by a case decided in 1894, in the same state, where the claim was that the payment of a cer-

Proc. (N. Y.) 77, aff'd 2 Civ. Proc. (N. Y.) 81; 10 Daly (N. Y.), 406. The action in this case was for a minor child's death. See *Green v. Hudson R. R. Co.*, 16 How. Pr. (N. Y.) 263, aff'd 31 Barb. 200. *Examine Murray v. Usher*, 117 N. Y. 542; 27 N. Y. St. R. 928; 23 N. E. 564, aff'g 46 Hun (N. Y.), 404; 11 N. Y. St. R. 789; 27 Wkly. Dig. 411.

¹² *Cregin v. Brooklyn Croastown R. Co.*, 83 N. Y. 595, case reverses 10

Hun (N. Y.), 341. See *S. C.*, 75 N. Y. 194; 56 How. (N. Y.) 465, which affirms 56 How. (N. Y.) 32.

¹³ *Roeder v. Ormsby*, 13 Abb. (N. Y.) 334; 22 How. (N. Y.) 270.

¹⁴ *Morseman v. Manhattan Ry. Co.*, 10 N. Y. Supp. 105; 32 N. Y. St. R. 61; 16 Daly (N. Y.), 249.

¹⁵ *Murray v. Usher*, 117 N. Y. 242; 27 N. Y. St. R. 928; 23 N. E. 564, aff'g 46 Hun, 404; 11 N. Y. St. R. 789; 27 Wkly. Dig. 411.

tain sum of money by defendant before suit brought operated as a release, which point was decided adversely to defendant, upon the facts before the court, but it was held that it might, without doubt, be shown, as the facts were, that the payment was made and that it was applied to the expenses of the funeral and burial of deceased, and that the jury should credit the amount to defendant in estimating the damages, if any, which the plaintiff should recover.¹⁶ This certainly is a most logical and just conclusion operating to the benefit of parties in needy circumstances and depriving those entitled to recover for the death, of none of their rights to a fair and just compensation. It is true that in this latter case the expenses were all incurred after the death, while in the former, only a part thereof were for expenses so incurred. But the decisions are that expenses of the sickness and of the funeral are both recoverable as an element of damages for the killing, and the 1894 ruling ought to cover all expenses concerning which evidence is admissible to increase the damages.

§ 578. "Fair and just compensation for the pecuniary injury"—Life expectancy—Mortality tables.—Life expectancy is, as we have seen,¹⁷ an important factor, and it involves the consideration of other elements. Thus the fact that a mother has only a life expectancy of ten years may bring into consideration the probability that she will become dependent upon her children and so affect the measure of damages.¹⁸ So earning capacity may be affected in that it would in certain cases probably diminish, as advanced age lessened the life expectancy and ability to earn continuously.¹⁹ Again, the probability that a

¹⁶ *Stuber v. McEntee*, 142 N. Y. 200; 31 Abb. N. C. 246; 58 N. Y. St. R. 455; 36 N. E. 878, case reverses 47 N. Y. St. R. 294; 19 N. Y. Supp. 900. The amount paid was \$400, which was used by the family to pay the funeral expenses and the cost of a lot in the cemetery and to purchase a gravestone to mark the burial place.

¹⁷ See sec. 562, herein and note.

¹⁸ *McIntyre v. New York C. R. Co.*,

47 Barb. (N. Y.) 515, case aff'd 37 N. Y. 287; 35 How. 36; 4 Trans. App. 1. See *Purcell v. Laurer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988; 2 Am. Neg. Rep. 57.

¹⁹ *Taylor v. Long Island R. Co.*, 16 App. Div. (N. Y.) 1; 44 N. Y. Supp. 820; 2 Am. Neg. Rep. 608, per Hatch, J., who in considering whether the verdict was excessive says that the deceased was 63 years old and "taking into consideration his

very old man would live a long time may be important upon the question of his pecuniary loss by the deprivation of his support through defendant's negligence, and the jury having him before them may judge from his appearance something of the years allotted to him in the future.²⁰ So the fact that exceptional activity promised long life to a man even though in advanced years constitutes a factor.²¹ And the probable duration of a life may be shown by the Northampton tables,²² although as above stated the jury may judge of this fact from the party's appearance. But something more than the probable duration of the life of deceased and of one relative whom he was supporting should be considered.²³ So proof of the life expectancy of the surviving parents would seem to be necessary in an action for a child's death.²⁴ And in North Carolina the life expectancy of a deceased child, when not fixed by statute, is a matter of evidence.²⁵ And mortuary tables embodied in the Code may be considered by the jury without having been put in evidence.²⁶

§ 579. "Fair and just compensation for the pecuniary injury"—Death of husband.—The primary question in the case of a husband's death, as in other cases, is what was the probable chance of pecuniary benefit to the widow as well, also, as the extent of the present, actual pecuniary loss. In deter-

probable duration of life, and his ability to earn continuously, which could not increase, but would certainly diminish, the sum which his family would receive as a result of his earnings, after the cost of his own living was deducted, we can readily see that the pecuniary loss to the next of kin was more than covered by the sum which is rendered." See *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. St. R. 642. See sec. 563, herein, and notes.

²⁰ *Purcell v. Laurer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988; 2 Am. Neg. Rep. 57, per Ward, J. See also upon the last point, *Moskovitz v. Lighte*, 68 Hun (N. Y.), 182; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732,

case aff'd 140 N. Y. 619; 55 N. Y. St. R. 929; 35 N. E. 890.

²¹ *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. St. R. 642.

²² *Sauter v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.), 446, aff'd 66 N. Y. 50; 23 Am. Rep. 18.

²³ *Palmer v. New York C. & H. R. R. Co.*, 26 Wkly. Dig. 26; 5 N. Y. St. R. 536, aff'd 112 N. Y. 234; 20 N. Y. St. R. 904; 19 N. E. 678.

²⁴ *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.), 116.

²⁵ *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191.

²⁶ *Coley v. Statesville*, 121 N. C. 301; 28 S. E. 482.

mining these the general factors of age, etc.,²⁷ are important elements, but the extent of the proof available in any certain case must necessarily differ according to the varying circumstances, and the courts of New York have certainly not been illiberal in awarding damages and sustaining verdicts for want of exact or extended proof.²⁸ But vindictive or exemplary damages are excluded as well, also, as mental suffering, etc., and sufferings of the injured husband prior to his death.²⁹ A material element of damages exists by reason of the rule that a wife is entitled to her support, and the deprivation of such maintenance and of her home, and the facts that her husband was in a position to give them to her by reason of his health, business activity and promise of long life, notwithstanding his advanced age, will justify a fair award of damages for his negligent killing, and in this connection the amount of his earnings, his earning capacity and the probability of its increasing or diminishing are material and relevant.³⁰ So the husband's chances of promotion, his competency or incompetency to fill a better position, his actual living expenses, care exercised therein, his net income, former and present employment and industry are all admissible in evidence.³¹ In New York it is decided in an early case that the value of the support of the widow and children, during the time deceased would probably have lived, less their earnings, may be considered.³²

§ 580. "Fair and just compensation for the pecuniary injury"—Death of wife—Death of wife and mother.—Under the former statute of New York, the husband suing as administrator for his wife's death by negligence could not prove the value to him of her services and could not recover therefor as the damages were for the exclusive benefit of the "widow and next of kin," and went in such case to the next of kin.³³ But

²⁷ Examine secs. 563-572, herein.

²⁸ See as to jury not being restricted to the pecuniary loss proven, sec. 560, herein.

²⁹ See secs. 563-567, herein.

³⁰ *Beecher v. Long Island R. Co.*, 53 App. Div. (N. Y.) 324; 65 N. Y. St. R. 642. See *Althorf v. Wolfe*, 2

Hilt. (N. Y.) 344, aff'd 22 N. Y. 355.

See secs. 562, 569, 574, herein.

³¹ *Burns v. Asheboro & M. R. Co.*, 125 N. C. 304; 34 S. E. 495.

³² *Althorf v. Wolfe*, 2 *Hilt. (N. Y.)* 344, aff'd 22 N. Y. 355.

³³ *Dickens v. New York C. R. Co.*, 23 N. Y. 158, rev'g 28 Barb. 41.

where the husband is entitled to the wife's entire personal estate, she having no descendants, he can show the amount and character of her work, her earnings and probable profits as well as the amount of her funeral expenses, and her age and health, where he sues, as administrator, for her killing.³⁴ These cases differ from those where the husband's right of action for loss of the wife's services by reason of personal injuries survives her death,³⁵ and from causes of action for the loss of the wife's services, loss of her society and comfort and expenses of her injury and the death of the husband after suit brought.³⁶ It should also be remembered that the present Code,³⁷ provides that the husband, wife or next of kin are entitled to sue and that the damages recoverable are exclusively for their benefit, and the change making the husband a beneficiary was affected in 1870.³⁸ The surviving husband, wife or next of kin are therefore the class named and are entitled to the proceeds of the recovery to be distributed as if they were unbequeathed assets, etc.³⁹ If the husband is the sole surviving beneficiary, the pecuniary loss sustained by him as the husband might differ in character, in so far as the loss of his wife's services is concerned, from that sustained by other surviving next of kin who are entitled to share in the proceeds of the recovery. But, however this may be, it is held that very slight evidence of pecuniary injury to the husband is required, although some evidence thereof is necessary to justify a recovery.⁴⁰ It would also seem to logically follow that the intent of the statutory amendment above mentioned would entitle the husband when

³⁴ *Meyer v. Hart*, 23 App Div. (N. Y.) 181; 48 N. Y. Supp. 904.

³⁵ In *Sweet v. Metropolitan St. R. Co.*, 18 Misc. (N. Y.) 355; 41 N. Y. Supp. 549, the action was for the loss of services from the wife's injury and it was held to survive her death.

³⁶ See *Cregin v. Brooklyn Cross-town R. Co.*, 83 N. Y. 595; 38 Am. Rep. 474, rev'g 19 Hun, 341; *S. C.*, 75 N. Y. 192; 56 How. 465; 31 Am. Rep. 459, aff'g 56 How 32; *S. C.*, 18 Hun, 368; *Foels v. Tonawanda*, 65 Hun (N. Y.), 624; 48 N. Y. St. R. 150; 20 N. Y. Supp. 447.

³⁷ 2 *Stor. Annot. Code* (1898), secs. 1902, 1903, 1908 and see sec. 1870.

³⁸ See *N. Y. Laws*, 1847, ch. 440, ch. 450, secs. 1, 2; *Laws*, 1849, ch. 236, ch. 256; *Laws*, 1870, ch. 78. See *Lynch v. Davis*, 12 How. (N. Y.) 323.

³⁹ *Snedeker v. Snedeker*, 164 N. Y. 58, 62, per Bartlett, J.

⁴⁰ *Cornwall v. Mills*, 44 N. Y. Supr. 45. See *Mitchell v. New York C. & H. R. R. Co.*, 2 Hun (N. Y.), 535; 5 T. & C. 122, aff'd 64 N. Y. 655.

suing as one of a surviving class to prove the loss of his wife's services as a part of the damages, even though he would receive no greater share in the amount recovered for that reason alone, and in this connection it is held that the jury may take into account the wife's, or wife's and mother's prospective earnings and the loss of her services, and in determining the value of the latter, the character of the services rendered may be considered, including not only the household labor and care of the family but also the nature of whatever other occupation she was engaged in and from which a pecuniary benefit by way of earnings or otherwise was derived and which was lost by reason of her premature death. The disposition of her earnings is also a relevant factor, as where the family was wholly or in part supported thereby, or whether all or only a part of said earnings were so used. The size of the family and the age and sex of the children may also be relevant and the fact that the deceased had no income may also be material. Necessarily the age, health, etc., of deceased may be proven. This last question has, however been fully considered elsewhere herein as have the questions of funeral and medical expenses, loss of society, mental and physical suffering."⁴¹

§ 581. "Fair and just compensation for the pecuniary injury"—Death of parent.—In determining the measure of damages to surviving children for loss occasioned by the killing of a parent or parents, the liability of the parent for the support of a minor must constitute a factor, in so far as the parent's death deprives such minor thereof. The pecuniary

⁴¹See upon the above points, *Cregin v. Brooklyn Crosstown R. Co.*, 83 N. Y. 595; 38 Am. Rep. 474, rev'g 19 Hun, 341; *S. C.*, 75 N. Y. 192; 50 How. 465; 31 Am. Rep. 459, aff'g 56 How. 32; *S. C.*, 18 Hun, 368; *Medinger v. Brooklyn Heights R. R. Co.*, 6 App. Div. (N. Y.) 42; 39 N. Y. Supp. 613; *Lyons v. Second Ave. R. Co.*, 89 Hun (N. Y.), 374; 69 N. Y. St. R. 816; 35 N. Y. Supp. 372, aff'd 152 N. Y. 654; 47 N. E. 1109, *Klemm v. New York, C. & H. R. R. Co.*, 78 Hun (N. Y.), 277; 60 N. Y. St. R. 231; 28 N. Y. Supp. 861; *Green v. Hudson R. R. Co.*, 32 Barb. (N. Y.) 25, aff'd 30 How. 593 n. See also *S. C.*, 28 Barb. (N. Y.) 9; 16 How. 230, 263, aff'd 31 Barb. 260, which is aff'd 2 Abb. Dec. 277; 2 Keyes, 294; 30 How. 593. Examine also *Malonee v. N. Y. C. & H. R. R. Co.*, 20 Wkly. Dig. (N. Y.) 252; *Mitchell v. New York C. & H. R. R. Co.*, 2 Hun (N. Y.), 535; 5 Thomp. & C. (N. Y.) 122, aff'd 64 N. Y. 655.

benefit, therefore, which would have accrued to surviving children, had the parent not have been prematurely killed, should be considered, and they may recover such prospective, pecuniary losses as are actually shown by the evidence to be the proximate damages from the negligent or wrongful killing, although the jury is not confined to those actually proven in order to award such damages. The elements which may be proven and which are of weight in determining the amount of the verdict, or whether or not such verdict should be reversed, set aside or modified, are the age and sex of deceased, his or her mental and physical health, character, quality, capacity, condition, occupation, and, if a father, his chances of advancement in his employment, earnings, earning capacity, situation and circumstances in life, financially and otherwise, dependency upon children, pecuniary aid furnished the latter by them, whether or not deceased was the children's sole support and his life expectancy. The size of deceased's family or number of surviving children may be shown, also their age, sex, mental and physical health, circumstances or financial condition as involved in the question whether they were solely dependent upon the parent's aid for support, or whether they were self-supporting, wholly or partially, whether the children which are next of kin were married or unmarried, living away from home or at home, whether able to work or not, their capacity therefor, and whether and to what extent they aided or supported the deceased. It is not, however, essential that all these factors should be proven for the reason, as we have stated elsewhere, that prospective damages are of such a character as to be incapable of direct or exact proof, and nominal damages will be given without such proof.⁴²

⁴²In a majority of the following cases the factors noted are considered, but without discussion. Age of deceased father, his occupation, health, salary, number of children, the entire dependency upon him for support, their age and sex considered. *Wallace v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 57; 55 N. Y. Supp. 132; 5 Am. Neg. Rep. 215. Deceased was a woman 68 years old, not in robust health and somewhat

dependent upon her children for support, but held that it did not follow that her life was of no pecuniary benefit to her next of kin. *Phalen v. Rochester R. Co.*, 31 App. Div. (N. Y.) 448; 52 N. Y. Supp. 836; 22 Civ. Proc. 42. Day laborer, 33 years old, left wife and three children. He was their sole support, earned \$1.25 a day and was of temperate habits. His chances of advancement were also considered. *Felice v. New*

§ 582. "Fair and just compensation for the pecuniary injury"—Support, care, etc., of children.—The benefit of the counsel of a husband and father is of pecuniary value,⁴³ and so is the loss of maternal nurture and education, and the jury may consider the parent's capacity to bestow such physical, moral and intellectual instruction, training and education as may be of service to the children in after life, and which would have been received from deceased.⁴⁴ And this rule may include not only minor but adult children.⁴⁵

York C. & H. R. R. Co., 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637. Deceased was widow, age and health and number of children noted, also that she did the housework. *Walls v. Rochester R. Co.*, 92 Hun (N. Y.), 581; 72 N. Y. St. R. 250; 36 N. Y. Supp. 1102. Death of wife and mother, no pecuniary aid received from her, \$5,000, reduced to \$2,500. *Klemm v. New York C. & H. R. R. Co.*, 78 Hun, 277; 60 N. Y. St. R. 231; 28 N. Y. Supp. 361. Deceased was a woman, her occupation, age, strength, activity, number of children and their dependency upon her considered. *Henning v. Caldwell*, 45 N. Y. St. R. 373; 18 N. Y. Supp. 339; aff'd 137 N. Y. 553; 50 N. Y. St. R. 931; 33 N. E. 337. Pecuniary injury should be ascertained from proof of the character, qualities, capacity and condition of deceased and number, age, sex, circumstances and condition of health

of children or next of kin of deceased. But it does not follow that there is no pecuniary loss because children are of full age and living away from home and supporting themselves. There was also a sick daughter at home, one son and daughter, one married and the other unmarried and children had no property. *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 523, aff'g 20 Wkly. Dig. 341. Age, earnings, occupation, life expectancy and probability of dependency of mother, a widow, also number of children; that some were married and did not live with deceased, and that all were of age and that she aided her children by making small things which were useful to them, were all considered. *McIntyre v. New York C. R. Co.*, 47 Barb. (N. Y.) 515, aff'd 37 N. Y. 287; 35 How. 36; 4 Trans. App. 1. See same case, 43 Barb. 532, as to nonsuit not being granted where services are

⁴³ *Felice v. New York C. & H. R. R. Co.*, 14 App. Div. (N. Y.) 345; 43 N. Y. Supp. 922; 1 Am. Neg. Rep. 637.

⁴⁴ *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; 24 N. Y. 471; 23 How. (N. Y.) 363 (cited 1 Am. Neg. Rep. 380). In this case besides performing her household duties and other outside work, the mother sent her children to school and instructed them, and also nursed them when they were sick. Her religious activity in the

church, as well as her business capacity and ability to save, were also factors in this connection. See also *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; 35 How. (N. Y.) 36; 4 Trans. App. 1, aff'g 47 Barb. 515.

⁴⁵ See *Tilley* case, cited in last preceding note. In this case there were five children, the eldest being an adult 23 years of age. See next following section herein.

§ 583. "Fair and just compensation for the pecuniary injury"—Death of parent—Damages not limited to children's minority.—In estimating the pecuniary injury to children occasioned by a parent's negligent or wrongful killing, there is no sufficient legal reason for limiting the damages to the children's minority, if there is evidence to satisfy the jury that the pecuniary benefits would have been continued afterward, or that the damages will continue after such minority.*

§ 584. "Fair and just compensation for the pecuniary injury"—Death of children—Generally.—In considering the general elements of damages in connection with the loss occasioned to parents by the negligent or wrongful killing of their children, the courts have classified the cases so that they distinctly cover (1) children of tender age, (2) minors generally, and (3) adults, and it is obvious that as a child becomes more advanced in years the character of the proof of pecuniary injury is of necessity more specific, even though it cannot even in cases of adults be exact. Evidence of the facts and circumstances attending the injury and death are as a rule available, but beyond such evidence the proof becomes at once of comparatively little value in so far as the actual pecuniary loss is concerned, especially so where the deceased was a young child, for specific loss is difficult of approximation, and whether the case be that of minors or of adults there can be no well-defined, positive rule worthy of more than the most general application, or which offers any safe basis for estimating the value of the life. All probable and possible benefits should be considered, and present and prospective losses to the next of kin, including the prospect of inheriting from the child.⁶⁷ But the probability of loss of

proven which are of some value or where they are of some pecuniary benefit. That jury may include prospective losses actually shown by evidence to result to the next of kin as the proximate damages and as to value of mother's earnings and prospect of inheritance, see *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471. See also secs. 570, 571, 574, herein. As to duty to support, dependency, etc.,

physical and financial condition, see secs. 568, 569, 572, 573, 575, herein. As to value of support of wife and children and deduction of earnings, see *Althorf v. Wolfe*, 2 Hilt. 344, aff'd 22 N. Y. 355.

⁶⁶ *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252.

⁶⁷ See on the three general propositions the following citations and the opinions of the courts therein:

advice and counsel of a child in case the parents become aged and dependent, physically or mentally upon others for advice, is held to be too remote an element of damages.* A general rule would be that the net moneyed value of the child's life constitutes the measure of damages, or a fair and just compensation for the pecuniary injury sustained by the next of kin or those entitled to recover.*

§ 585. "Fair and just compensation for the pecuniary injury"—Death of children—Evidential factors relating to children.—In determining what constitutes a fair and just compensation for the pecuniary loss sustained by reason of the killing of children through negligence or wrongful act, it must be remembered that, as we have stated elsewhere, the very tender years of a child may of necessity preclude proof of facts which might be available and applicable in case of children of advanced years or of adults, and in stating the following general factors as elements of damage, we have given those which have been proven and considered in the various cases of very young infants, minors generally and adult children. These factors are deceased's age and sex, mental and physical condition and ability, and this includes height, weight and strength in certain cases, ability to work continuously, when of age to render services or to labor, the child's brightness and general intelligence, attendance at school and progress there, general character, adaptability and capacity. If the child is of sufficient age to have developed habits of industry or sobriety or otherwise,

Keenan v. Brooklyn City R. Co., 145 N. Y. 348, 350, 351; 64 N. Y. St. R. 813; 40 N. E. 15; **Butler v. Manhattan R. Co.**, 143 N. Y. 417, 421; 62 N. Y. St. R. 432; 38 N. E. 454; **Birkett v. Knickerbocker Ice Co.**, 110 N. Y. 504; 18 N. Y. St. R. 130; **Houghkirk v. Delaware & H. Can. Co.**, 92 N. Y. 219; **Ihl v. Forty-Second St. & G. St. F. R. Co.**, 47 N. Y. 317; **Kane v. Mitchell Trans. Co.**, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581; **Johnson v. Long Island R. Co.**, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, *aff'd* 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857.

* **Gill v. Rochester & P. R. Co.**, 37 Hun (N. Y.), 107. See sec. 569, *herein*.

* **Russell v. Windsor Steamboat Co.**, 126 N. C. 961; 36 S. E. 191, citing **Birkett v. Knickerbocker Ice Co.**, 110 N. Y. 504; 18 N. Y. St. R. 130; **Ihl v. Forty-Second St. & G. St. F. R. Co.**, 47 N. Y. 317, and numerous other cases.

these are important and relevant factors. Life expectancy is also material, and whether or not there was a promise of a continued and useful life. If the child was of suitable years the fact whether he or she was married or not may be considered, and also whether deceased, especially if an adult, lived at home with the parents or elsewhere. The occupation, earnings and saving capacity of the child when of age and ability to perform labor are relevant and material evidence, and whether continuously employed, the number of years engaged in labor, whether the employment was by the parent or otherwise, the child's disposition of his or her earnings, whether they were given all to the parent or only a part thereof or were wholly used by the child, and in case of employment by the father whether the child received fixed wages for his services or a sum dependent upon the father's judgment and good will, the disposition made by the parent of the child's earnings by way of support of the family or otherwise, are all important, material and relevant factors. In addition there are other elements of damages relating more particularly to children of tender age and minors generally which are given elsewhere. It is not necessary, however, to prove all the above factors.⁵⁰

§ 586. "Fair and just compensation for the pecuniary injury"—Death of children—Evidential factors relating to parents or next of kin.—The evidential factors to be considered upon the question of damages, resulting from the negligent or wrongful killing of children, and which relate to the parents or next of kin, as distinguished from those relating to the deceased child as elements of damages, are the age of the parent or parents or of surviving next of kin, the sex of the latter, and also whether the sole parent surviving was a father or mother; the parent's physical and mental health and condition, character and capacity; the circumstances, position and condition in life, as that the father or mother were penniless or without means of support or otherwise, whether or not such parent or parents were dependent wholly or in part upon the deceased for support, and whether the latter was supporting

⁵⁰ For authorities supporting the above propositions, see note to next following section.

them wholly or partly or furnishing no pecuniary aid, and this would also include the question of legal obligation of children of sufficient means to support indigent parents; the duration and extent of care of parents by children and of contributions if any, to their support; and the employment of the child's wages or earnings therefor. The fact that the child's care was voluntary has also been considered. Other elements are the parent's or parents' life expectancy, occupation and earnings. Evidence is also material and relevant that the deceased left no widow or children, that the father was the sole heir and next of kin and exclusive beneficiary, that a widowed mother survived, whether or not there were any next of kin and the character of the relation of the surviving next of kin and their number and ages. But the number, ages and condition, mental, physical or financial of those who are not next of kin is inadmissible, nor may it be shown whether they are married or unmarried. Evidence has also been considered, showing that the parents or other next of kin resided in a foreign country as bearing upon the pecuniary injury to them, and the nature of their actual relations with the deceased. It may also be stated that it is clearly apparent throughout the decisions that the statute contemplates possible and uncertain damages not before recoverable and the range of probabilities is seemingly limited only by those which are based on some reasonable expectation and which are within the intent, by fair construction of the statute, having in view the remedy contemplated, and we may here repeat what was said in the last section, that there is no necessity of proving all the above-mentioned elements of damages to warrant a recovery.⁵¹

⁵¹ Some of the following citations have been considered elsewhere herein under their appropriate headings, but owing to the importance of this subject of the death of children and for more convenient and ready reference, they are also given in this note. See also cases considered under the next following section. In case of a young child, loss is to be estimated upon all the facts proven, including probable and possible benefits, and the measure of damages is

the entire pecuniary loss. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. Y. St. R. 130; 18 N. E. 108, aff'g 41 Hun, 404; 3 N. Y. St. R. 133; 25 Wkly. Dig. 46. This case is cited as to the measure of damages for the killing of an infant of tender years in *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191. Father was aged 106; deceased son was 27 years old and industrious. *Burke v. Wetherbee*, 98 N. Y. 562, rev'g 18 Wkly. Dig. 369. Deceased

§ 587. "Fair and just compensation for the pecuniary injury"—Death of children—Decisions and opinions.—In a decision which turned upon the right of the father to share in the

son was 13 years old. Mother had no means and was unable to work because of a malady; evidence held admissible. *Harlinger v. New York C. & H. R. R. Co.*, 15 Wkly. Dig. 392, aff'g 92 N. Y. 661. Deceased daughter was 6 years old, intelligent and healthy; parent's occupation was market gardener; circumstances of death proven, no other evidence, special and prospective damages recoverable, the first proven by character and amount thereof, the second by age, sex, general health and intelligence of deceased, and the situation and condition of survivors and their relation to deceased. General indefiniteness and inaccuracy of proof considered at length by the court. *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 219, rev'g 28 Hun, 407; 15 Wkly. Dig. 522, which aff'd 11 Abb. N. C. 72; 63 How. (N. Y.) 328; 4 Month. Law Bull. 65. Age and sex of deceased, social condition and standing of next of kin and probability of their sustaining any pecuniary damage by infant's death should be considered by the jury. Deceased was daughter of plaintiff. *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, aff'g 24 Hun, 235. Father may recover full damages for loss of infant son, where recovery is for his exclusive benefit, and this includes loss of his son's services during minority. *McGovern v. New York, C. & H. R. R. Co.*, 67 N. Y. 417. Where child is of tender years affirmative proof of special damages unnecessary. *Prendegast v. New York C. & H. R. R. Co.*, 58 N. Y. 652. See also sec. 561, herein. Deceased was about three years old.

Damages may be estimated from age and sex of child and circumstances, condition and position in life of parents and occupation of father, present and prospective damages to be considered. Difficulty of furnishing any specific or direct proof considered by the court. *Ihl v. Forty-Second St. & G. St. F. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450, cited as to the measure of damages for killing an infant of very tender years in *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191. Value of services of minor, aged 11, may be determined by jury of their own knowledge. *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445. Examine also the last cited case. Not necessary that deceased infant son should leave a widow and next of kin to entitle father to recover. *McMahon v. Mayor (N. Y.)*, 33 N. Y. 642. Deceased was between 6 and 7 years old; no proof of damages necessary. *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 E. D. Smith 103. Mother for son's death, her financial circumstances admissible. *Fowler v. Buffalo Furnace Co.*, 41 App. Div. (N. Y.) 84; 58 N. Y. Supp. 223, appeal dismissed 160 N. Y. 665. Boy 16 killed while riding bicycle, circumstances of accident proven and \$2,000 held not excessive. *Quinn v. Pietro*, 38 App. Div. (N. Y.) 484; 56 N. Y. Supp. 419; 5 Am. Neg. Rep. 692. Deceased son was 19 years old, healthy, industrious and earning wages which he gave to his father—\$5,000 not excessive. *Twist v. Rochester*, 37 App. Div. (N. Y.) 307; 55 N. Y. Supp. 850. Deceased was a bright boy 8½ years

recovery by the widow, the court, per Bartlett, J., says: "It does not follow that the father has no pecuniary interest in the death of his son. It might have happened had the son survived

old—\$6,000 held excessive. *Schaffer v. Baker Transfer Co.*, 29 App. Div. (N. Y.) 459; 51 N. Y. Supp. 1092. Only evidence was of the age, sex and general intelligence of deceased (child was 5 years old); nominal damages recoverable. *Howell v. Rochester R. Co.*, 24 App. Div. (N. Y.) 502; 49 N. Y. Supp. 17. Deceased daughter was a vigorous woman before the injury, about 60 years old. She was large and weighed about 180 pounds. The facts of the accident and injury were proven. The plaintiff was next of kin and was before the jury and they could judge somewhat as to his probable duration of life. He was penniless and dependent, 82 years old and might live 10 years. Deceased was his only child and was comfortably supporting him at the time of the injury—\$3,000 not excessive. *Purcell v. Laurer*, 14 App. Div. (N. Y.) 33; 43 N. Y. Supp. 988; 2 Am. Neg. Rep. 57. Only evidence was that father was a laborer and deceased daughter was 16 years old and since her mother's death had taken care of his house. There was no evidence as to his or her character or capabilities or of the relations existing between them—\$4,000 was reduced to \$2,500. *Dinnihau v. Lake Ontario Beach Imp. Co.*, 8 App. Div. (N. Y.) 509; 40 N. Y. Supp. 764. Deceased daughter was 19 years old; she was bright and industrious and earned \$7 a week, which she gave to her mother to aid supporting family. Her father was 61 years old—\$6,000 reduced to \$4,000. *Seeley v. New York C. & H. R. R. Co.*, 8 App. Div. (N. Y.) 402; 75 N. Y. St. R. 261; 40 N. Y. Supp. 866.

Deceased was an infant daughter and father was exclusive beneficiary. Held that he could recover the entire pecuniary loss and that prospective earnings during infancy were included and this covered loss of services during infancy. Also that an instruction which precluded recovery for loss of earnings while an infant and until majority, was not cured by an instruction that the jury were not confined to minority, but might find for pecuniary damages thereafter. *Coghlan v. Third Ave. R. Co.*, 7 App. Div. (N. Y.) 124; 39 N. Y. Supp. 1098, aff'g 16 Misc. 677; 25 Civ. Proc. 249; 39 N. Y. Supp. 113. Action by father for death of child 7 years old; evidence admissible that services of child were required in household. *Pressman v. Mooney*, 5 App. Div. (N. Y.) 121; 39 N. Y. Supp. 44. Deceased was 8½ years old; the number of brothers and sisters surviving and their ages was shown, also the age of the father, his occupation and amount of his earnings per week—\$375 not set aside as inadequate. *Roger v. Rochester R. Co.*, 2 App. Div. (N. Y.) 5; 73 N. Y. St. R. 209. Deceased was a boy 7 years old, bright and healthy—\$3,500 held not excessive. *Heinz v. Brooklyn Heights R. Co.*, 91 Hun (N. Y.), 640; 71 N. Y. St. R. 623; 36 N. Y. Supp. 675. Deceased was 26 years old, an unmarried man, sober and industrious, adult brothers and sisters and a widowed mother survived. He had never contributed to their support—\$3,000 not excessive. *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153

thirty years, that his wife would have died childless and he be left as the only support of an aged and penniless father; or if no father was living but several next of kin of the same degree,

N. Y. 680. Deceased was 22 years old; he was unmarried; earned \$1.85 per day. His father with whom he lived was his next of kin and was 58 years old. *Fitzgerald v. New York, C. & H. R. R. Co.*, 88 Hun (N. Y.), 359; 68 N. Y. St. R. 762; 34 N. Y. Supp. 762, case rev'd 154 N. Y. 263; 48 N. E. 514, upon ground that cause of death did not sufficiently appear as due to negligence of defendant. Deceased, a man, was unmarried, 33 years old, worked for his father but at no fixed wages, such amount being paid him as the father judged proper. Present and prospective loss and prospect of inheritance considered. *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857. Only proof was that deceased, a boy 7 years old, attended school and did errands for his mother—\$1,500 excessive. *Housner v. Houston, W. St. & P. F. Co.*, 7 Misc. (N. Y.) 48; 57 N. Y. St. R. 528; 27 N. Y. Supp. 365. Deceased was 4 years old. The mother was a widow with three surviving children of the ages of 13 and under; her circumstances and condition in life were shown and she was examined before the jury to enable them to determine her age, failure to otherwise prove her age held not fatal to a recovery of more than nominal damages—\$2,000 not excessive. *Moskovitz v. Lighte*, 68 Hun (N. Y.), 102; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732, aff'd 140 N. Y. 619; 55 N. Y. St. R. 929; 35 N. E. 890. Deceased was a son; mother had no means; son aided her. *Waldele v.*

New York C. & H. R. R. Co., 29 Hun (N. Y.), 35, rev'g 61 How. 350, rev'd 95 N. Y. 274. Deceased boy was aged 2 years and 9 months and was in good health; only nominal damages in absence of further proof and verdict therefor will not be set aside as inadequate. *Silberstein v. Williams Wicke Co.*, 29 Abb. N. C. (N. Y.) 291; 22 N. Y. Supp. 170. Deceased daughter was 5 years old—\$2,000 to father not excessive. *Huerzeler v. Central Crosstown R. Co.*, 1 Misc. (N. Y.) 136; 48 N. Y. St. R. 649; 20 N. Y. Supp. 676, aff'd 739 N. Y. 490; 54 N. Y. St. R. 836; 34 N. E. 1101, upon point of imputed negligence of mother, and Earl, J., said, "The question of damages is not before us. There was sufficient evidence in the case upon the question of damages for the jury," citing *Houghkirk v. Delaware & H. Can. Co.*, 92 N. Y. 219, noted at beginning of this note. Deceased was 6 years old—\$4,500 not excessive, although the court doubted that the death of so young a child could result in pecuniary damages. *Ahern v. Steele*, 48 Hun (N. Y.), 517; 16 N. Y. St. R. 24; 1 N. Y. Supp. 257, case rev'd 115 N. Y. 203; 26 N. Y. St. R. 295; 22 N. E. 193, case is cited in *Missouri, K. & T. R. Co. v. Gilmore* (Tex. Civ. App. 1899), 53 S. W. 61. Deceased daughter was 36 years old and was in good health. The amount of her weekly earnings, for 5 or 6 years prior to her death, was proven and also her yearly contributions to her parents' support for 20 years and her voluntary care of her father and mother. Her father was the only next of kin. He was 66 years old and infirm in

it is within the range of possibilities that the decedent might have accumulated within his added years of life a considerable sum and then died, leaving it to them. The statute evidently deals with remote and uncertain damages not recoverable at common law." The deceased in this case left no children.⁵² In another case the deceased son was thirty years old. He left no wife or children and only his father, who was his sole next of kin and so entitled to the entire amount recovered. The son, at the time of the accident occasioning his death, was in good health, had never been sick since he was a boy and had never been known to stay away from work one day on account of his ill-health. His trade was stone cutting, which he had followed since he was 16 years old. Every two weeks he would turn over to his father the sum of sixty dollars, of which the father would return to him twelve dollars, being six dollars a week with which to buy clothes and pay his incidental expenses, the remaining sum of forty-eight dollars being used by the plaintiff in paying house rent and supporting his family, which included boarding plaintiff's intestate and furnishing him with a home, and the court declared that all of this evidence was helpful and proper, but the plaintiff did not rest here, and proved the marriage, size of family, physical condition, misfortunes and poverty of survivors, who were not the next of kin, and for such error the judgment

health, and without property, as was also the mother who was 58 years old. There were also personal services rendered by the daughter. *Bowles v. Rome*, Watertown R. Co., 46 Hun (N. Y.), 324; 12 N. Y. St. R. 457, *aff'd* 113 N. Y. 643; 22 N. Y. St. R. 997; 21 N. E. 414. Mother had no means and son contributed to her support. Age, circumstances and condition of next of kin should be shown. *Carpenter v. Buffalo*, N. Y. & P. R. Co., 38 Hun (N. Y.), 116. Deceased son was 17 years old; possibility of loss of advice and counsel to parents or possible need by reason of future feebleness, etc., not considered. *Gill v. Rochester & P. R. Co.*, 37 Hun, 107. Deceased was

about 22 years old; he earned \$25 a month and was unmarried; survivors were a father, 65 years old, and a mother, two brothers and a sister, who all resided in a foreign country. *Bierbauer v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.), 559, *aff'd* 77 N. Y. 588. Court considered the probable burden and expense that a deceased child would have been, and his probable inability to support himself. Child was about 4 years old. *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234. See secs. 561, 574, *herein*.

⁵² *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 63, *aff'd* 47 App. Div. 471

below was reversed. In this case evidence as to the son's earnings was held admissible to show what use the father was accustomed to make of such wages and this part of the case was not reversed and accords with the ruling of the appeal court.⁵³ Again, where deceased was a boy five years of age and the plaintiff was his father and next of kin, the trial judge charged that: "In an action for the loss of services of a child by the father, the limit of recovery is twenty-one years of age; but in deciding this case you may take into account, if you find it to be probable, that this boy might have lived beyond the age of twenty-one years, and you may compensate the father for whatever age you find the probabilities of the case to be that this boy would have lived." The court also charged as an abstract proposition of law, "that the father has no legal claim upon the earnings of the son beyond the age of twenty-one years," and added, "that the father could compel the son to support him in his old age and the jury had a right to consider that fact," but the court refused to charge upon request, as a proposition of law, "that the father has no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor and unable to support himself and the son is shown to have means." For this refusal to so charge the judgment was reversed and a new trial granted. The court of appeals, per Haight, J., affirmed the rule declared in an earlier case as setting forth the various elements of pecuniary loss to be considered by the jury in estimating the damages and which is as follows: "First, the probable earnings of the son during his minority, over and above his support, clothing and education; next, the probability of his living and becoming of sufficient ability to support his father in case of his becoming aged, poor and unable to support himself; and then they had the right to consider the amount he would have brought to his next of kin while living, and their prospect of inheriting from him after death,"⁵⁴ and in addition it was declared that, "the father had no right to the earnings of his son as such, after he became

⁵³ Lipp v. Otis Brothers & Co., 161 N. Y. 559, per Parker, Ch. J., 56 N. E. 79, rev'g 28 App. Div. (N. Y.) 227; 51 N. Y. Supp. 13. R. Co., 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, aff'd 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857.

⁵⁴ Citing Johnson v. Long Island

twenty-one years of age.”⁵⁵ Another declaration of the court of appeals, per Andrews, Ch. J., although made in connection with the question of damages for a miscarriage resulting from personal injury is also pertinent here. The court, after stating the difficulty of estimating damages for an infant’s killing, asserts that the ascertainment of the value of an infant’s life is in a great degree a matter of speculation and conjecture, dependent upon the probabilities whether the infant would have lived to an age capable of rendering service and whether the continued life would be a pecuniary benefit or a burden, and also upon numerous contingencies. But it was added that the material facts capable of proof were the age and sex of the infant, its mental and physical condition, its bodily strength, and generally whether there was an apparent promise of a continued or useful life or the contrary, and in view of the facts of the case before the court there is a strong intimation that proof is necessary as to the sex, mental and physical capacity of the child, although such intimation would, however, only be binding as such, in a like or analogous case.⁵⁶ In another decision in the appeal division a judgment of six cents damages was set aside as insufficient where it appeared that the deceased was a boy sixteen years old, who was attending school and expected to graduate therefrom the following summer. Said son was healthy and strong, six feet in height and weighed one hundred and forty pounds. The father did not depend upon the son for a source of income but on the contrary was prosperous, and paid the expenses of his education.⁵⁷

§ 588. “Fair and just compensation for the pecuniary injury”—Services of minor, cost of support, etc.—Damages not limited to minority.—Outside of those general elements of damages where an action is brought to recover for the death of children,⁵⁸ there are certain factors which relate particularly to

⁵⁵ *Keenan v. Brooklyn City R. Co.*, N. Y. Supp. 142, aff’g 3 Misc. 453; 30 145 N. Y. 348; 64 N. Y. St. R. 813; 40 Abb. N. C. 78; 52 N. Y. St. R. 498; N. E. 15, rev’g 8 Misc. 601; 60 N. Y. 23 N. Y. Supp. 163.

⁵⁶ *Butler v. Manhattan R. Co.*, 143 51 App. Div. (N. Y.) 512; 64 N. Y. N. Y. 417, 421; 62 N. Y. St. R. 432; St. R. 878; 30 Civ. Proc. R. 371.

⁵⁷ *Morris v. Metropolitan St. R. Co.*, 60 N. Y. St. R. 873; 38 N. E. 454, rev’g 4 Misc. 401; 53 N. Y. St. R. 664; 24

⁵⁸ See secs. 584 et seq., herein.

minor children. It is a matter of common knowledge that children of very tender years can render no services of provable value and in extreme infancy their services can be of no actual pecuniary value, while the burden necessarily rests upon the parents of support, clothing and education during minority, or at least until emancipation. But before majority is reached a child's services may be of actual provable value not only as a wage earner, aiding in the care and support of the family but, as, in many cases, bearing the entire burden of support thereof. Or a child may be of service in performing household duties, even though it may be very young. And in view of the law that present and prospective damages may be awarded, it cannot be said that a child's services are of no pecuniary value, even though such value is not susceptible of definite proof, nor will it be held that the cost of support, clothing and education of a child exceed the value of its services. A father is legally entitled to the services of his child during its minority and also to such child's earnings except in so far as the child's emancipation may change the rule. When, however, majority is reached, these legal claims of the father cease, except the conditions are such as to bring the child within the rule in New York, enforcing a legal obligation under certain circumstances to support indigent, etc., parents. It follows that a father can recover for the loss of services during minority and for the probable earnings of the child during that period, over and above its support. Nor is the recovery limited to the child's minority, for all the benefits probable and possible, as modified by the chances of failure and misfortune which might result to the next of kin from the child's life after majority would have been reached, may also be considered. In addition the action is not based upon the loss of the child's services but upon the statute and therefore the recovery is held not to be restricted to such loss of services but is the whole pecuniary loss.⁶⁰ In North Carolina

⁶⁰ *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. Y. St. R. 130; 13 Cent. 130; 18 N. E. 108, *aff'd* 110 N. Y. 504; 3 N. Y. St. R. 133; 25 Wkly. Dig. 48; *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348, 350, *per* Haight, J.; 64 N. Y. St. R. 843; 40

N. E. 15, *citing* *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.), 306; 62 N. Y. St. R. 46; 30 N. Y. Supp. 318, *aff'd* 144 N. Y. 719; 70 N. Y. St. R. 868; 29 N. E. 857; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417; *Ihl v. Forty-Second St. & G. St. F. R.*

under the same wording of the statute as to the amount to be awarded being a fair and just compensation for the pecuniary injury, the infant's probable gross income, based upon his expectancy of life, less the expenditures for his living, constitutes the measure of damages.⁶⁰

§ 589. "Fair and just compensation for the pecuniary injury"—Nominal damages—Death of infants.—We have considered under a prior section the question of nominal damages for the negligent or wrongful killing of other than children.⁶¹ In case an infant is negligently or wrongfully killed if

Co., 47 N. Y. 317; 7 Am. Rep. 450; *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; *Coghlan v. Third Ave. R. Co.*, 7 App. Div. (N. Y.) 124; 39 N. Y. Supp. 1098, aff'g 16 Misc. 677; 25 Civ. Proc. 249; 39 N. Y. Supp. 113; *Pressman v. Mooney*, 5 App. Div. (N. Y.) 121; 39 N. Y. Supp. 44; *Ford v. Monroe*, 20 Wend. (N. Y.) 210. See *Morris v. Metropolitan St. Ry. Co.*, 51 App. Div. (N. Y.) 512; 64 N. Y. St. R. 878; 30 Civ. Proc. 371; *Stuebing v. Marshall*, 2 Civ. Proc. (N. Y.) 77, aff'd 2 Civ. Proc. 81; 10 Daly, 406.

⁶⁰ *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191. And in that state there is a legal presumption that a father is entitled to his minor son's earnings and if he continues as a member of the family after his minority, services rendered by him are presumed to be gratuitous. *Grant v. Grant*, 109 N. C. 710; 14 S. E. 90. As to mother's right to sue for loss of services of her infant unmarried daughter by reason of death caused by malpractice, see *Sorensen v. Balaban*, 11 App. Div. (N. Y.) 164; 76 N. Y. St. R. 654; 42 N. Y. Supp. 654. As to emancipation of infant and right of such minor to work for herself, see *Taylor v. Welsh*, 92 Hun (N. Y.), 272; 72 N. Y. St. R. 316; 36 N. Y. Supp. 952. Father

liable for abandoned minor son's necessities. *Manning v. Wells*, 8 Misc. (N. Y.) 646; 61 N. Y. St. R. 59; 29 N. Y. Supp. 1044, aff'd 85 Hun (N. Y.), 27; 66 N. Y. St. R. 109; 32 N. Y. Supp. 601. That mother must allege and prove that child was in her service when she sues for damages for injury, see *Geraghty v. New*, 7 Misc. (N. Y.) 30; 57 N. Y. St. R. 497; 27 N. Y. Supp. 403. As to right of emancipated child to contract with father for wages or compensation for services, see *Kain v. Larkin*, 131 N. Y. 307; 43 N. Y. St. R. 197; 30 N. E. 106, rev'g 42 N. Y. St. R. 571; 17 N. Y. Supp. 223. See as to right of parents to earnings of child, *McClurg v. McKercher*, 56 Hun (N. Y.), 305. Where the child was killed in New Mexico it is necessary to aver that deceased was a minor under the act of that state which gives a right to the father and mother, to sue if the child was a "minor and unmarried." *Isaac v. Denver & Rio Grande R. Co.*, 12 Daly (N. Y.), 340, aff'd 102 N. Y. 718. As to right of action for loss of service of child killed, see notes 41 L. R. A. 807; 34 id. 788. And see as to value of children, 15 Cent. L. J. 286.

⁶¹ See sec. 560, herein.

the child is of very tender years, the proof upon the question of damages must of necessity be limited and cannot extend much beyond that of the age and sex of the child, the situation or circumstances and condition in life of the parents and other facts existing at the time of the death and trial, while in some cases the infant's mental and physical condition may be susceptible of proof, and in a general way the last might be true as to all very young children. The pecuniary value of the life of an infant for several years after its birth is from a strictly legal standpoint a matter concerning which it would be most difficult if not impossible to determine even approximately, for all evidence beyond that above mentioned would be merely speculative and hypothetical and of no aid to the jury. But to hold that such a life is of no pecuniary value and that no recovery can be had except upon proof of the pecuniary loss occasioned by its wrongful taking would put a premium on negligence. The jury, therefore, have been given a large discretion in determining what constitutes a fair and just compensation in this class of cases. And the rule is that in an action to recover damages for the negligent or wrongful killing of an infant of tender years, proof of special or direct pecuniary damage or injury is not necessary, either to maintain the action or to enable the jury to give nominal damages, nor will they be restricted to nominal damages in such case. This is likewise true where there is an absence of proof of pecuniary injury as such, or other than as above stated.⁶² But it is also intimated in a case decided in

⁶² Rule applied in an action for the killing of an infant 5 years old although the only evidence was of the age, sex and general intelligence of deceased. *Howell v. Rochester R. Co.*, 24 App. Div. (N. Y.) 502; 49 N. Y. Supp. 17. The recovery is not limited to nominal damages but rests upon such proof as can be made, and the amount to be assessed rests in the jury's discretion subject to review upon abuse of such discretion. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; 18 N. Y. St. R. 130; 18 N. E. 108, aff'g 41 Hun, 404; 3 N. Y. St. R. 133; 25 Wkly.

Dig. 46. This case is cited as to the measure of damages for an infant's death in *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 N. E. 191. Deceased was 6 years old, healthy and bright. The facts attending her death and parents' occupation were shown. There was no other proof of pecuniary injury and the court declared that although the proof was inadequate, no more could be required than it was possible to give, and the matter was, therefore, for the jury to determine the pecuniary loss. *Houghkirk v. Delaware & H. C. Co.*, 92 N. Y. 219, rev'g 28 Hun, 407; 15

1894 that while there are some material facts capable of proof, such as the age and sex of the infant, its mental and physical condition, its bodily strength, and generally whether there was

Wkly. Dig. 522, which aff'd 11 Abb. N. C. 72; 63 How. 328; 4 Month. Law Bull. 65. In the case of the death of an infant daughter, the court declared that the jury should consider the age and sex of the deceased and the social condition and standing of the next of kin, and the probability of their sustaining any pecuniary damage by her death, and that nothing could be allowed which was not of definite pecuniary value, while the verdict must be only for the pecuniary injury, but that there was no way to ascertain mathematically what that damage would be, therefore it must be to a great extent speculative with nothing to control the jury or fix the amount of the verdict except their good judgment and the statutory limit. This limit does not, however, now exist. *Etherington v. Prospect Park & C. I. R. Co.*, 88 N. Y. 641, aff'g 24 Hun, 235. Proof is not necessary as to special pecuniary damage. *Kennedy v. Ryall*, 67 N. Y. 379, aff'g 40 N. Y. Super. 347. See sec. 561, herein. Where deceased was only 3 years old, it was held that proof of special pecuniary damages was unnecessary to maintain the action or to warrant the jury in finding more than nominal damages, and that the jury might estimate the damages with reference to the pecuniary injury, present or prospective, upon all the facts proved, which were sustained by those entitled to recover. The jury in this case had before them the parents, their position in life, the occupation of the father and the age and sex of the child. A nonsuit was refused and the court declared that any other

evidence would necessarily be speculative and hypothetical and would not aid the jury. There is also a discussion as to the impracticability of furnishing direct evidence of specific loss in these cases and a further declaration that to require such proof would render the statute nugatory in most cases. *Ihl v. Forty-Second St. & G. St. F. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450. In case of the killing of a boy 11 years old jury may use their own judgment, and may infer that his services were of some value. *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445. No proof of pecuniary damage required where child about 7 years old was killed. The statute does not limit the recovery to the actual loss proven. *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310, aff'g 3 E. D. Smith, 103. In case of a child about 4 years old only nominal damages were held recoverable under a ruling which, and upon an opinion which is certainly, at the least, not in harmony with the law of New York as evidenced by the decisions. *Lehman v. City of Brooklyn*, 29 Barb. (N. Y.) 234. A verdict for nominal damages will not be set aside on the ground of a presumption of pecuniary loss to the next of kin from the killing of an infant of tender years. It was also held in this case that only nominal damages could be recovered where there was no proof of other than deceased's age, which was 2 years and nine months, and of his health. *Silberstein v. Wicke Co.*, 29 Abb. N. C. (N. Y.) 291; 22 N. Y. Supp. 170. Deceased child was 3½ years old. The ages and number of

an apparent promise of a continued or useful life or the contrary, yet the jury's verdict must, though speculative, have some of these safeguards slight as they were, and must rest upon some of these elements, such as sex or mental or physical condition.⁶⁵

§ 590. "Fair and just compensation for the pecuniary injury"—Death of unborn child.—The death of an unborn child does not constitute an element of damages.⁶⁶

brothers and sisters, the occupation of the father and his age and earnings were shown, but the court refused to set aside as inadequate a verdict of \$375. *Reger v. Rochester Ry. Co.*, 2 App. Div. (N. Y.) 5; 73 N. Y. St. R. 209. Where the deceased was 16 years old and there was no evidence other than that of her age, and that she had cared for the house since her mother's death, \$4,000 was held excessive where the action was for her father's sole benefit. *Dinnihan v. Lake Ontario B. Imp. Co.*, 8 App. Div. (N. Y.) 509; 40 N. Y. Supp. 764. Held that the father might recover the entire pecuniary loss for the death of an infant daughter. *Coghlan v. Third Ave. R. R. Co.*, 7 App. Div. (N. Y.) 124; 39 N. Y. Supp. 11098, aff'g 16 Misc. 677. See *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417. The only proof of pecuniary loss from death of boy of 10 years of age was that although attending school he sometimes did errands for his mother; \$1,500 in favor of mother held excessive. *Heusner v. Houston*, 7 Misc. (N. Y.) 48; 57 N. Y. St. R. 528; 27 N. Y. Supp. 365. Age of widowed mother need not be proven where otherwise determinable. *Moskovitz v. Lighte*, 68 Hun (N. Y.), 102; 52 N. Y. St. R. 216; 22 N. Y. Supp. 732, aff'd 140 N. Y. 619; 55 N. Y. St. R. 929; 35 N. E. 890.

Although it does not appear that there is any pecuniary damage because the child is so young, yet the court will not disturb the verdict for that reason alone. *Ahern v. Steele*, 48 Hun (N. Y.), 517; 1 N. Y. Supp. 259, case reversed, 115 N. Y. 203; 26 N. Y. St. R. 295; 22 N. E. 193, and the case in 48 Hun, rev'd 7 N. Y. St. R. 416; 26 Wkly. Dig. 474; the case in 1 N. Y. Supp. 259, is cited in *Missouri, K. & T. R. Co. v. Gilmore* (Tex. Civ. App. 1899), 53 S. W. 61. Error to nonsuit plaintiff or to direct that nominal damages be given for child's death where there is no proof of special damages. *Gorham v. New York C. & H. R. R. Co.*, 23 Hun (N. Y.), 449. Error to nonsuit or to direct verdict for nominal damages for absence of proof of special damages. *Gorham v. New York C. & H. R. R. Co.*, 23 Hun (N. Y.), 449.

⁶⁵ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 421, per Andrews, Ch. J.; 60 N. Y. St. R. 873, case affirms 3 Misc. 453; 30 Abb. N. C. 78; 52 N. Y. St. R. 498; 23 N. Y. Supp. 163, case reverses 4 Misc. 401; 53 N. Y. St. R. 664; 24 N. Y. Supp. 142. See also *Carpenter v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.), 116; and examine cases in last preceding note.

⁶⁶ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 421, per Andrews, Ch. J.; 62 N. Y. St. R. 432; 60 N. Y. St. R.

§ 591. "Fair and just compensation for the pecuniary injury"—Death of child—Expense occasioned by mother's sickness.—Where by reason of the death of her son and consequent shock to her maternal feelings, the mother suffers sickness and the husband and father is subjected to expense therefor, he may allege such expense as special damages and may recover the same in an action for his son's killing.⁶⁵

§ 592. "Fair and just compensation for the pecuniary injury"—Collateral kindred—Next of kin.—In New York no distinction seems to be made as to collateral kindred and those immediately related. The words of the statute do not create a liability merely in those cases where the relations between the parties are such that the persons to be indemnified had a legal right to some pecuniary benefit which is lost by the death of the person killed. The right of action is given to the surviving husband or wife, and next of kin exclusively, and by next of kin are meant those parties who are pecuniarily injured by the death of the person to whom they stand in that relation. It is not required that the degree of kindred should be such as to create the duty of sustenance, support or education. Nor does it matter that some of the next of kin have suffered greater pecuniary loss than others from the death. The sum to be recovered represents the entire pecuniary loss resulting from the death to each and all the relations mentioned in the statute. The legislature created the remedy for the husband or wife or next of kin as a class, and the damages are for the benefit of every person constituting that class, who survives. There is, therefore, no discrimination with reference to the degree of kinship nor with reference to those enumerated in the statute as beneficiaries.⁶⁶

163; 38 N. E. 454; 26 L. R. A. 46, rev'g 4 Misc 401; 53 N. Y. St. R. 664; 24 N. Y. Supp. 142, aff'g 3 Misc. 453; 30 Abb. N. C. 78; 52 N. Y. St. R. 498; 23 N. Y. Supp. 163.

⁶⁵ *Ford v. Monroe*, 20 Wend. (N. Y.) 210.

⁶⁶ *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 62, 63, per Bartlett, J., citing *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310; *Tilley v.*

Hudson R. R. Co., 24 N. Y. 474; *Murphy v. New York C. & H. R. R. Co.*, 88 N. Y. 447. See also *Kelly v. Twenty-Third*, 14 Daly (N. Y.), 418; 14 N. Y. St. R. 699; 27 Wkly. Dig. 572, case aff'd 113 N. Y. 628; 22 N. Y. St. R. 994; 20 N. E. 878. Examine generally as to recovery, *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.), 65; 70 N. Y. St. R. 203; 35 N. Y. Supp. 581, aff'd 153 N. Y.

§ 593. Death—Mitigation of damages—Defenses—Insurance.—Insurance upon the life of deceased cannot be considered in mitigation of damages.⁶⁷

§ 594. Death—Defense—Provoking difficulty—Liability of sheriff or officer.—Where one in the custody of a sheriff provokes a difficulty with a fellow prisoner and strikes the first blow and is killed, and no reason to anticipate the affray exists, the sheriff is not liable in damages for the death, although he is chargeable by law with the duty of receiving and safely keeping those persons committed to his custody.⁶⁸ But an officer who kills another without justification is liable to decedent's representatives, notwithstanding he may also be criminally prosecuted.⁶⁹

§ 595. Death—Allowance of interest.—Interest may be allowed from the time of the death to the date of the verdict, at the rate provided by the statute in force at the time of the verdict.⁷⁰ If, however, the cause of action arises under a foreign statute which does not permit the recovery of interest upon the damages given in such cases, such statute controls, and interest cannot be recovered since the New York statute only relates in

680; *Pineo v. New York C. R. Co.*, 34 Hun (N. Y.), 80, *aff'd* 99 N. Y. 644; *Dickens v. New York C. R. Co.*, 1 Abb. Dec. (N. Y.) 504.

⁶⁷ *Kellogg v. New York C. & H. R. R. Co.*, 79 N. Y. 72; *Althorf v. Wolfe*, 2 Hilt. (N. Y.) 344, *aff'd* 22 N. Y. 355.

⁶⁸ *Gunther v. Johnson*, 36 App. Div. (N. Y.) 437; 55 N. Y. Supp. 869.

⁶⁹ *Kain v. Larkin*, 56 Hun (N. Y.), 79; 29 N. Y. St. R. 643; 9 N. Y. Supp. 89, under N. Y. Code Civ. Proc. sec. 1899 (*Stover's Annot. Code*, 1898), which provides that "where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other." This section is a part of article 4th which includes secs. 1902

—1905, relating to death by negligence, and the title of the article is "certain actions to recover damages for wrongs." As to intentional killing and excuse or justification and that master not liable for servant's wilful act, etc., see *Fraser v. Freeman*, 56 Barb. (N. Y.) 243, *rev'd* 43 N. Y. 566.

⁷⁰ *Salter v. Utica & Black R. R. Co.*, 86 N. Y. 401, case affirms 23 Hun, 203, decided under act 1870, ch. 78, although it is held that this act does not apply to pending cases, and therefore the rule in the text is not within the statutes. *Cook v. New York Cent. & H. R. R. Co.*, 10 Hun (N. Y.), 426. See *Erwin v. Neversink Steamboat Co.*, 23 Hun (N. Y.), 578, *aff'd* 88 N. Y. 124.

this respect to matters of procedure, etc.¹ But interest on the damages is to be added in the entry of judgment, and is not within the province of the jury to compute.²

¹ *Kiefer v. Grand Trunk R. Co.*, 12 App. Div. (N. Y.) 28; 76 N. Y. St. R. 171; 42 N. Y. Supp. 171, *aff'd* 153 N. Y. 688.

² *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664; 16 Wkly. Dig. 491, *rev'g* 27 Hun, 219. But see *Boyd v. New York C. & H. R. R. Co.*, 6 Civ. Proc. (N. Y.) 222; *Sinne v. Mayor, etc.*, 8 Civ. Proc. (N. Y.) 252 note. "When final judgment for the plain-

tiff is rendered, the clerk must add to the sum awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision may specify the day from which interest is to be computed; if it omits to do so, the day may be determined by the clerk upon affidavits." 2 *Stover's N. Y. Ann. Code Civ. Proc.* sec. 1904.

CHAPTER XXVII.

DEATH—"FAIR AND JUST COMPENSATION WITH REFERENCE TO THE PECUNIARY INJURIES"—"DIRECT DAMAGES" SUSTAINED—FORFEITURE OR FINE—"SUCH SUM AS THE JURY MAY DEEM REASONABLE."

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| <p>§ 596. "Fair and just compensation with reference to the pecuniary injuries"—Statutes.</p> <p>597. "Fair and just compensation with reference to the pecuniary injuries"—Statutes—Continued—Generally.</p> <p>598. "Fair and just compensation with reference to the pecuniary injuries"—Statutes—Continued—Beneficiaries, etc.</p> <p>599. "Direct damages sustained"—Miners' statute.</p> <p>600. Forfeiture or fine—Indictment—Railroads—Common carriers—Statute.</p> <p>601. "Such sum as the jury may deem reasonable"—Statute.</p> <p>602. "Fair and just compensation with reference to the pecuniary injuries"—Pecuniary loss.</p> <p>603. Same subject continued.</p> <p>604. "Fair and just compensation with reference to the pecuniary injuries"—Exemplary damages.</p> <p>605. "Fair and just compensation with reference to the pecuniary injuries"—Jury and instructions.</p> | <p>606. Same subject—Proper and erroneous instructions—Illustrations.</p> <p>607. "Fair and just compensation with reference to the pecuniary injuries"—Factors generally to be considered.</p> <p>608. Same subject continued—Evidence of wages.</p> <p>609. "Fair and just compensation with reference to the pecuniary injuries"—Sufferings of person injured.</p> <p>610. "Fair and just compensation with reference to the pecuniary injuries"—Solatium—Mental suffering, loss of society, etc.</p> <p>611. "Fair and just compensation with reference to the pecuniary injuries"—Physical injury to beneficiary.</p> <p>612. "Fair and just compensation with reference to the pecuniary injuries"—Relationship, legal and actual, of deceased to beneficiaries.</p> <p>613. "Fair and just compensation with reference to the pecuniary injuries"—Legal or moral obligation—Legal right—Support or dependency.</p> |
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| <p>§ 614. Same subject continued.</p> <p>615. Same subject concluded.</p> <p>616. "Fair and just compensation with reference to the pecuniary injuries"—Reasonable expectation of pecuniary benefit.</p> <p>617. "Fair and just compensation with reference to the pecuniary injuries"—Physical and financial condition—Age and number of beneficiaries.</p> <p>618. Same subject continued.</p> <p>619. Same subject continued.</p> <p>620. Same subject—Conclusion.</p> <p>621. "Fair and just compensation with reference to the pecuniary injuries"—Wealth of defendant.</p> <p>622. "Fair and just compensation with reference to the pecuniary injuries"—Probable accumulations.</p> <p>623. "Fair and just compensation with reference to the pecuniary injuries"—Expenses of sickness, funeral, etc.</p> <p>624. "Fair and just compensation with reference to the pecuniary injuries"—Life expectancy — Mortality tables.</p> <p>625. "Fair and just compensation with reference to the pecuniary injuries"—Nominal damages.</p> <p>626. Same subject continued.</p> <p>627. "Fair and just compensation with reference to the pecuniary injuries"—Death of husband—Husband and father.</p> <p>628. Same subject — Annuity — Dower, etc. — Instruction and opinion of court.</p> | <p>629. "Fair and just compensation with reference to the pecuniary injuries"—Death of wife.</p> <p>630. Same subject continued — Married woman's act.</p> <p>631. "Fair and just compensation with reference to the pecuniary injuries"—Death of parent.</p> <p>632. "Fair and just compensation with reference to the pecuniary injuries"—Training, etc., of children—Death of parent.</p> <p>633. "Fair and just compensation with reference to the pecuniary injuries"—Death of children.</p> <p>634. Same subject continued.</p> <p>635. "Fair and just compensation with reference to the pecuniary injuries"—Death of children—Minority and majority.</p> <p>636. "Fair and just compensation with reference to the pecuniary injuries"—Death of children—Adults.</p> <p>637. "Fair and just compensation with reference to the pecuniary injuries"—Collateral kindred.</p> <p>638. Defenses—Mitigation of damages—Insurance.</p> <p>639. "Fair and just compensation with reference to the pecuniary injuries"—Defenses — Remarriage and marriage.</p> <p>640. Death—Defenses—Pension to widow and children in mitigation.</p> <p>641. Damages assessed on affirmation of judgment.</p> |
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§ 596. "Fair and just compensation with reference to the

pecuniary injuries”—Statutes.—In Arkansas, Illinois, Maine, Montana and Nebraska, the jury may give such damages under the General Statutes as they shall deem a fair and just compensation with reference to the pecuniary injuries. In Arkansas the constitution¹ prohibits a limitation of the amount to be recovered. In Illinois, Maine and Nebraska, the damages are limited to five thousand dollars, and in Montana they must not exceed twenty thousand dollars. The wife and next of kin are the designated beneficiaries in Arkansas, Illinois, Montana and Nebraska, and the amount recovered is for the exclusive benefit of the widow and next of kin, while in Maine the damages are those resulting from the death to the persons for whose benefit the action is brought, and the recovery is for the exclusive benefit of the widow, if no children, and of the children if no widow, and if both, then of her and them equally, and if neither, of his heirs. The action in all the above named states must be brought by and in the name of the personal representative. The right to sue exists where the death is caused by wrongful act, neglect or default, such as would if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, and this even though the death shall have been caused under such circumstances as amount in law to a felony.²

¹ Art. 5.

² Ark. Sandels & Hill's Dig. Ark. Stats. 1894, p. 1310, secs. 5911, 5912. (See id. p. 1309, 131, sec. 5908, id. pp. 1311-1314, secs. 5920-5939, as to revivor of actions in general.) Mansfield's Dig. secs. 5225, 5226. Sanborn & Hill's Dig. secs. 5912, 5925, Ill. Hurd's Ill. Rev. Stat. 1899, p. 964, ch. 70; 1 Starr & C. Ann. St. ch. 70; Rev. Stat. 174, p. 582; 1 Ill. Rev. Stat. 1858, secs. 1, 2, p. 422; Ill. Act, Feb. 12, 1853. Indian Ty. Mansfield's Ark. Dig. secs. 5225, 5226, adopted as law of Indian Territory, by act of congress, May 2, 1890; for construction of act and application, see Ardmore Coal Co. v. Bevil (U. S. C. C. A. 8th Civ.), 61 Fed. 757. Me. Acts, 1891, ch. 124, secs. 1, 2;

Freeman's Suppl. 1885-1895, p. 438. Mont. Codes (Civ. Proc.), 1895, secs. 578, 579; Comp. Stat. 1888, p. 911, secs. 981, 982; Rev. Stat. 1879, p. 506; Codes (Civ.), 1895, secs. 4353, 4354, provides for payment of debts by one who kills another in a duel, and also for maintenance of widow and minor children of the person slain or disabled. As to survival of actions, see Const. Codes & Stats. 1895, sec. 587, p. 792. See also chaps. 23, 31, herein. Neb. Comp. stat. 1901, p. 523, secs. 2503, 2504 (that action does not abate, see id. p. 1248, sec. 5632, and as to revival generally, see id. p. 1311, secs. 6035, et seq.); Comp. Stat. 1897, ch. 21; Comp. L. 1881, ch. 21, secs. 1, 2.

§ 597. "Fair and just compensation with reference to the pecuniary injuries"—Statutes—Continued—Generally.—Damages may be recovered in all cases under the Nebraska statute for the wrongful act, neglect or default of another where the injured party might have maintained the action had he survived the injury,³ and this applies to one whose death was occasioned by injuries while being transported by a railroad company.⁴ So the Arkansas death act applies to all cases in which a recovery may be had for negligent, etc., killing, regardless of the agency inflicting the injury, and supersedes the act of 1875, relating to injuries by railroad trains.⁵ In Illinois the compensation to be awarded is to be considered in view of the fact whether or not the death results from a cause other than the injuries for which the suit is brought.⁶ This involves the question whether there was conscious suffering or an instantaneous death.⁷ And in the same connection the survival statute is important,⁸ as is also the determination of the point whether the action is for the death or the injury and the necessary elements of damages in connection with these actions

³ Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 678; 79 N. W. 556; 14 Am. & Eng. R. Cas. N. S. 343; Neb. Comp. Stat. 1897, chap. 21.

⁴ Chicago, R. I. & T. R. Co. v. Zerneck (Neb.), 82 N. W. 26.

⁵ Davis v. St. Louis, I. M. & S. R. Co., 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690.

⁶ Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586; 6 West. 773; 9 N. E. 263; 19 Ill. App. 591; Merrihew v. Chicago City R. Co., 92 Ill. App. 386, under Act, Feb. 12, 1853, Laws, 1853, p. 97. See sec. 609, herein.

⁷ Lake Shore & M. S. R. Co. v. Dylinski, 67 Ill. App. 114; 2 Chic. L. J. Wkly. 77; St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46, citing numerous cases; St. Louis, S. W. R. Co. v. Mahoney, 67 Ark. 617; 55 S. W. 840; Sawyer v.

Perry, 88 Me. 42; 33 Atl. 660; State v. Grand Trunk R. Co., 61 Md. 114, indictment; State v. Maine, C. R. Co., 60 Me. 490, indictment.

⁸ Ark. Const. art. 5; Ark. Dig. Stat. 1884, sec. 5223; Ill. Rev. Stat. 1891, ch. 3, sec. 122; 1 Starr & C. Ann. Stat. 1885, p. 247; p. 123, sec. 123; Comp. Stat. Mont. 1887, sec. 22. Examine Hill v. Bryant, 61 Ark. 208; 32 S. W. 506, under Sanb. & B. Ark. Dig. sec. 5925. Does not survive against wrongdoer's personal representative. Davis v. Nichols (Ark.), 15 S. W. 880. That action lies against corporation for receiver's negligence after receiver's discharge and restoration of property, see Bartlett v. Cicero Light, H. & P. Co., 177 Ill. 68; 52 N. E. 339; 48 Cent. L. J. 116; 42 L. R. A. 715, rev'g 69 Ill. App. 576. Examine cases cited in last preceding note herein.

and which are dependent upon the character thereof, since if the death act is exclusive, the measure of damages would not rest upon the same factors as under a survival action.⁹ The above considerations further involve the question whether or not there can be more than one recovery and to what extent the action for the injury or a judgment in the survival action bars an action for damages for the pecuniary loss suffered by the negligent or wrongful killing.¹⁰ Although a father may sue as administrator and recover for the death of a son, and the judgment is not a bar to an action by him in the same capacity for damages for the death of another son from the same act of negligence.¹¹ In Arkansas, however, these actions are different and neither is a bar to the other and there may be a recovery for the damages resulting from the injuries and also for those occasioned by the death.¹² And in the case of a minor child's death the father has also a common-law action for loss of services. There is also the survival right in the personal representatives so that three actions lie in such case which may be prosecuted at the same time and recoveries had in each and all of them.¹³

⁹ See *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; 6 West. 773; 9 N. E. 263; 19 Ill. App. 591; *Holton v. Daly*, 106 Ill. App. 591, both cited in *Martin v. Missouri P. R. Co.*, 58 Kan. 475; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576; 3 Am. Neg. Rep. 165.

¹⁰ See *Consolidated Coal Co. v. Machl*, 130 Ill. 551; 22 N. E. 715; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; 6 West. 773; 9 N. E. 263; 19 Ill. App. 591; *Beard v. Skeldon*, 113 Ill. 584; 13 Ill. App. 54; *Holton v. Daly*, 106 Ill. 131. See *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Chicago, etc., R. Co. v. Morris*, 26 Ill. 400; *Chicago v. Major*, 18 Ill. 349. *Examine Lake Shore & M. S. R. Co. v. Dylinski*, 67 Ill. App. 114; 2 Chic. L. J. Wkly. 77.

¹¹ *Illinois C. R. Co. v. Slater*, 139 Ill. 190; 28 N. E. 830; 49 Am. & Eng. R. Cas. 480, aff'g 39 Ill. App. 69.

¹² *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563; 40 S. W. 463; 2 Am. Neg. Rep. 295, per *Bates J.*, a case of death from injuries caused by the derailment of a train and the pendency of the action for the injury.

and verdict thereon was averred. Administrators may maintain two actions, one under act of 1838 and one under act of 1883. *Davis v. St. Louis, I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690.

¹³ So held in *Davis v. St. Louis, I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690. The act of 1883 does not take away the survival right under *Mansf. Dig. sec. 5223*. This statute (*id. secs. 5225, 5226*), super-

§ 598. "Fair and just compensation with reference to the pecuniary injuries"—Statutes—Continued—Beneficiaries, etc.—In Arkansas, under the death loss act, the suit is brought by the personal representative for the benefit of the widow and next of kin, and the father has also his common-law right of action,¹⁴ and the damages are not for the benefit of the estate.¹⁵ In Maine the damages recoverable are limited to those which result to the beneficiaries themselves.¹⁶ So in Montana the existence of beneficiaries is necessary, and a complaint is fatally defective which fails to aver whether deceased left a widow or next of kin.¹⁷ In Nebraska the complaint must show some person entitled to recover under the statute, and it must

sedes the act of 1875, relating to suits for injuries by railway trains. As to action being new, see *State v. Grand Trunk R. Co.*, 61 Me. 114, indictment; *State v. Maine C. R. Co.*, 60 Me. 490, indictment.

¹⁴ *Davis v. St. Louis, I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690. As to the existence of beneficiaries being necessary under prior act, see *Little Rock & Ft. S. R. Co. v. Townsend*, 41 Ark. 382. As to "heir-at-law," see *St. Louis, I. M. & S. R. Co. v. Needham*, 52 Fed. 373.

¹⁵ *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark.—; 21 S. W. 58. But see this same case 63 Ark. 563; 40 S. W. 463; 2 Am. Neg. Rep. 295, opinion of Battle, J., given in note, sec. 623 herein as to funeral expenses, etc.

¹⁶ *Kay v. New England Dredging Co.*, 92 Me. 454; 43 Atl. 29. See sec. 600, herein.

¹⁷ "Complaint fails to state that deceased had any widow or next of kin. There was no claim that he left a widow . . . I cannot agree with the view that there should be no allegations in a complaint as to there being any widow and next of kin. Unless there be a surviving

widow or next of kin there is no one to whom the damages recovered for injuries resulting in death can go. . . . The complaint was fatally defective in not stating that there were next of kin of the deceased, in my opinion. It is urged, however, that there was evidence of next of kin introduced in this case and that this defect was cured by verdict. The defendant, however, objected to the introduction of this evidence, and has embodied his exceptions in his bill of exceptions. When material evidence is introduced under the objection of the party against whom the same is offered, and it was error to have admitted the same, the rule does not apply. Neither do I think a defendant is bound to exercise his objection to a defective complaint by demurrer. The plaintiff is responsible for his pleadings and its defects and not the defendant. The civil practice act of Montana says the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur to the same." *Serensen v. Northern Pac. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407, 408, 409, per Knowles, J.; Rev. Stat. Mont. 1879, p. 508.

also aver other necessary statutory prerequisites to a recovery.¹⁸ But a complaint otherwise sufficient is proper where it avers that deceased left a widow and children,¹⁹ or where the widow and next of kin are described,²⁰ or where the names of deceased's surviving dependent children are alleged, even though it fails to aver that he left a widow.²¹ It is sufficient in the absence of a demurrer to allege that deceased left a widow and next of kin. This averment may be made at the end of the declaration and need not be set forth in each count.²² But the mother may be entitled to only a fractional part of the damages under the statute of distributions and so not recover her actual loss.²³ Again, the action for personal injuries, which survives must be prosecuted by the personal representative for the benefit of the widow and next of kin,²⁴ although the degree of relationship may or may not be important.²⁵ But the right to sue as administratrix need not be proven unless put in issue by plea,²⁶ and where the declaration alleged that the next of kin were the father, mother, two brothers and five sisters, and only father and mother were proven and no objection was made in the trial court, it is not available on appeal.²⁷ And in an action for loss by death brought

¹⁸ Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 678; 79 N. W. 556; 14 Am. & Eng. R. Cas. N. S. 343; Chicago, B. & Q. R. Co. v. Bond, 58 Neb. 385; 78 N. W. 310; 6 Am. Neg. Rep. 116; 15 Am. & Eng. R. Cas. N. S. 759; Chicago, B. & Q. R. Co. v. Van Buskirk, 58 Neb. 218; 78 N. W. 514; Burlington & M. R. Co. v. Crockett, 17 Neb. 570; 24 N. W. 219. Action lies where deceased leaves either a widow or next of kin dependent upon him for support. Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1; 78 N. W. 359; 12 Am. & Eng. R. Cas. N. S. 655. That husband not next of kin, see Warren v. Englehart, 13 Neb. 283; 13 N. W. 401.

¹⁹ Friend v. Burleigh, 53 Neb. 674; 74 N. W. 50, a case of defective sidewalk, injury and death. But see St. Louis, I. M. & S. R. Co. v. Yocum, 34 Ark. 493.

²⁰ Omaha & R. V. R. Co. v. Crow, 54 Neb. 747; 74 N. W. 1066.

²¹ Chicago, B. & Q. R. Co. v. Oyater, 58 Neb. 1; 78 N. W. 359; 12 Am. & Eng. R. Cas. N. S. 655.

²² Lake Shore & M. S. R. Co. v. Hession, 150 Ill. 546; 37 N. E. 505, aff'g 50 Ill. App. 685. See St. Louis, I. M. & S. R. Co. v. Yocum, 34 Ark. 493.

²³ Falkenan v. Rowland, 70 Ill. App. 26.

²⁴ Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586; 6 West. 773; 9 N. E. 263; Holton v. Daly, 106 Ill. 131.

²⁵ Chicago & A. R. Co. v. Shannon, 43 Ill. 338, per the court.

²⁶ Union R. & T. Co. v. Schacklett (Ill.), 8 West. 63.

²⁷ Chicago & G. T. R. Co. v. Gacimowski, 150 Ill. 189; 40 N. E. 601, aff'g 54 Ill. App. 276.

against a railroad company, there must be a widow and next of kin and the existence of such persons must be alleged,²⁹ although the husband suing as administrator may recover.³⁰ And no cause of action is stated in a declaration which does not aver that any one suffered any pecuniary loss because of deceased's killing, nor that she left her surviving a husband and next of kin.³⁰ And it must also be alleged that a child born after deceased was killed was one of the next of kin.³¹

§ 599. "Direct damages sustained"—Miners' statute.—In Illinois there is a statute known as the miners' act which provides for the recovery of "direct damages sustained" for a wilful violation thereof or for a wilful failure to comply therewith. Under this enactment the right of action accrues to the widow of deceased, his lineal heirs or adopted children, or any person dependent for support upon deceased before he was killed and the limit of recovery is five thousand dollars.³² But the action under this statute is not to recover a penalty but only the damages alleged to have been occasioned by a violation of the law.³³ And an allegation of a "wilful omission" to comply

²⁹ Chicago, etc., R. Co. v. Morris, 26 Ill. 400.

³⁰ Cleveland, C. C. & St. L. R. R. Co. v. Baddeley, 150 Ill. 328; 36 N. E. 965, aff'g 52 Ill. App. 94.

³¹ St. Luke's Hospital v. Foster, 86 Ill. App. 282., See further as to existence of beneficiaries being necessary, etc. Lake Shore, etc., R. Co. v. Hession, 150 Ill. 546; Quincy Coal Co. v. Hood, 77 Ill. 68; Conant v. Griffin, 48 Ill. 410; West Chicago St. R. Co. v. Mabie, 77 Ill. App. 176, holding also that the omission of the essential averment of the existence of next of kin is not cured by verdict. As to instruction fixing the term next of kin, see Chicago, etc. R. Co. v. Shannon, 43 Ill. 338. As to recovery where no next of kin or pecuniary loss proven, see Chicago, etc., R. Co. v. Gillam, 27 Ill. App. 386. The loss for the death of a wife is for the surviving husband and next

of kin. Illinois C. R. Co. v. Chicago Title & T. Co., 79 Ill. App. 623; Chicago, M. & St. P. R. Co. v. Dowd, 115 Ill. 659; 2 West. 882.

³² Chicago & A. R. Co. v. Logue, 47 Ill. App. 292.

³³ 3 Starr & C. Ann. St. (am'd 1887) ch. 93, secs. 4, 14, p. 400; Hurd's Rev. Stat. 1889, ch. 93, secs. 6, 8, 14. Sec. 4 of this act requires an inspection of the mine each morning before the miners enter, and for a report thereof, and where deceased was killed in said mine by a fall of dirt, no recovery can be had where, after the employees had commenced work but three hours prior to the accident an inspection had been made, since a defect which existed earlier could have been discovered when the inspection was made. Missouri & I. Coal Co. v. Schwalb, 74 Ill. App. 567.

³⁴ Missouri & I. Coal Co. v. Schwalb, 74 Ill. App. 567.

with the requirement as to providing a sufficient light does not involve a charge of wrongful intent, but that such omission constituted conscious acts of the mind and not merely inadvertence, and it is proper therefore to refuse testimony of an intention to comply with the statute in good faith.³⁴ Another important consideration is that this statute gives a right of action for the injury and also a right to recover for the loss of life,³⁵ and although different beneficiaries are named under this act than are designated by the general death loss act, it seems that the action is not brought by the personal representative, but that the widow may sue, although others may be benefited who are shown to exist.³⁶

§ 600. Forfeiture or fine—Indictment—Railroads—Common carriers—Statute.—In Maine in addition to the statutes elsewhere herein noted, railroad corporations and other common carriers forfeit for loss of life through their negligence or carelessness or by that of their servants or agents, not less than five hundred, nor more than five thousand dollars to be recovered by indictment. But due care and diligence is required to have been exercised by the person killed and a fine is precluded where deceased was killed while walking in the road or while there contrary to the company's rules and regulations. The recovery is for the same class of beneficiaries as under the general death statute.³⁷ The action, however, while in form by indictment is analogous in some respects, at least, to the civil action for death, in so far as the rules of evidence and general legal principles gov-

³⁴ *Odin Coal Co. v. Denman*, 185 Ill. 413; 57 N. E. 192, aff'g 84 Ill. App. 190. See also *Hawley v. Daly*, 13 Ill. App. 391.

³⁵ 3 Starr & C. Ann. Stat. (am'd 1887) ch. 93, secs. 4, 6, 8, 14; *Hurd's Rev. Stat.* 1889, ch. 93, secs. 4, 6, 8, 14.

³⁶ See *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Consolidated Coal Co. v. Maehl*, 130 Ill. 551; 22 N. E. 715; *Beard v. Skeldon*, 113 Ill. 584; 13 Ill. App. 54. See sec. 598, herein, as to beneficiaries.

³⁷ *Rev. Stat. Me.* 1883, ch. 51, secs. 68, 69; id. ch. 52, sec. 7; *Rev. Stat.*

1871, ch. 51, sec. 36; *Rev. Stat. Me.* 1857, ch. 51, sec. 42, p. 370; ch. 52, sec. 7, p. 376; Act 1855, ch. 161. As to contributory negligence, see *State v. Maine Cent. R. Co.*, 76 Me. 357; 19 Am. & Eng. R. Cas. 312. As to Ark. Act, 1875, relating to injuries by railway trains, see *Davis v. St. Louis, I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690. As to Neb. Comp. Stat. ch. 72; Ark. 1, sec. 3, see *Chicago, R. I. & P. R. Co. v. Zerneck* (Neb.), 82 N. W. 26.

erning the recovery are concerned.³⁸ This statement is subject, however, to this qualification that in survival actions a different rule as to the elements of damages generally exists than in cases where the action is for the death itself.³⁹ So that it may be stated not only as pertinent to the above assertion, but also as a rule under this enactment under consideration that in determining whether the action for killing lies under this statute or another act in that state, the test is the instantaneous death,⁴⁰ which involves the survival of the injured party's right of action, and the construction of the statutes upon the question of the legislative intent to create two remedies for the same injury, which latter cannot be assumed.⁴¹ Again, it will be observed by comparison of this enactment with the general death loss act that as we stated at the beginning of this section the persons entitled to recover are the same, therefore the same rules as to the existence of beneficiaries being a prerequisite to the action should apply in both cases.⁴² In Arkansas there is a statutory remedy in case an adult is killed by the running of a railroad train in that state.⁴³

§ 601. "Such sum as the jury may deem reasonable"—Statute.—Another statute⁴⁴ in Maine provides for the recovery of such sum as the jury may deem reasonable as damages where the life of any person is lost through defect or want of repair or sufficient railing in any highway, causeway or bridge, and the county or town obligated to keep the same in repair is liable, provided it had the required statutory notice.⁴⁵

³⁸ State v. Grand Trunk R. Co., 58 Me. 176.

³⁹ See secs. 503, 609, herein.

⁴⁰ See chap. 37 herein as to instantaneous death.

⁴¹ State v. Maine C. R. Co., 60 Me. 490, per the court; Sawyer v. Perry, 88 Me. 42; 33 Atl. 660. See Chicago, R. I. & P. R. Co. v. Zernecke (Neb.), 82 N. W. 26. See sec. 609, herein.

⁴² See sec. 598, herein. Existence of beneficiaries necessary and should be averred. State v. Grand Trunk R. Co., 60 Me. 145, indictment.

⁴³ Sandel & Hill's Dig. Ark. Stat. 1894, p. 1310, sec. 5910; Act, February 3, 1875, sec. 3. See also Sanb. & H. Dig. 1894, secs. 6349, 6357, as to damages to persons or property by railroads. As to injury, etc., to employees of railroads, see Ill. Act, February 28, 1893; Stats. secs. 6248-6250. As to death of employee in Montana, see Codes (Civ. Proc.), 1895, secs. 578, 579.

⁴⁴ See secs. 599, 600, herein, for other Maine statutes.

⁴⁵ Rev. Stat. (Me. 1883), ch. 18.

§ 602. "Fair and just compensation with reference to the pecuniary injuries"—**Pecuniary loss.**—The plaintiff in the case of negligent or wrongful death is entitled to recover a fair and just compensation for the benefit of those entitled for the pecuniary loss sustained by them by reason of the death, not exceeding the sum limited by statute⁴⁶ where the statute fixes such limit. Only the pecuniary loss can, however, be recovered.⁴⁷ This rule is well settled, and has been asserted in a large majority of the cases wherein actions have been brought to recover the loss occasioned by negligent and wrongful killing in the states which come under this fair and just compensation statute. But the damages awarded must be within such amount as the statute limits as the extent of the recovery in states where there is such a limitation,⁴⁸ although the actual pe-

⁴⁶ *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; 52 N. W. 849. See *Cleveland, C. C. & St. L. R. Co. v. Keenan*, 190 Ill. 217; 60 N. E. 107, aff'g 92 Ill. App. 430.

⁴⁷ *St. Louis & W. R. Co. v. Henson* (U. S. C. C. A. 8th C.), (E. D. Ark.) 58 Fed. 531; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; 19 Am. & Eng. R. Cas. 195, 212; *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; 18 L. Ed. 591, aff'g *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S. C. C. N. D. Ill.) 412, 453; *Bailey v. Chicago & A. R. Co.*, 4 Biss. (U. S. C. C. N. D. Ill.) 430; *Economy Light & P. Co. v. Stephen*, 187 Ill. 137; 58 N. E. 359, aff'g 87 Ill. App. 220; *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330; 51 N. E. 701, rev'g 72 Ill. App. 55; *Calumet Elec. St. R. Co. v. Van Pelt*, 173 Ill. 70; 50 N. E. 678, aff'g 68 Ill. App. 582; *Chicago, M. & S. P. R. Co. v. Dowd*, 115 Ill. 659; 2 West. 882; *Holton v. Daly*, 106 Ill. 131; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 198; *St. Louis, P. & N. R. Co. v. Rawley*, 90 Ill. App. 653; *Chicago City R. Co. v. Gillam*, 27 Ill. App. 386; *West Chicago St. R. Co.*

v. Mable, 77 Ill. App. 176; *Illinois C. R. Co. v. Chicago Title & T. Co.*, 79 Ill. App. 623; *Illinois C. R. Co. v. Ashline*, 56 Ill. App. 475; *Chicago Consol. B. Co. v. Tietz*, 37 Ill. App. 599; *Malott v. Shimer*, 153 Ind. 35; 1 Repr. 1234; 54 M. E. 101; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774; *McKay v. New England Dredging Co.*, 92 Me. 454; 43 Atl. 29; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; 52 N. W. 840. See secs. 605, 610, herein. Under the general allegation of damages evidence is admissible as to all damages necessarily and naturally resulting from the death (*Serensen v. Northern Pac. R. Co.* [U. S. C. C. D. Mont.], 45 Fed. 407, 411, per Knowles, J.), and the complaint need not allege special damages to the next of kin, and need not show that they have suffered a pecuniary loss by the death. *Serensen v. Northern Pac. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407, 409, 410, following *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90, per Nelson, J.

⁴⁸ *Calumet Elect. St. R. Co. v. Van Pelt*, 173 Ill. 70; 50 N. E. 678, aff'g 68 Ill. App. 582; *Anderson v. Chicago*,

pecuniary loss is not the limitation of damages for the reasonable expectation of pecuniary benefit.⁴⁹ So the right to nominal damages⁵⁰ and the right of action under the survival statutes, and the elements of damages in such cases should be considered.⁵¹ Nor will the total amount of pecuniary damages be increased to aid one of the beneficiaries to get enough, even though that one be entitled to more than the others.⁵²

§ 603. Same subject continued.—The question of the necessity of alleging and proving pecuniary loss becomes important, but it is also closely involved with that of the recovery of nominal damages,⁵³ for if the statute was intended to give such damages without proof of actual loss, then it is obvious that the allegations need not go beyond the legal proof required to justify the recovery of some damages. In Illinois the averments of the complaint will be sufficient if they are such as to admit evidence of the pecuniary loss; but special pecuniary injury need not be pleaded, and an allegation of damages in a stated sum is, it seems, also sufficient,⁵⁴ although a complaint in which it does not appear that any one suffered any pecuniary loss because of the death is insufficient.⁵⁵ Special or pecuniary

B. & Q. R. Co., 35 Neb. 95; 52 N. W. 840. See *Illinois C. R. Co. v. Cozby*, 174 Ill. 109; 50 N. E. 1011, aff'g 69 Ill. App. 256; *Chicago, M. & St. P. R. Co. v. Dowd*, 115 Ill. 659; 2 West. 882. But examine *Illinois C. R. Co. v. Ashline*, 56 Ill. App. 475. See *Lake Shore & M. S. R. Co. v. Rohlf*, 51 Ill. App. 215; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 368; 2 West. 50. See sec. 605, herein.

⁴⁹ *Chicago v. Keefe*, 114 Ill. 222; 1 West. 352.

⁵⁰ See sec. 625, herein.

⁵¹ See secs. 503, 596 n, 609 and chap. 23 herein.

⁵² *Falkenan v. Rowland*, 70 Ill. App. 20.

⁵³ See sec. 625, herein.

⁵⁴ *Chicago & A. R. Co. v. Carey*, 115 Ill. 115; 2 West. 73; 3 N. E. 519;

Stafford v. Rubens, 115 Ill. 196; 1 West. 640; *Chicago v. Hesing*, 83 Ill. 204. See cases cited, sec. 625, herein. See further as to pleading and evidence, *Holton v. Daly*, 106 Ill. 131; *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S. C. C. Ill.) 412. An allegation that defendants promised and undertook to perform certain acts for the safety of the deceased is mere surplusage in an action of trespass on the case for death caused by defendants' negligent acts, and that it is no obstacle to the action that a breach of contract arises from the wrong done or duty neglected. *Kinnare v. Chicago*, 70 Ill. App. 106, aff'd 171 Ill. 832; 49 N. E. 536; 3 Chic. L. Jour. Wkly. 128.

⁵⁵ *St. Luke's Hospital v. Foster*, 86 Ill. App. 282. But see *Falkenan*

loss need not be averred under the Montana statute of 1879.⁵⁴ But in Nebraska it must not only appear that the person for whose benefit the suit is brought, had a pecuniary interest in the life of deceased,⁵⁷ but there must also be an averment of pecuniary injury with reference to the survivor,⁵⁸ although it is sufficient, if the facts set forth with respect to the deceased and the relation the survivors sustained to him are such as show a pecuniary loss.⁵⁹ And it seems that it is not necessary that the words, damage, injury or loss be used to ensure the absolute sufficiency of the complaint or petition.⁶⁰ The necessity of proof of pecuniary loss, as well as the requirement of an allegation thereof, is involved with that of the right to nominal damages and has been considered in connection therewith.⁶¹

v. Rowland, 70 Ill. App. 20; 3 Am. Neg. Rep. 530, where there was no proof of pecuniary interest of the brothers and sisters in deceased's life.

⁵⁴ Page 506; *Serensen v. Northern P. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407.

⁵⁷ *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678; 79 N. W. 556; 14 Am. & Eng. R. Cas. N. S. 343, under Neb. Comp. Stat. 1897, chap. 21. See cases in next following note.

⁵⁸ *Chicago, B. & Q. B. Co. v. Bond*, 58 Neb. 385; 78 N. W. 710; 15 Am. & Eng. R. Cas. N. S. 759; 6 Am. Neg. Rep. 116; *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 218; 78 N. W. 514; *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4; 64 N. W. 450; *Orgall v. Burlington, etc. R. Co.* is same case.

⁵⁹ *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50. Deceased's good health, active conduct of business and that he left a widow and children, held sufficient in this case. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; 63 N. W. 941, holds that there is a sufficient showing of pecuniary injury, where the petition avers that minor children are left,

who were wholly dependent upon deceased for support.

⁶⁰ *Kearney Elect. Co. v. Laughlin*, 45 Neb. 390; 63 N. W. 941, under Neb. Comp. Stat. 1893, ch. 21, sec. 2.

⁶¹ See secs. 613, 625, herein. When declarations of one killed that he intended to take passage on a train are part of the *res gestæ* relating to the act of departure. *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438; 46 N. E. 269, rev'g 60 Ill. App. 525. As to no necessity of exact proof of loss, *Baltimore & O. S. R. Co. v. Then*, 159 Ill. 535; 42 N. E. 971, aff'g 59 Ill. App. 561. That administrator suing for the death is a competent witness on his own behalf, *Illinois C. R. Co. v. Reardon*, 157 Ill. 372; 41 N. E. 871. That evidence must afford some data to enable the extent of the loss to be ascertained, *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; 38 N. E. 760. As to necessity of proof of pecuniary loss, *Chicago v. Major*, 18 Ill. 349. As to reduction of damages where no special pecuniary injury is shown in case of death of a 4-year old child. *West Chicago R. Co. v. Mabie*, 77 Ill. App. 176. Decedent's daughter, though not an expert, may

§ 604. "Fair and just compensation with reference to the pecuniary injuries"—Exemplary damages.—The intent of this statutory provision, specifying the measure of compensation, does not cover exemplary or vindictive damages, since no damages are allowed by way of punishment.⁶² Nor can a husband recover anything except the value of his deceased wife's services estimated in dollars and cents upon the evidence.⁶³ Nor can punitive damages be awarded under the Maine statute of 1891.⁶⁴

testify as to his health and physical ability. *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26. As to reduction of damages where no proof existed as to age, etc., see *Serensen v. Northern P. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407. In case of death and an action under accident insurance policy, see as to declarations as to the fact, nature and extent of injury made by the injured party a few minutes after the accident being admissible as *res gestæ*. *Travelers Protect. Assoc. of America v. West* (U. S. C. C. A. Ill.), 42 C. C. A. 284; 102 Fed. 226. The declarations of a party himself to whomsoever made are competent evidence when confined strictly to such complaints, expressions and exclamations as furnish evidence of a present existing pain or malady to prove his condition, ills, pains and symptoms, whether arising from sickness or from an injury or accident or violence. If made to a medical attendant they are of more weight than if made to another person. So is a declaration made by a deceased person contemporaneously or nearly so with a main event, in consequence of which it is alleged he died as to the cause of that event. Though generally the declarations must be contemporaneous with the event, yet where there are connecting circumstances, they may even when made sometime afterwards, form a part

of the whole *res gestæ*. Where the principal fact is the fact of bodily injury the *res gestæ* are the statements of the cause made by the party injured almost contemporaneously with the occurrence of the injury, and those relating to the consequences made while the latter subsisted and were in progress. *Insurance Co. v. Mosely*, 8 Wall. (U. S.) 397, cited *Mutual L. Ins. Co. v. Hillman*, 145 U. S. 296; *Baltimore & O. R. Co. v. Rambo*, 59 Fed. 77; *North Am. Acc. Assoc. v. Woodson*, 64 Fed. 691; *Denver & R. G. R. Co. v. Roller*, 100 Fed. 752, 756. See 4 Joyce on Ins. secs. 3820, 3821. See further as to evidence, secs. 605, 618, 625, herein as to nominal damages, support and dependency, jury and instructions, and the cases giving facts under sec. 607, herein, as to factors generally.

⁶² *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C. N. D. Ill.) 453, 455, 456, charge of Davis, J., to jury, the case was affirmed, *Illinois Cent. R. Co. v. Barron*, 5 Wall. (72 U. S.) 99; 18 L. Ed. 591. See same case generally, 1 Biss. (U. S. C. C. N. D. Ill.) 412.

⁶³ *St. Louis S. W. R. Co. v. Henson* (U. S. C. C. A. 8th C. E. D. Ark.), 58 Fed. 531; 7 C. C. A. 349.

⁶⁴ *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; 49 Atl. 418; Stat. 1891, c. 124. See secs. 602, 603, herein.

§ 605. "Fair and just compensation with reference to the pecuniary injuries"—Jury and instructions.—The jury should determine what is a fair and just compensation, and this must depend upon all the facts and circumstances in evidence before them in each particular case. There are cases, however, in which much must necessarily be left to the judgment and discretion of the jury, especially so where from the very nature of the action there can be no certain definite proof of the pecuniary injury, as is evidenced in a suit for the death of young children of too tender years to render services. But however much discretion is vested in the jury, the verdict must not be the result of passion or prejudice, and the jury should be properly instructed by the court, while their award of damages is subject to be modified, reversed or set aside for proper cause, as where the verdict is excessive, etc.⁶⁵

⁶⁵ In an action of this kind the constant factor is the practical knowledge, varied experience and sound judgment of 12 men. *St. Louis, I. M. & S. R. Co. v. Needham* (U. S. C. C. A. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 377; 5 Am. & Eng. R. Cas. 88, per Sanborn, Cir. J. The court should limit the jury to the assessment of such damages as the evidence shows. *McNulta v. Jenkins*, 91 Ill. App. 309. It is the duty of the court to instruct the jury as to the basis upon which the damages are to be computed, and the pecuniary value of deceased's life ascertained. *Hunt v. Kille* (U. S. C. C. A. Ill.), 38 C. C. A. 641; 98 Fed. 49. The jury should not consider the comments of the coroner's jury on the situation at the place of accident, nor should they take with them depositions or a plat attached to the coroner's verdict, nor should they consider the defendant's conduct in regard to the accident in connection with the same. *Pittsburgh, C. C. & St. L. R. Co. v. Dahlin*, 67 Ill. App. 99. Where de-

ceased is a minor, the value of her services may be estimated, without proof thereof, from the child's age, and the juror's knowledge and experience in matters of common observation. *Callaway v. Spurgeon*, 63 Ill. App. 571. An instruction should refer to the evidence as the basis of damages. *Lake Shore & M. S. R. Co. v. Rohlf*, 51 Ill. App. 215. Jury should be instructed as to the elements on which to estimate the damages, and not generally directed to award them according to their belief. *Chicago E. & L. S. R. Co. v. Adamick*, 33 Ill. App. 412. Damages must depend upon the good sense and sound judgment of the jury upon all the facts and circumstances of each particular case, and the pecuniary injury is uncertain and indefinite. *Illinois C. R. Co. v. Barron* (Ill. Stat.), 5 Wall. (U. S.) 90; 18 L. Ed. 591, per Nelson, J.; *City of Chicago v. Major*, 18 Ill. 349. As to damages being left to jury's discretion, etc., see *St. Louis etc. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628; *Little Rock & Ft. S. R. Co.*

§ 606. Same subject—Proper and erroneous instructions—Illustrations.—It is not improper to charge the jury that they may consider whatever they may from the evidence believe the widow and next of kin might have reasonably expected in a pecuniary way from the continued life of the intestate,⁶⁵ and an instruction is not objectionable that if the jury believed the plaintiff was entitled by a preponderance of evidence to recover under any count of the declaration they might award such damages as, under the evidence, they thought the parties, for whose use the suit was brought had actually sustained, if any, not exceeding the amount demanded in the declaration.⁶⁷ And the jury may be charged that if they find for the plaintiff they shall assess the damages at such sum as they believe will be a fair and just compensation, based on the pecuniary loss, if any, resulting from the death to the next of kin, not exceeding the sum

v. Barker, 39 Ark. 491; Chicago v. Scholten, 75 Ill. 468; McLean Coal Co. v. McVey, 38 Ill. App. 158; Chicago M. & St. P. R. Co. v. Wilson, 35 Ill. App. 346; Salem v. Harvey, 29 Ill. App. 483, aff'd 129 Ill. 344; 21 N. E. 1076; Illinois C. R. Co. v. Slater, 28 Ill. App. 73, aff'd 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418. While the court should not state what constitutes a reasonable and just compensation, yet it may express the extreme limit to which a verdict should go. Conley v. Maine Cent. R. Co., 95 Me. 149; 49 Atl. 668; State v. Maine C. R. Co., 76 Me. 357; Johnson v. Missouri P. R. Co., 18 Neb. 690; 26 N. W. 347. Deceased was twelve years old—\$2,500 not excessive. Baltimore & O. S. W. R. Co. v. Then, 159 Ill. 535; 42 N. E. 971, aff'g 59 Ill. App. 561. Judgment for \$2,000 will be reversed as attributable to passion, where boy was killed and evidence is meager. East St. Louis Elec. St. R. Co. v. Burns, 77 Ill. App. 529. Deceased was less than 4 years old; no special pecuniary

injury was shown—\$4,000 excessive. West Chicago St. R. Co. v. Mabie, 77 Ill. App. 176. Deceased was 5 years old—\$3,000 not excessive. West Chicago St. R. Co. v. Waniata, 68 Ill. App. 481, aff'd 169 Ill. 17; 48 N. E. 437. Deceased was a 10-year old boy—\$5,000 excessive. North Chicago St. R. Co. v. Wrixon, 51 Ill. App. 307. Deceased was an infant son—\$1,000 not excessive. Joliet v. Weston, 22 Ill. App. 225, aff'd 123 Ill. 641; 14 N. E. 665; 12 West. 750. Deceased son was 10 years old—\$2,850 not excessive. Omaha v. Richards, 49 Neb. 244; 68 N. W. 528, aff'd 70 N. W. 363. Deceased boy was 17 years old—\$2,400 not excessive in behalf of father who was poor and had dependent children. Post v. Olmstead, 47 Neb. 893; 66 N. W. 828.

⁶⁵ Chicago & A. R. Co. v. Kelly, 182 Ill. 267; 54 N. E. 979, aff'g 80 Ill. App. 675.

⁶⁷ Illinois C. R. Co. v. Cozby, 174 Ill. 109; 50 N. E. 1011, aff'g 69 Ill. App. 256.

claimed in the declaration.⁶⁸ So an instruction is not erroneous that if the plaintiff has proved his case as alleged, the jury should find the defendant guilty and assess plaintiff's damages at such sum as proved by a preponderance of the evidence, where the jury are also explicitly directed that they must be governed solely by the pecuniary loss sustained and the manner of estimating such loss is charged.⁶⁹ Again, if the jury find the defendant guilty of the wrongful act, neglect and default under the evidence and the court's instructions, and as averred in the complaint the widow and next of kin may recover such damages as the jury may deem from the evidence and proofs a fair and just compensation having reference to the pecuniary injuries sustained through the death by such widow and next of kin within the statutory limitation, and an instruction to this effect is proper.⁷⁰ But a charge not to assess the damages above the amount demanded in the declaration is censurable although not reversible, although the amount claimed exceeded the statutory limit. It appeared, however, that the verdict was not affected by such instruction.⁷¹ And a direction to the jury is too general and indefinite and is erroneous, that the jury are not limited to the actual present loss that might be proved, but that they might go further and compensate for the relative injury with reference to the future and compensate for the pecuniary injuries present and prospective; nor should they be charged as to deceased's disposition to aid his mother, for they should be confined to the facts of actual help or obligation to help.⁷² So an instruction is erroneous which merely states that the jury may assess the damages at whatever sum in their opinion to which the plaintiff is entitled, not exceeding five thousand dollars.⁷³ But a charge is not objectionable as placing no limitation upon the amount recoverable, where the jury are directed that if they believe defendant's negligence caused the death, plaintiff was

⁶⁸ Calumet Elec. R. Co. v. Van Pelt, 173 Ill. 70; 50 N. E. 678, aff'g 68 Ill. App. 582.

⁶⁹ Wabash R. Co. v. Smith, 162 Ill. 583; 44 N. E. 856. Above instruction does not direct damages to be allowed as a solatium.

⁷⁰ Chicago, M. & St. P. R. Co. v.

Dowd, 115 Ill. 659; 3 West. 882; 4 N. E. 368.

⁷¹ Calumet Iron & Steel Co. v. Martin, 115 Ill. 368; 2 West. 50.

⁷² Chicago & N. W. R. Co. v. Shannon, 45 Ill. 197.

⁷³ Hunt v. Kile (U. S. C. C. A. Ill.), 38 C. C. A. 641; 98 Fed. 49.

entitled to recover in such sum as in the jury's judgment the evidence warrants.⁷⁴ Again, instructions which amount to a persuasive argument to render a large verdict, as where attention is directed to the amount specifically claimed as damages in the declaration and allowed by statute, are not reversible error even though improper, where the verdict assesses the damages at only half such amount.⁷⁵ So a charge is improper that in substance states that the damages that can be recovered cannot exceed five thousand dollars and that the law of the state limits the recovery to that sum.⁷⁶ And an instruction is erroneous in failing to refer to the evidence as a basis for awarding damages, where the jury are directed that if they find for the plaintiff they may assess the damages at such a sum as will be a fair compensation with reference to the pecuniary injuries resulting from such death, not exceeding five thousand dollars.⁷⁷

§ 607. "Fair and just compensation with reference to the pecuniary injuries"—Factors generally to be considered.—

There are certain elements of damages, or rather certain factors to be considered in estimating the amount of compensation to be awarded, which apply especially to particular legal relations, such as husband and wife, parent and child, which have been treated of herein under these different headings. There are also some evidential matters, the materiality or admissibility of which have been the subject of discussion in the several states which have this statutory provision as to fair and just compensation, which we have discussed elsewhere, such as the ages and number of the surviving family, the physical and financial condition of surviving beneficiaries, etc. The following factors, however, subject to such adverse rulings as we have stated elsewhere, under the separate consideration thereof, may generally be considered in arriving at the amount of damages which shall be deemed fair and just. Thus deceased's age, sex, mental and physical

⁷⁴ Chicago, P. & St. L. R. Co. v. Woolridge, 72 Ill. App. 551, case rev'd 174, Ill. 330; 51 N. E. 701.

⁷⁵ Chicago & A. R. Co. v. Gibbons, 65 Ill. App. 550.

⁷⁶ Illinois C. R. Co. v. Ashline, 56 Ill. App. 475.

⁷⁷ Lake Shore & M. S. R. Co. v. Rohlf, 51 Ill. App. 215. As to instructions see further Lake Shore & M. S. R. Co. v. Parker, 131 Ill. 557; 23 N. E. 237; North Chicago R. M. Co. v. Morrissey, 111 Ill. 646; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88.

health and strength, his life expectancy, and if deceased was a minor, his general intelligence and personal characteristics are material and relevant. So are deceased's capability or incapability as to self-support, his capacity and ability to perform hard labor, also the fact whether he was skilled or unskilled, his experience and business qualifications, his education, his activity in business or otherwise, his occupation and the character thereof, whether in business or retired, employed or out of employment, whether he worked part of the time or steadily, his chances of promotion, his habits as to industry, steadiness, sobriety, prudence, carefulness, saving or the contrary, his earning capacity and the probability whether it would increase or diminish, his earnings or income and the source thereof, the disposition of such earnings, personal expenses, amount given family, or the character and extent of aid rendered beneficiaries, whether he was the family's sole support, whether his occupation was his sole source of income, whether the income ceased with his death, as in case of a pension, whether deceased was divorced, married or single, and if the latter, the possibility of his marriage had he lived as affecting the descent of his property; the probability whether, if deceased had property, it would have been retained unimpaired, or would have increased or diminished, in so far as such facts depended upon deceased's ability, etc. Again, the facts are important which show the character of the services rendered by the deceased wife, son or daughter in the household, in so far as they affect the actual pecuniary loss. So the age and life expectancy, etc., of the surviving father or mother may be proven, and in some cases the physical and financial condition, ages, sex and numbers of survivors have been held admissible, not for the purpose of enhancing damages, but to show the character of the pecuniary injury. So the character of the relations, lineal and collateral, legal or actual, may be material, as in case of dependency, or whether deceased had lived at home or elsewhere, or the beneficiaries had resided abroad and were not dependent.⁷⁸

⁷⁸ The admissibility of these factors is not discussed in all the following cases, being mentioned in many of them as proven or in evidence, their admissibility and relevancy being apparently conceded. Deceased was a railroad yard master, had an earning capacity of \$85 to \$90 a month. He was industrious, experienced, sober, prudent, faithful to his family and

§ 608. Same subject continued—Evidence of wages.—In an action by a widow and two children for the death of a fireman killed in a train collision owing to the negligent and conflicting orders of a train despatcher, a schedule showing

his life expectancy was thirty-two years—\$17,820 not excessive. *Dwyer v. St. Louis & S. F. R. Co.* (U. S. C. C. W. D. Ark.), 52 Fed. 87. Deceased was a switchman and earned \$60 a month, aided in support of children, although divorced from wife, injury caused death in 4 hours—\$500 for pain and suffering, and \$2,500 to children, not excessive. *St. Louis, I. M. & S. R. Co. v. McCain*, 67 Ark. 377; 55 S. W. 165. Deceased was husband and father, held that his earning capacity, character and business qualifications could be considered (under *Sanborn & H. Ark. Dig. sec. 5912*). It appeared that he was 34 years old with a life expectancy of 25 years, was in good health, robust, temperate, industrious, trustworthy, careful, painstaking, gave \$800 to \$900 yearly to his wife and children for their support, and possessed good business qualifications. Only a small part of his time was passed at home—\$10,000 not excessive. *St. Louis I. M. & S. R. Co. v. Sweet*, 60 Ark. 550; 31 S. W. 571. Decedent's income and the fact that he received a monthly pension of \$72 and that he at times sought and obtained employment will be considered, also that he possessed ordinary business ability, was 52 years old, energetic and industrious. In this case, \$7,500 in favor of a widow and minor children was recovered. *St. Louis, I. M. & S. R. Co. v. Maddry*, 57 Ark. 506; 21 S. W. 472; 58 Am. & Eng. R. Cas. 327. Deceased was 29 years old, a railway brakeman, gave his family from \$40 to \$55 monthly out of wages of \$60 a month. It did not appear that his earning capacity would have increased and he had no other source of income—\$7,500 excessive for wife and children. *St. Louis I. M. & S. R. Co. v. Robbins*, 57 Ark. 377; 21 S. W. 886. Deceased's earnings over and above his board, the small amount of his yearly expenses, the constantly increasing value of his services, the amount sent to his father, and the latter's poverty, dependence, and life expectancy were all considered—\$2,391 not excessive. *Fordyce v. McCants*, 55 Ark. 384; 18 S. W. 371; 51 Ark. 509; 11 S. W. 694; 4 L. R. A. 296. Deceased's health, life expectancy, earnings, amount of money given monthly to mother and sister, their several ages and life expectancy and her physical condition were considered. *Little Rock & Ft. S. R. Co. v. Voss* (Ark.), 18 S. W. 172. Deceased was a minor and brakeman; chances of promotion considered. *Davis v. St. Louis, I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 44 Am. & Eng. R. Cas. 690; 7 L. R. A. 283. Deceased child's intelligence, obedience and mother's poverty considered. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; 19 Am. & Eng. R. Cas. 195, 212. See charge of Davis, J., to jury, *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C. A. N. D. Ill.) 453. Changes and chances of human life, health and sickness are factors. *Bailey v. Chicago & A. R. Co.* (U. S. C. C. N. D. Ill.), 4 Biss. 430. Deceased was a girl 12 years old. *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535; 42 N. E. 911, aff'g 59 Ill. App. 561. Loss of wages

the rate of wages to all classes of the defendant's employees was, in connection with other evidence, held competent for the purpose of showing the wages paid the fireman in its employ.⁷⁹

of minor son not the limit of damages. Illinois C. R. Co. v. Reardon, 157 Ill. 372; 41 N. E. 871. Deceased brother was habitual drunkard, and incapable of self-support. North Chicago St. R. Co. v. Brodie, 156 Ill. 317; 40 N. E. 942, rev'g 57 Ill. App. 564. Evidence should afford some data for ascertainment of loss. Ohio & M. R. Co. v. Wangelin, 152 Ill. 138; 38 N. E. 760. As to habits, capacity, etc., see Chicago v. Scholten, 75 Ill. 468. As to instruction as to present and prospective loss being too general and indefinite, see Chicago & N. W. R. Co. v. Swett, 45 Ill. 197. Deceased was a son, the character and amount of aid rendered parents, father's age and financial condition considered—\$2,000 not excessive. Chicago & A. R. Co. v. Shannon, 43 Ill. 388. Deceased was son and brother; his age, occupation, income, property, probable increase or decrease of wealth, that he was unmarried and possibility that he might have married are material. Illinois Cent. R. Co. v. Barron (Stat. Ill.), 5 Wall. (U. S.) 90; 18 L. Ed. 591; Barron v. Illinois C. R. Co., 1 Biss. (U. S. C. C. N. D. Ill.) 412, 453. Deceased man's age, health, strength, earning

capacity, daily wages, and that he left a wife and children considered—\$5,000 not excessive. Economy Light & P. Co. v. Stephen, 87 Ill. App. 220, aff'd (Ill.); 58 N. E. 359. Evidence of habits of deceased may be competent upon question of contributory negligence. Chicago, R. I. & P. R. Co. v. Downey, 85 Ill. App. 175. Age, earnings and financial condition admissible. Chicago & A. R. Co. v. Pearson, 82 Ill. App. 605. Earning until 21 years of age, not the limit of damages. West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; 3 Chic. L. J. Wkly. 238. Deceased was a girl 4 years old—\$3,500 reduced to \$2,000. West Chicago St. R. Co. v. Scanlon, 68 Ill. App. 628; 2 Chic. L. J. Wkly. 113, aff'd 168 Ill. 34; 48 N. E. 148. Deceased son was 33 years old; he supported parents 70 years old—\$5,000 reduced to \$3,000. Leiter v. Kinare, 68 Ill. App. 358. Age of deceased adult son, that he was unmarried and disposition of his wages considered. Webster Mfg. Co. v. Mulvany, 68 Ill. App. 607, aff'd 168 Ill. 311; 48 N. E. 168. Deceased's age, occupation and property owned by him considered—\$5,000 not exces-

⁷⁹ The witness here was a terminal agent and as such had been officially furnished with and had possession of this official schedule of wages paid employees. Moreover there was competent evidence to show about what the earnings of a fireman were on the company's road if it was material to prove the fact, and it is not essential to prove the individual earnings of a fireman killed where it is shown that he was paid

on a mileage basis and the rate thereof. And the jury may take notice of the fact that such employees are paid under a general schedule of wages as well also as of other facts in the common knowledge of intelligent men, and they may exercise their good sense and judgment in estimating damages. Missouri, K. & T. R. Co. v. Elliott (U. S. C. C. A. 8th C. C. C. A. Ind. Ty.), 102 Fed. 96; 42 C. C. A. 188.

It also decided in the same case that the admission of evidence of what deceased told witness he earned per month when he first commenced work in defendant's switch yards and of the amount of his wages when he became fireman is, if incompetent,

sive. *Louisville, N. A. & C. R. Co. v. Patchen*, 66 Ill. App. 206. Health and ability to perform hard labor may be proven. *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26. Deceased's age and occupation and age of surviving child considered—\$5,000 excessive. *Chicago, B. & Q. B. Co. v. Gunderson*, 65 Ill. App. 638. Death of mother, adult sons lived with her and she kept house for them. *Chicago & W. I. R. Co. v. Ptacek*, 62 Ill. App. 375; 1 Chic. L. J. Wkly. 53. That daughter was an adult, and her earnings and aid rendered parents considered—\$4,140 excessive. *Armour v. Czischki*, 59 Ill. App. 17. Deceased employee's earnings which he might have given family are not the limit of recovery. *Swift v. Foster*, 55 Ill. App. 286. Deceased, laborer, earned \$1.50 a day. *Baltimore & O. R. Co. v. Stanley*, 54 Ill. App. 215. Deceased minor sons, age and daily earnings considered—\$2,500 not excessive. *Illinois C. R. Co. v. Gilbert*, 51 Ill. App. 404. Deceased was 45 years old; when he was employed, he earned weekly \$9 or \$10 and supported his family—\$5,000 not excessive. *Lake Shore & M. S. R. Co. v. Ouska*, 51 Ill. App. 334, aff'd 151 Ill. 232; 27 N. E. 899. Deceased was 31 years old, and in good health and sole support of family. *Chicago & E. I. R. Co. v. Knevrim*, 48 Ill. App. 243. Age of deceased husband, his health, education, habits of sobriety and steadiness, the fact that he had learned a trade and that he was unemployed considered—\$2,000 not excessive. *Marschall v. Laughran*, 47

Ill. App. 29. Habits and character of deceased as affecting next of kin's pecuniary relations with him and support received admissible. *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466. Dependency of surviving sister on deceased brother, her occupation and earnings considered. *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324. Deceased adult daughter was school-teacher, aided in support of family and lived with parents. *City of Salem v. Harvey*, 29 Ill. App. 483, aff'd 129 Ill. 1076; 21 W. E. 1076. Deceased son's age, occupation, disposition of earnings with relation to parents, etc., considered. *Chicago & A. R. Co. v. Adler*, 28 Ill. App. 102. Deceased was 73 years old, labored at odd jobs for part of time and earned about \$215 yearly—\$1,200 held excessive. *Conley v. Maine Cent. R. Co.*, 95 Me. 149; 49 Atl. 668. Earning capacity, ability to labor and probabilities of obtaining profitable employment are elements of damages. *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; 49 Atl. 418, under Stat. 1891, ch. 124. Deceased was laborer, unskilled, aged 23, had not saved anything and had no family—\$8,000 excessive and also more than statutory limit. *O'Donnell v. Maine C. R. Co.*, 86 Me. 552; 30 Atl. 116; 10 Am. & Eng. Corp. Rep. 293; 25 L. R. A. 658. Occupation and daily earnings were in evidence and also the facts that some of the kindred resided abroad but there was no evidence as to age, earning or saving capacity—\$1,750 excessive. *Serensen v. Northern P. R. Co.* (U. S. C. D. Mont.), 45 Fed. 407. See *John-*

immaterial error, where it is merely cumulative evidence of a fact abundantly proved by competent testimony, and is in addition a fact which is a matter of common knowledge. Nor will such testimony be a ground of reversal where no objection is interposed to it as hearsay at the time of its introduction. The admission of incompetent evidence of a material fact being an error without prejudice, where the fact is proved by other competent evidence or the party complaining of the error was instrumental in excluding competent evidence to prove the fact, or where the fact is one of common knowledge.⁸⁰

§ 609. "Fair and just compensation with reference to the pecuniary injuries"—Sufferings of person injured.—Where the trial court permits the plaintiff to prove the nature of intestate's injuries and that they had occasioned his death, but it also charged the jury that "nothing can be allowed for the pain and suffering of deceased," such action is not error for which there will be a reversal of the case.⁸¹ But where there was only a moment's interval of conscious suffering, a verdict of four thousand dollars for the pain and suffering of

son v. Missouri P. R. Co., 18 Neb. 690; 26 N. W. 347. Deceased's age at the time of death important. Soyer v. Great Falls Water Co., 15 Mont. 1; 37 Pac. 837. Life expectancy of deceased material, so are his good health and activity in business and manner of his death. Friend v. Burleigh, 53 Neb. 674; 74 N. W. 50. Deceased minor son's age and that of his father, the latter's poverty and condition with relation to dependent children, the son's occupation and competency therein, earning capacity and amount of earnings considered—\$2,400 not excessive. Post v. Olmstead, 47 Neb. 893; 66 N. W. 828. Life expectancy just before the injury and value of services may be proved. Missouri P. R. Co. v. Baier (Neb.), 55 N. W. 913. Deceased's indulgence in liquors, careless and and nonsaving habits and fail-

ure to aid next of kin considered. Anderson v. Chicago, B. & Q. R. Co. (Neb.), 52 N. W. 840. See further *Roose v. Perkins*, 9 Neb. 304; *Stafford v. Rubens*, 115 Ill. 196; 1 West. 640; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 198; *Malott v. Shimer*, 153 Ind. 35; 1 Repr. 1,234; 54 N. E. 161; 15 Am. & Eng. R. Cas. N. S. 774; 6 Am. Neg. Rep. 263; *Grau v. Houston*, 45 Neb. 813; 64 N. W. 245.

⁸⁰ *Missouri, K. & T. R. Co. v. Elliott* (U. S. C. C. A. 8th C. C. C. A. Ind. Ty.), 102 Fed. 96; 42 C. C. A. 188.

⁸¹ *St. Louis & S. F. R. Co. v. Hicks* (U. S. C. C. A. W. D. Ark.), 79 Fed. 262; 1 Am. Neg. Rep. 793, per *Thayer*, Cir. J. In this case an employee of a lumber company was killed by reason of open switch on railroad track.

deceased will be reversed,⁸² although a verdict of two thousand five hundred dollars will stand where deceased suffered intense pain and anguish for the twenty-four hours during which he survived the injuries, and he suffered a terrible shock to his system and his leg was mangled.⁸³ In the states however which come under this provision of the statute as to fair and just compensation, etc., this question of recovery for the pain and suffering of the injured party is also involved in that of the survival of the cause of action, as well as that whether or not the action for the death is separate and distinct from that which survives,⁸⁴ and if the death is occasioned by a cause other than the injury, there is precisely the same basis of recovery as the person himself would have had had he lived, otherwise his bodily pain and suffering cannot be considered,⁸⁵ and it may be generally stated that nothing can be allowed for the pain and suffering of the injured person.⁸⁶

§ 610. "Fair and just compensation with reference to the pecuniary injuries"—Solatium—Mental suffering, loss of society, etc.—Nothing can be allowed for the grief or distress of

⁸² *St. Louis, I. M. & S. R. Co. v. Dawson*, 68 Ark. 1; 56 S. W. 46. In this case a child 6 years old was killed on railroad track. Examine also *St. Louis S. W. R. Co. v. Mahoney*, 67 Ark. 617; 55 S. W. 840. Servant was killed in this case. *St. Louis, I. M. & S. R. Co. v. McCain*, 67 Ark. 377; 55 S. W. 165. A servant was killed in this case. Foreman of switching crew and switchman of another crew are not fellow servants under *Sanb. & B. Dig.* secs. 6248, 6249.

⁸³ *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 377; 21 S. W. 886, brakeman killed.

⁸⁴ An action survives in favor of the widow and children in *Indian Territory*. *Missouri, K. & T. R. Co. (Ind. Ty.)*, 51 S. W. 1067; 14 Am. & Eng. R. Cas. N. S. 587. See sec. 596 n, herein.

⁸⁵ *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; 6 West. 773; 9 N. E. 263; 19 Ill. App. 591. See also *Holton v. Daly*, 106 Ill. 131.

⁸⁶ *St. Louis, I. M. & S. R. Co. v. Needham* (U. S. C. C. A. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 378; 5 Am. & Eng. R. Cas. 88, per Sanborn, C. J.; *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; 18 L. Ed. 591, per Nelson, J.; *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C. N. D. Ill.) 412, and charge of Davis, J., in same case; *id.* 445, 453, 455; *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105; *Malott v. Shimer*, 153 Ind. 35; 1 Repr. 1234; 54 N. E. 101; 15 Am. & Eng. R. Cas. N. S. 774; 6 Am. Neg. Rep. 263; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; 49 Atl. 418, under Stat. 1891, ch. 124.

anyone,⁸⁷ whether husband, wife, parent, child or other lineal or collateral kindred, for mental anguish or suffering is excluded as an element of damages under this statutory provision which allows only a fair and just compensation with reference to the pecuniary injury,⁸⁸ nor for loss of a wife's companionship, of her love and affection or anything of that kind.⁸⁹ Nor can anything be allowed for the wounded feelings of a parent.⁹⁰ Nor can there be any recovery for loss of companionship and association of a deceased child.⁹¹ Nor for loss of society of other deceased persons,⁹² and although the declaration alleges that the next of kin are deprived of the deceased's comfort, assistance and companionship, an instruction to give such damages as are proved by a preponderance of evidence is not open to the objection that it allows damages as a solatium where it also explicitly charged that the jury must be governed solely by the pecuniary loss.⁹³

§ 611. "Fair and just compensation with reference to the pecuniary injuries"—Physical injury to beneficiary.—The physical injury sustained by a beneficiary, although re-

⁸⁷ *St. Louis & S. F. R. Co. v. Hicks* (U. S. C. C. A. W. D. Ark.), 49 U. S. App. 112; 79 Fed. 262; 1 Am. Neg. Rep. 798. But see sec. 609, herein.

⁸⁸ *St. Louis S. W. R. Co. v. Henson* (U. S. C. C. A. 8th C. E. D. Ark.), 58 Fed. 531; *St. Louis, I. M. & S. R. Co. v. Needham* (U. S. C. C. A. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 378; 5 Am. & Eng. R. Cas. 88, per Sanborn, Cir. J.; *Little Rock & F. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C. N. D. Ill.) 412; id. 453, 455, 456, charge by Davis, J., aff'd *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; 18 L. Ed. 591; *Bailey v. Chicago & A. R. Co.* (U. S. C. C. N. D. Ill.), 4 Biss. 430; *Wabash R. Co. v. Smith*, 162 Ill. 583; 44 N. E. 856; *Chicago Consol. Bottling Co. v. Tietz*, 37 Ill. App. 509; *Chicago, etc., R. Co. v. Gillam*, 27 Ill. App. 386; *Malott v. Shimer*, 153 Ind. 35; 1

Repr. 1234; 54 N. E. 101; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; 49 Atl. 418; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; 52 N. W. 840.

⁸⁹ *St. Louis S. W. R. Co. v. Henson* (U. S. C. C. A. 8th C. E. D. Ark.), 58 Fed. 531.

⁹⁰ *Bailey v. Chicago & A. R. Co.* (U. S. C. C. N. D. Ill.), 4 Biss. 430. *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C. N. D. Ill.) 412; id. 453, 455, 456, per Davis, J., charging the jury; case aff'd *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; 18 L. Ed. 591.

⁹¹ *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44.

⁹² *Kerkow v. Bauer*, 15 Neb. 150. See cases cited in preceding notes to this section.

⁹³ *Wabash R. Co. v. Smith*, 162 Ill. 583; 44 N. E. 856.

sulting from the killing, as in case of ill health occasioned by overwork, consequent upon the death, is not a ground of recovery.⁹⁴

§ 612. "Fair and just compensation with reference to the pecuniary injuries"—Relationship, legal and actual, of deceased to beneficiaries.—The relationship, legal and actual, sustained by deceased to the beneficiaries, is important in determining not only the actual loss, but also in ascertaining the pecuniary advantage which the beneficiaries had a reasonable expectation of deriving except for the death. So that damages may be based upon this reasonable probability of pecuniary benefit, whether arising from legal or family relations.⁹⁵ Thus the fact that deceased was at home only a small part of the time, coupled with his business energy and habits will be considered in connection with the value of his instruction and training of his children.⁹⁶ So the relations between deceased and his next of kin, lineal or collateral, are important,⁹⁷ and although legal relations may have ceased between a husband and wife, yet his actual relations with her by the way of aid furnished her for their children will be considered.⁹⁸ But if legal relations between husband and wife have been terminated, the right of recovery has ended.⁹⁹ Again, the pecuniary relations of deceased with the surviving beneficiaries are material and relevant.¹⁰⁰ And in fact this question of legal and actual relations, in so far as it affects the measure of damages, is involved in nearly every case where recovery is sought for the negligent or wrongful killing of a person, and to add to this section the decisions which come within this classification would be to substantially repeat most of the cases which have been considered elsewhere under other headings. The reader is, therefore, referred to the several sec-

⁹⁴ *Elshire v. Schuyler*, 15 Neb. 591; *Barron v. Illinois C. R. Co.*, 1 561.

⁹⁵ *McKay v. New England Dredg-* ⁹⁶ *St. Louis, I. M. & S. R. Co.*
ing Co., 92 Me. 454; 43 Atl. 20, under *v. McCain*, 67 Ark. 377; 55 S. W.
Me. act, 1891, ch. 124. 165.

⁹⁷ *St. Louis, I. M. & S. R. Co. v.* ⁹⁸ *North Chicago v. Brodie*, 156
Sweet, 60 Ark. 550; 31 S. W. 571. Ill. 317; 40 N. E. 942.

⁹⁹ *Illinois C. R. Co. v. Barron* (Ill. ¹⁰⁰ *Chicago & G. W. R. Co. v. Travis*,
Stat.), 5 Wall. (U. S.) 90; 18 L. Ed. 44 Ill. App. 466.

tions relating to damages for death under this fair and just compensation statute.¹

§ 613. "Fair and just compensation with reference to the pecuniary injuries"—Legal or moral obligation—Legal right—Support and dependency.—What has been lost by the death depends upon what constitutes the "pecuniary injury" and therefore that is the basis of recovery,² but the question at once arises whether the legal or moral obligation to support those in certain relations, such as the wife or the minor children, or the legal or moral right of such persons to claim support can enhance the damages, and it has been decided that it must appear that there was a legal obligation to support the next of kin because of their dependency, or that it must be shown that they were supported in whole or in part by deceased, in order to recover more than nominal damages, although it was subsequently held in the same case that the inability of the next of kin to support themselves and the question of their dependence were not material or admissible evidence to show pecuniary injury.³ And it has also been declared that it need not be proven that a legal claim to support exists to justify a recovery.⁴ In case of a child's death in so far as the parent's legal right to services, and also the former's right and the latter's obligation to support are concerned, it is certain that the damages rest largely upon the legal obligation and legal right coupled with the reasonable expectation of pecuniary benefit. But where the child is too young to render services of any value, then it is apparent that the question is one rather of a deprivation of a reasonable expectation of pecuniary advantage than otherwise.⁵

¹ The point is particularly involved in those sections, which relate to support and to reasonable expectation of pecuniary benefit under secs. 613-616, herein.

² See secs. 602, 603, herein.

³ Chicago P. & St. L. R. Co. v. Woolridge, 72 Ill. App. 551, rev'd 174 Ill. 330; 51 N. E. 701. See John Morris Co. v. Burgess, 44 Ill. App. 27.

⁴ Illinois C. R. Co. v. Barron (Ill. Stat.) 5 Wall. (U. S.) 90, 106; 18 L. Ed. 591; Barron v. Illinois C. R. Co., 1 Biss. (U. S. C. C.) 412. See McKay v. New England Dredging Co., 92 Me. 454; 43 Atl. 29; Chicago & A. R. Co. v. Shannon. See sec. 625, herein.

⁵ See secs. 616, 635, 636, herein.

§ 614. *Same subject continued.*—The statutes of those states which come within this provision as to fair and just compensation are evidently intended to benefit those who as beneficiaries have been deprived by the death of certain rights due from one who sustained at the time of the killing certain legal relations burdened with certain legal obligations such as the duty to support and the right to claim the same.⁶ Therefore in Arkansas and Illinois the amount of contributions of the deceased towards the support of his wife and children, and all the various factors which show the ability of the intestate in the matter of supporting his family will be considered, as well as the reasonable expectancy from his continued life had he not been killed.⁷ And in these states where the deceased was either a minor or adult child, the extent of his contributions to his parents for their support or to other kindred as well as the intent to continue the same will be relevant and material upon the question of damages, although the recovery may also rest upon the reasonable expectation of benefit of pecuniary advantage, shown by the evidence.⁸ So that it is apparent that in this latter instance the recovery does not rest upon any legal obligation or legal right, but rather upon the loss of a pecuniary

⁶ See sec. 598, herein.

⁷ *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550; 31 S. W. 571; *St. Louis, I. M. & S. R. Co. v. Maddry*, 57 Ark. 506; 21 S. W. 472; 58 Am. & Eng. R. Cas. 327; *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 377; 21 S. W. 886; *Pennsylvania, etc., Co. v. Keane*, 143 Ill. 172, 175; 32 N. E. 260; *Chicago & Edison Co. v. Moren*, 86 Ill. App. 152, *aff'd* 57 N. E. 773; *Lake Shore & M. S. R. Co. v. Ouska*, 51 Ill. App. 334, *aff'd* 151 Ill. 232; 27 N. E. 897; *Chicago & E. I. R. Co. v. Knevrin*, 48 Ill. App. 243; *Chicago & G. W. R. Co. v. Travis*, 44 Ill. App. 466. Widow's testimony that she was supported by her husband is competent. *St. Louis P. & N. R. Co. v. Dorsey*, 189 Ill. 251; 59 N. E. 593, *aff'g* 89 Ill. App. 555. But see

Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302; *Swift & Co. v. Foster*, 163 Ill. 50; 44 N. E. 37; 12 Nat. Corp. Rep. 396.

⁸ *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628; *Fordyce v. McCants*, 55 Ark. 384; 18 S. W. 371; 51 Ark. 509; 11 S. W. 694; 4 L. R. A. 296; *Leiter v. Kinnare*, 68 Ill. App. 358; *Armour v. Czischki*, 59 Ill. App. 17; *St. Louis, A. & T. H. R. Co. v. Bauer*, 53 Ill. App. 525, *aff'd* 156 Ill. 106; 40 N. E. 448; *City of Salem v. Harvey*, 29 Ill. App. 483, *aff'd* 129 Ill. 344; 21 N. E. 1076; *Chicago & A. R. Co. v. Adler*, 28 Ill. App. 102. But examine *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333; 3 S. W. 50, and secs. 617-619, herein.

benefit.⁹ But in another case some stress seems to have been put by the court upon the legal obligation of a deceased son to have aided his mother, for it was decided that one of the questions to be considered was whether he was bound to aid her.¹⁰ Again, an instruction is held erroneous which allows the jury to award such damages as will be a just compensation for the damage to the means of support of the next of kin.¹¹ In Illinois, as we have elsewhere stated,¹² proof of support of lineal kindred does not seem necessary,¹³ although upon this question the decisions are not in harmony.¹⁴ In that state under the statute limiting the damages to the pecuniary injuries sustained by the wife and next of kin, it is immaterial that the lineal descendants were dependent upon the deceased and were unable to support themselves.¹⁵ But it is also held that it is not a material factor that minor children had other means of support after the father's negligent death,¹⁶ and evidence of the deceased widow's ability to earn money is admissible under allegations that by her negligent death the children are deprived of their education and means of support.¹⁷ But evidence of pecuniary loss is admissible upon an averment that the widow and minor children have by the death of the husband and father been deprived of support, etc.,¹⁸ and the amount of the recovery will be affected

⁹ *Examine McKay v. New England Dredging Co.*, 92 Me. 454; 43 Atl. 29.

¹⁰ *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197.

¹¹ *Illinois Cent. R. Co. v. Bartle*, 94 Ill. App. 57.

¹² See sec. 625, herein.

¹³ *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495; 51 N. E. 708, aff'g 74 Ill. App. 356. See *Illinois C. R. Co. v. Barron* (Ill. Stat.), 5 Wall. (U. S.) 90, 106; 18 Lawy. Ed. 591.

¹⁴ See *Swift & Co. v. Foster*, 163 Ill. 50; 44 N. E. 837; 12 Nat. Corp. Rep. 396, see secs. 617-619, herein.

¹⁵ *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330; 51 N. E. 701, rev'g 72 Ill. App. 551, under Ill. Rev. Stat. ch. 70, sec. 2. This last case (72 Ill. App. 551) held that in

order to recover more than nominal damages, it was necessary in an action by the administrator to prove that the next of kin were wholly or in part supported by the deceased, or that by reason of their dependence he was legally bound to support them.

¹⁶ *Heyer v. Salsbury*, 7 Ill. App. 93.

¹⁷ *Chicago & A. Ry. Co. v. Carey*, 115 Ill. 115; 3 N. E. 519.

¹⁸ *Chicago & A. R. Co. v. Carey*, 115 Ill. 115; 3 N. E. 519; 2 West. 73. But see *Mayers v. Smith*, 121 Ill. 442; 13 N. E. 216; 11 West. 575; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *John Morris Co. v. Burgess*, 44 Ill. App. 27. See further as to loss of support and recovery therefor, *Chicago & A. R. Co. v. May*, 106 Ill. 288.

by the fact that the next of kin have received no aid or contributed towards their support, and this also where they are not dependent therefor upon deceased.¹⁹

§ 615. Same subject concluded.—If collateral kindred have been aided and needed support, proof of the amount is decided not to be necessary to justify the award of substantial damages.²⁰ And the recovery is not limited by the contributions to the family's support by deceased,²¹ nor is it the entire expense of supporting the family, but the damages are to be measured by a fair and just compensation for the loss of the means of support with which they would probably have been provided had there been no death.²² In Nebraska there should be a party survivor who was dependent upon or legally entitled to support by deceased;²³ as well also that there was some one dependent upon him therefor,²⁴ or that there are kindred upon whom the law confers a right to be supported.²⁵ Although if facts are alleged showing ability to support, such as health and the active conduct of business, together with such averment of the existence of the proper persons, it will be sufficient, although evidence which is otherwise competent to show the pecuniary loss to the widow and next of kin is not rendered incompetent because of the fact that the next of kin are self-supporting and independent of the earnings of deceased, none of which are devoted to their maintenance.²⁶ And the extent of the loss may

¹⁹ *Chicago v. Scholtzen*, 75 Ill. 468; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago v. Hesing*, 83 Ill. 204; *Illinois C. R. Co. v. Barron* (Ill. Stat.), 5 Wall. (U. S.) 90; 18 L. Ed. 591; *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S. C. C.) 412. Deceased was an adult and one of the collateral kindred had received some aid. In *Falkenan v. Rowland*, 70 Ill. App. 20, brothers and sisters had at times received pecuniary aid from deceased but they had no pecuniary interest in his life.

²⁰ *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324.

²¹ *Swift v. Foster*, 55 Ill. App. 286.

²² *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.

²³ *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385; 78 N. W. 710; 6 Am. Neg. Rep. 116; 15 Am. & Eng. R. Cas. N. S. 759, citing *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 218; 78 N. W. 514; *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50.

²⁴ *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1; 78 N. W. 359; 12 Am. & Eng. R. Cas. N. S. 655.

²⁵ *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747; 74 N. W. 1066.

²⁶ *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50.

be shown by evidence of deceased's competency to support his family, coupled with proof of their need.²⁷ So the fact that minor children are "wholly dependent" upon deceased shows pecuniary injury.²⁸ But evidence showing noncontribution to the support of brothers and sisters will affect the amount of recovery.²⁹ But in these cases, as also in the case of a father where the son has been killed, there may, it seems, be a recovery, although there was no legal obligation to support the beneficiary.³⁰ Another question of dependency upon deceased arises in connection with those cases where proof is admissible by a widow of the number of minor children left by the death of a husband and father.³¹

§ 616. "Fair and just compensation with reference to the pecuniary injuries"—Reasonable expectation of pecuniary benefit.—The reasonable expectation of pecuniary benefit of which the parties entitled to recover have been deprived by the negligent killing is to be considered under this statutory provision as to "fair and just compensation."³² The reasonable char-

²⁷ See facts in *Post v. Olmstead*, 47 Neb. 893; 66 N. W. 828.

²⁸ *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; 63 N. W. 941. See as to minor children, right to recover for loss of support, *Westphal v. Austin*, 39 Ill. App. 230; *Bloedel v. Bimmerman*, 41 Neb. 695.

²⁹ *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; 52 N. W. 840. And see as to father who had received no aid from deceased son, *Johnson v. Missouri P. R. Co.*, 18 Neb. 690; 26 N. W. 347.

³⁰ See cases in last note. See secs. 617-619, 625, herein.

³¹ See sec. 617-619, herein.

³² *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 Ark. 306; 21 S. W. 472. Action was in favor of decedent's widow and minor children. *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628, death of child. *Fordyce v. McCants*, 51 Ark. 509; 11 S. W. 694; 4 L. R. A. 296; 55

Ark. 384, 388; 18 S. W. 371, father for adult son's death. *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41, death of child. *Cleveland, C. C. & St. L. R. Co. v. Keenan*, 190 Ill. 217; 60 N. E. 107, aff'g 92 Ill. App. 430; *Chicago & A. R. Co. v. Kelley*, 80 Ill. App. 675, holding that instruction is not objectionable, that jury may consider whatever they may from the evidence believe that widow and next of kin might have reasonably expected in a pecuniary way from the life of the intestate, aff'd 182 Ill. 267; 54 N. E. 979; *Illinois C. R. Co. v. Barron* (Stat. Ill.), 5 Wall. (U. S.) 90; 18 L. Ed. 591; *Barron v. Illinois C. R. Co.*, 1 Bias. (U. S. C. C.) 412, 453, action for death of adult man for benefit of father, brothers and sisters. *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535; 42 N. E. 971, aff'g 59 Ill. App. 461, death of girl. *Chicago v. Keefe*, 114 Ill. 232; 1 West. 352; West

acter, however, of such expectation must appear from the facts proven, and these determine the measure of damages.³³ This reasonable expectation includes also the right to recover for prospective losses by way of probable support, expected gifts, aid or assistance and the like, as more fully appears under other appropriate headings herein. Again, it is decided that the damages awarded must be the present worth of the future pecuniary benefits, lost to the beneficiary by the wrongful killing. So the probabilities that deceased would have obtained profitable employment may be considered.³⁴ So every reasonable expectation of pecuniary benefit or advantage, from the continuance of the life of deceased, of which there is any legal evidence, should be considered by the jury.³⁵

§ 617. "Fair and just compensation with reference to the pecuniary injuries"—Physical and financial condition—Age and number of beneficiaries.—The poverty and dependency of a father or of parents will be considered,³⁶ although the

Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; 3 Chic. L. J. Wkly. 238, death of child. Chicago & G. W. R. Co. v. Travis, 44 Ill. App. 466; Ohio & M. R. Co. v. Simms, 43 Ill. App. 260, death of man with family. McLean Coal Co. v. McVey, 38 Ill. App. 158, death of son. McKay v. New England Dredging Co., 92 Me. 454; 43 Atl. 29, to next of kin. Missouri, P. R. Co. v. Baier (Neb.), 55 N. W. 913; Johnson v. Missouri, P. R. Co., 18 Neb. 699; 26 N. W. 347, death of son. But see Chicago, etc., R. Co. v. Swett, 45 Ill. 197. See sec. 635 herein, upon the point whether this reasonable expectation of pecuniary benefit extends beyond minority of children.

³³ Fordyce v. McCants, 51 Ark. 509; 11 S. W. 694; 4 L. R. A. 296.

³⁴ Oakes v. Maine Cent. R. Co., 95 Me. 103; 49 Atl. 418, under Stat. 1891, ch. 124.

³⁵ West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; 3 Chic. L.

J. Wkly. 238. See McLean Coal Co. v. McVey, 38 Ill. App. 158.

³⁶ Fordyce v. McCants, 55 Ark. 384; 18 S. W. 371; 51 Ark. 509; 4 L. R. A. 296; 11 S. W. 694; Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333; 3 S. W. 50; Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 350; 39 Ark. 491. Mother in this case was poor and kept boarders; a case of excessive damages. Chicago & A. R. Co. v. Shannon, 43 Ill. 388. Pecuniary condition of father and aid rendered by deceased son considered. Chicago v. Powers, 42 Ill. 169. Parents' condition admissible; this case is explained and distinguished in Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205; St. Louis, A. & T. H. R. Co. v. Bauer, 53 Ill. App. 525, aff'd 156 Ill. 106; 40 N. E. 448. Aid was furnished parents who were advanced in years; a case of not excessive damages. Aurora v. Seedelman, 34 Ill. App. 285. Pecuniary condition of parents admissible for death of small child to

financial condition of a father who sues as administrator for the next of kin cannot be shown, as that plaintiff was wealthy and able to hire others to perform services in place of a deceased son, where there is no proof that the latter was unable to care for himself.³⁷ Nor can the pecuniary loss be affected by the number of children left by deceased and their ages, nor by the fact that he supported his family, nor is such evidence admissible as it is calculated to awaken the sympathies of and prejudice the jury on other issues.³⁸ And in line with this decision it is determined that an instruction is not misleading as basing the recovery upon the pecuniary condition of the widow and children after his death, where such instruction allows a recovery, if by the wrongful death said beneficiaries have been and are deprived of their means of support.³⁹ And it is also decided that a surviving father's physical condition, as that he had but one arm, is inadmissible evidence as it could not affect the loss.⁴⁰ So it has been decided in another case that the pecuniary circumstances of the widow and her minor daughter could not be considered, nor the fact that the plaintiff was physically crippled, since the question was one of pecuniary loss only as the measure of damages.⁴¹

§ 618. Same subject continued.—Evidence is admissible

show inability to keep more vigilant watch over their children.

³⁷ *Illinois C. R. Co. v. Slater*, 28 Ill. App. 73, *aff'd* 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418.

³⁸ *St. Louis, P. & N. R. Co. v. Rawley*, 90 Ill. App. 653; *Pennsylvania Co. v. Roy*, 102 U. S. (12 Otto) 451; 26 L. E. 141, has been cited as supporting the point that evidence of the size of the family is irrelevant, but that was a personal injury case. Widow cannot show the number of her family. *Illinois Cent. R. Co. v. Ashline*, 56 Ill. App. 475.

³⁹ *Economy Light & P. Co. v. Stephen*, 187 Ill. 137; 58 N. E. 359, *aff'g* 87 Ill. App. 220.

⁴⁰ *Illinois Cent. R. Co. v. Bandy*, 88 Ill. App. 629. See also *Chicago, P.*

& St. L. R. Co. v. Woolridge, 72 Ill. App. 551, *rev'd* 174 Ill. 330; 51 N. E. 701; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302, holding that evidence is inadmissible that the earnings of deceased were the sole means of support of plaintiff and her child. *John Morris Co. v. Burgess*, 44 Ill. App. 27, holding that widow cannot be asked as to source of support of herself and children at the time of her husband's death. See further *Beard v. Skeldon*, 13 Ill. App. 54; *Chicago v. McCulloch*, 10 Ill. App. 459; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322; *Chicago & N. W. R. Co. v. Howard*, 6 Ill. App. 569.

⁴¹ *Illinois C. R. R. Co. v. Baches*, 55 Ill. 379.

as to the dependency of the widow and children before and at the death of deceased, although their pecuniary circumstances since the death cannot be shown.⁴² So evidence may be given that deceased left children,⁴³ and the facts that a deceased daughter left a father, mother, two brothers and a sister and her pecuniary relations to the family have been of weight in determining the amount of damages.⁴⁴ So where it is claimed that deceased at the time of the injury was contributing to the assistance of the next of kin, his father, in the performance of the latter's legal duty of supporting the mother and other children, the fact of the existence of such mother and other children would seem to be entirely admissible, not as a direct ground for the jury's action, but as showing what deceased was doing and likely to do to make his life pecuniarily valuable to the plaintiff. The evidence is admissible not as establishing directly a greater right to consideration from the jury, but as showing what consideration plaintiff was receiving and likely to receive in the future from this deceased son.⁴⁵ So where a child was killed, the family was shown to be poor, living by daily labors of the father and mother, since in case of such poverty the fact that the boy would have commenced early to assist in supporting them is relevant.⁴⁶ Again, the facts that the mother was poor and kept boarders was considered a factor in determining the measure of damages for the loss of a son who was an only child.⁴⁷

§ 619. Same subject, continued.—In Arkansas the fact that the sister of deceased was an invalid, and that he had contributed to her support, was considered as bearing upon the ex-

⁴² *Swift & Co. v. Foster*, 163 Ill. 50; 44 N. E. 837; 12 Nat. Corp. Rep. 396; *Pennsylvania Co. v. Keane*, 143 Ill. 172; 32 N. E. 260; *Mayers v. Smith*, 121 Ill. 442; 13 N. E. 216; 11 West. 575.

⁴³ *Consolidated Coal Co. v. Maehl*, 130 Ill. 551; 22 N. E. 715; *Beard v. Skeldon*, 113 Ill. 584; 13 Ill. App. 54.

⁴⁴ *City of Salem v. Harvey*, 29 Ill.

App. 483, aff'd 129 Ill. 344; 21 N. E. 1076.

⁴⁵ *South Omaha Waterworks Co. v. Vocasek* (Neb. 1901), 87 N. W. 536; 10 Am. Neg. Rep. 580, 583, 584, per Hastings, C.

⁴⁶ *Bailey v. Chicago & A. R. Co.* (U. S. C. C. N. D. Ill.), 4 Biss. 430.

⁴⁷ *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 39 Ark. 491. \$4,500 held excessive and \$3,500, reduced by \$1,235.

tent of aid rendered his mother.⁴⁸ But it cannot be shown that surviving minor children have other means of support,⁴⁹ nor that lineal next of kin are unable to support themselves, and are dependent upon decedent.⁵⁰ Again, where the beneficiaries or next of kin of the deceased sustain the relation specified under the statute, the appellate courts in determining whether or not the damages awarded are excessive, have considered the number, ages and sex of such beneficiaries or next of kin, their life expectancy, circumstances, dependency and physical condition, the contribution by deceased to their support as a family or individually, and as bearing upon their pecuniary loss, and the intestate's ability to aid them, his age, physical condition, expectancy of life, occupation and earnings, have been deemed factors.⁵¹ So evidence may be given showing the financial con-

⁴⁸ Little Rock & Ft. S. R. Co. v. Voss (Ark.), 18 S. W. 172.

⁴⁹ Hyer v. Salisbury, 7 Ill. App. 93.

⁵⁰ Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 330; 51 N. E. 701, rev'g 72 Ill. App. 55.

⁵¹ Survivors were a mother and invalid sister. The former was 59 years old with a life expectancy of nearly 15 years, and the latter was 19 years old with a life expectancy of 42 years. Deceased was in good health with a life expectancy of over 32 years, and he had contributed money to the joint and individual support of his mother and sister, the former being his next of kin, and the aid rendered her daughter was considered a contribution to her support—\$6,500 held not excessive. Little Rock & Ft. S. R. Co. v. Voss (Ark.), 18 S. W. 172. In the following decisions the facts noted have frequently been briefly stated by the court as in evidence without any discussion as to their admissibility, and where there is no such discussion, it is apparent that such facts were admitted in the trial court or their admissibility

conceded, and the weighing of such facts by the higher court in determining whether or not the damages are excessive, while not having the force or effect of a direct adjudication, is nevertheless entitled to some weight, for it cannot be assumed that an appellate court would, in deciding a cause, consider evidence if it was clearly inadmissible. Motion may show that deceased was sole support. Kerkow v. Bauer, 15 Neb. 150. There were 7 minor children between 5 months and 13 years old, wholly dependent upon deceased for their maintenance. Kearney Elect. Co. v. Laughlin, 45 Neb. 390; 63 N. W. 941. Names of surviving minor dependent children averred in complaint overcomes insufficiency by reason of failure to allege that decedent left a widow. Chicago, B. & Q. R. Co. v. Oyster, 38 Neb. 1; 78 N. W. 359; 12 Am. & Eng. R. Cas. N. S. 655. Father's age, that he was a poor man with four dependent young children considered in action for death of minor son—\$2,400 not excessive. Post v. Olmstead, 47 Neb. 893; 66 N. W. 828. Deceased left a widow and 2 children; a case of not

dition and circumstances of the parent or parents in case of the death of a minor, for the purpose of determining the pecuniary loss sustained by the survivor or survivors.⁵² And the pecuniary circumstances of the parents may also be proven, in the case where a small child is killed, for the purpose of showing their inability to keep a more vigilant watch over their children.⁵³

§ 620. Same subject—Conclusion.—It is apparent from the preceding decisions that the courts of the above specified states, do not intend to adhere strictly to any rule which will unquali-

excessive damages. *Economy Light & P. Co. v. Stephen*, 87 Ill. App. 220, aff'd (Ill.); 538 N. E. 369. Deceased left widow and 4 children, the eldest being 14, and the youngest 3 years old. Deceased was the family's supporter. *Chicago, Edison Co. v. Moren*, 80 Ill. App. 152, aff'd (Ill.); 57 N. E. 773. Earnings, financial condition, age and family of deceased admissible. *Chicago & A. R. Co. v. Pearson*, 82 Ill. App. 605. Support or dependency for support must be shown to recover more than nominal damages. In this case a son was shown to be crippled and so dependent. *Chicago, P. & St. L. R. Co. v. Woolridge*, 72 Ill. App. 551, case rev'd 174 Ill. 330; 51 N. E. 701. Deceased left a mother 60 years old, and five brothers and sisters. *Falkenan v. Rowland*, 70 Ill. App. 20; 3 Am. Neg. Rep. 530. Deceased left a wife and two children, and owned two teams—a case of not excessive damages. *Louisville, N. A. & C. R. Co. v. Patchen*, 66 Ill. App. 206. Deceased's youngest child was 19 years old; a case of excessive damages. *Chicago, B. & Q. R. Co. v. Gunderson*, 65 Ill. App. 638. Deceased left a widow and two minor children; a case of not excessive damages. *Baltimore & O. R. Co. v. Stanley*, 54 Ill. App. 215. Parents were ad-

vanced in years, and deceased son had aided in their support; a case of not excessive damages. *St. Louis, A. & T. H. R. Co. v. Bauer*, 53 Ill. App. 525, aff'd 156 Ill. 106; 40 N. E. 448. Deceased was only support of wife and three children—a case of not excessive damages. *Chicago & E. & I. R. Co. v. Knevrin*, 48 Ill. App. 243. As to proof that deceased contributed to sister's support, and that she needed it. See *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324. Deceased left father, brothers and sisters whom he aided. *Illinois & St. L. R. Co. v. Whalen*, 19 Ill. App. 116. Fathers, brothers and sisters, all of whom deceased had aided, survived; amount of deceased's property and probable increase or decrease of his wealth held proper factors. *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) (Ill. Statute), 90; 18 L. Ed. 591; *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S. C. C.) 412, 453. See also cases cited in the preceeding notes under this section.

⁵² *City of Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 418, cited to substantially the same points in *Gulf, Colo. & S. F. R. Co. v. Younger*, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378, 380, per Brown, J.

⁵³ *Aurora v. Seidelman*, 34 Ill. App. 285. Examine *Chicago v. McCulloch*, 10 Ill. App. 459.

fiedly exclude evidence of age, physical and financial condition and the like, of beneficiaries; but that the tendency is to exclude such evidence in the abstract, where it is offered solely for the purpose of enhancing or mitigating the damages. If, however, the nature of the statute and the class of the beneficiaries designated is such as to make the testimony relevant under the terms of the statute, then it will be admitted. It may also be admissible in certain cases to show that a pecuniary loss has been sustained by the wrongful killing by reason of the especial circumstances of the case or the particular class of beneficiaries, or to show a deprivation of a reasonable expectation of pecuniary advantage from the loss of the particular life; or it may be admissible in connection with, or as explaining or as tending to show the relevancy or admissibility of other material evidence.

§ 621. "Fair and just compensation with reference to the pecuniary injuries."—Wealth of defendant.⁵⁴—Defendant's wealth cannot be shown to affect the measure of damages.⁵⁵

§ 622. "Fair and just compensation with reference to the pecuniary injuries"—Probable accumulations.—Deceased's probable accumulations or probable increase or decrease of wealth may constitute important factors.⁵⁶ They would, however, be dependent upon various other elements, such as occupation, earnings or income, earning capacity, ability, experience, habits of industry, saving, age, etc.⁵⁷

§ 623. "Fair and just compensation with reference to the pecuniary injuries"—Expenses of sickness, funeral, etc.—In Arkansas funeral expenses are not a proper element of damages in an action for the benefit of the widow and next of kin brought for the killing of a passenger by a railway company, and evidence is inadmissible that the casket has not been paid for by either the company or the widow.⁵⁸ In a subsequent appeal in

⁵⁴ See secs. 607, 617, herein.

⁵⁵ Conant v. Griffin, 48 Ill. 410.

⁵⁶ See Illinois C. R. Co. v. Barron, 5 Wall. (U. S.) 90; Barron v. Illinois C. R. Co., 1 Biss. (U. S. C. C., N. D.

Ill.) 412, 453; *Roose v. Perkins*, 9 Neb. 304.

⁵⁷ See sec. 607, herein.

⁵⁸ *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark.—; 21 S. W. 58.

the same action the question of the allowance for medical and surgical attention and for funeral expenses was considered and the decision undoubtedly qualifies the rule above stated.⁵⁹ In an earlier decision, however, where the action was brought against a railway company for killing a child, the recovery included expenses.⁶⁰ And the husband may recover expenses consequent upon his wife's injuries from malpractice incurred thereafter, up to the time of her death therefrom.⁶¹ In Maine, however, an action by a father cannot be maintained for loss of a minor's services and for burial expenses which is not under the act of 1891, where the child was instantaneously killed.⁶²

§ 624. "Fair and just compensation with reference to the pecuniary injuries"—Life expectancy—Mortality tables.—We have seen that the natural expectancy of life of deceased and of the beneficiaries constitutes an important factor in the estimation of a fair and just compensation.⁶³ And to prove such expectancy the Carlisle tables are admissible,⁶⁴ even though the next of kin are not dependent upon deceased's earnings.⁶⁵ But

⁵⁹ "The instruction as to damages is erroneous in this: It told the jury that in estimating the damages they might take into consideration, among other things, the amount for which the estate of the deceased was liable for medical and surgical attention and for funeral expenses. The estate was not liable for such attention and expenses of a claim for the amount due therefor was not probated within two years after the date of letters of administration of appellee, and moreover the amount due for or the value of medical and surgical attention is not shown. The giving of this instruction is a prejudicial error." *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563; 40 S. W. 463; 2 Am. Neg. Rep. 295, per Battle, J., citing *Railroad Co. v. Barry*, 58 Ark. 198; 23 S. W. 1097; *Foster v. Pitts* (Ark.), 38 S. W. 111. That parent not liable for medical expenses of a son who has reach-

ed majority, see *Vorass v. Rosenberry*, 85 Ill. App. 623.

⁶⁰ *Little Rock & F. T. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44.

⁶¹ *Nixon v. Ludlam*, 50 Ill. App. 273.

⁶² *Bligh v. Biddeford & S. R. Co.*, 94 Me. 499; 48 Atl. 112.

⁶³ See sec. 607, herein. *Little Rock & Ft. S. R. Co. v. Voss* (Ark.), 18 S. W. 172; *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550; 31 S. W. 571; *Fordyce v. McCants*, 55 Ark. 384; 18 S. W. 371; *Dwyer v. St. Louis & S. F. R. Co.* (U. S. C. C. W. D. Ark.), 52 Fed. 87; *Missouri P. R. Co. v. Baier* (Neb.), 55 N. W. 913.

⁶⁴ *Friend v. Ingersoll* (Neb.), 58 N. W. 281; *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50; *Sellars v. Foster*, 27 Neb. 118; 42 N. W. 907.

⁶⁵ *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50.

such tables are not conclusive and should be considered with other competent and material evidence.⁶⁶

§ 625. "Fair and just compensation with reference to the pecuniary injuries"—Nominal damages.—Where a recovery is sought for the benefit of the father of a person, killed by a railroad company's negligence, only nominal damages can be recovered unless facts are proven showing a reasonable expectation of pecuniary benefit from the continued life of decedent, or that the father was assisted by deceased.⁶⁷ In Illinois, however, proof of support is unnecessary to warrant a recovery of at least nominal damages by lineal kindred.⁶⁸ And where a mother is entitled to the earnings of her minor son, proof of pecuniary loss is unnecessary as it will be presumed, while a question of error of law is presented on appeal from the refusal to instruct that only nominal damages can be given to the mother and brothers of a deceased child.⁶⁹ So the law presumes pecuniary loss where the relation of parent and child or husband and wife exists, and the death is shown,⁷⁰ although in Nebraska there can be no recovery of even nominal damages unless the petition shows that the persons entitled to recover have sustained pecuniary injury by the death.⁷¹

§ 626. Same subject continued.—Although a mother may be the only one entitled to more than nominal damages, yet the fact that under the statute of distributions she will take only a

⁶⁶ *Friend v. Ingersoll* (Neb.), 58 N. W. 281. See *St. Louis, I. M. & S. R. Co. v. Needham* (U. S. C. C. A. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 375; 54 Am. & Eng. R. Cas. 88.

⁶⁷ *Fordyce v. McCanta*, 51 Ark. 509; 11 S. W. 694; 4 L. R. A. 296. See *Little Rock & F. S. R. Co. v. Barker*, 39 Ark. 491.

⁶⁸ *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495; 51 N. E. 708, aff'g 74 Ill. App. 356. But see secs. 613-615, 617-619, herein.

⁶⁹ *Bradley v. Sattler*, 156 Ill. 603; 41 N. E. 171, aff'g 54 Ill. App.

504; *Stafford v. Rubens*, 115 Ill. 196; 1 West. 640; *Holton v. Daly*, 106 Ill. 131; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198. See *Johnson v. Missouri P. R. Co.*, 18 Neb. 690.

⁷⁰ *Chicago P. & St. L. R. Co. v. Woolridge*, 72 Ill. App. 55; case was rev'd as to dependency in 174 Ill. 330; 51 N. E. 701; *West Chicago St. R. Co. v. Scanlan*, 68 Ill. App. 626; 2 Chic. L. J. Wkly. 113, aff'd 168 Ill. 34; 48 N. E. 149; *Chicago v. Scholten*, 75 Ill. 468.

⁷¹ *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4; 64 N. W. 450. See secs. 602, 603, herein.

fractional part of the amount recovered, will not justify an award of more than the total loss in order to enable her to recover the full amount of her loss.⁷² Again, where a deceased brother was an habitual drunkard and incapable of supporting himself, only nominal damages will be allowed.⁷³ And in case of collateral kindred where there is no proof of pecuniary loss by way of support, aid or otherwise, only nominal damages will be awarded.⁷⁴ Outside, however, of the question of proof of pecuniary loss,⁷⁵ it would seem that proof is necessary of the statutory prerequisites, such as the death, the wrongful act, neglect or default, the existence of such circumstances as would have entitled the injured party to recover damages had he lived, and the existence of some of the designated beneficiaries, otherwise nominal damages ought not to be awarded,⁷⁶ although damages have been awarded where there has been no proof as to next of kin.⁷⁷ Dependency, however, for support seems, as above stated, to be the test of the recovery of nominal or substantial damages,⁷⁸ although this is immaterial in case of lineal next of kin.⁷⁹

⁷² *Falkenan v. Rowland*, 70 Ill. App. 20.

⁷³ *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317; 40 N. E. 942, rev'g 57 Ill. App. 564, under Ill. Act, Feb. 12, 1853. See also *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95: 52 N. W. 840.

⁷⁴ *Falkenan v. Rowland*, 70 Ill. App. 20, citing *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317. See *Chicago, etc., R. Co. v. Gillam*, 27 Ill. App. 386; *Chicago v. Hesing*, 83 Ill. 204; *Chicago v. Scholten*, 75 Ill. 468; *Serensen v. Northern P. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407. In this case there was an absence of certain proof and \$1,750 was held excessive for cousin. Examine *Lazelles v. Newfane*, 70 Vt. 440; 41 Atl. 511.

⁷⁵ See secs. 602, 603, herein.

⁷⁶ See *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Conant v. Griffin*, 48 Ill. 410; *Chicago v. Scholten*, 75 Ill. 468. The plaintiff has a right to show that deceased received injuries which re-

sulted in his death, although it is unnecessary to show the exact nature of injuries and to enter into details. *St. Louis & S. F. R. Co. v. Hicks* (U. S. C. C. A. W. D. Ark.), 79 Fed. 262; 1 Am. Neg. Rep. 793, per Traver, Cir. J.

⁷⁷ *Chicago, etc., R. Co. v. Gillam*, 27 Ill. App. 386. But see sec. 598, herein, as to degree of relationship and proof. See *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338, per the court. This case is disapproved in *Lazelles v. Newfane*, 70 Vt. 440; 44 Atl. 511.

⁷⁸ *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338, per the court; *Illinois & St. L. R. Co. v. Whalen*, 19 Ill. App. 116. See further as to nominal damages being recoverable and pecuniary loss, *Illinois C. R. Co. v. Gilbert*, 157 Ill. 354; 41 N. E. 724; *Chicago v. Keefe*, 114 Ill. 222; *Chicago v. Major*, 18 Ill. 349; *Johnson v. Missouri P. R. Co.*, 18 Neb. 696.

⁷⁹ *Chicago, P. & St. L. R. Co. v.*

§ 627. "Fair and just compensation with reference to the pecuniary injuries"—Death of husband—Husband and father.—In an action to recover damages for the negligent or wrongful killing of a husband or of a husband and father, the first point to be considered is the intent of the statute in designating the beneficiaries,⁸⁰ and then the question whether the action is based upon the death loss act or rests upon the survival of the action which accrued to the injured party.⁸¹ The widow, however, should receive such a sum as will compensate her for the pecuniary injury.⁸² The general elements of damages applicable to this class of cases in common with others have been considered elsewhere,⁸³ but there are certain factors which more particularly apply to the damages for a husband's or husband's and father's death. Thus the right of the wife and minor children to support is important.⁸⁴ The extent, however, of such dependency and the evidence showing it has been limited.⁸⁵ But the entire expense of supporting the family is not the measure of damages but a fair and just compensation for the deprivation of the means of support which deceased might have provided except for the death,⁸⁶ although an averment of the deprivation of support of the widow and minor children constitutes a basis of evidence of pecuniary loss,⁸⁷ and necessarily the various factors which show upon what his contributions to support of his wife and family are based, such as the actual amount of his earnings, expenditures, ability, industry, etc., are material and relevant,⁸⁸ although it is decided that the damages are not

Woolridge, 174 Ill. 330; 51 N. E. 701, rev'g 72 Ill. App. 55. See secs. 613-615, herein.

⁸⁰ See sec. 598, herein.

⁸¹ See sec. 607, herein.

⁸² St. Louis, I. M. & S. R. Co. v. Needham (U. S. C. C. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 375; 54 Am. & Eng. R. Cas. 88. See Cleveland, C. & St. L. R. Co. v. Keenan, 190 Ill. 217; 60 N. E. 107, aff'g 92 Ill. App. 430.

⁸³ See secs. 607, 608, herein.

⁸⁴ See Illinois Cent. R. Co. v. Welton, 52 Ill. 290.

⁸⁵ Swift & Co. v. Foster, 163 Ill. 50; 44 N. E. 837; 12 Nat. Corp. Rep. 396. See secs. 613-615, 617-619, herein.

⁸⁶ Ohio & M. R. Co. v. Simms, 43 Ill. App. 260.

⁸⁷ Chicago & A. R. Co. v. Carey, 115 Ill. 115; 2 West. 73; 3 N. E. 519.

⁸⁸ Dwyer v. St. Louis & S. F. R. Co. (U. S. C. C. W. D. Ark.), 52 Fed. 87; St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550; 31 S. W. 571; St. Louis, I. M. & S. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 886; Lake Shore & M. S. R. Co. v. Ouska, 51

limited to the amount of money of which deceased's earnings might have contributed to the support of his family.⁸⁰ So the size of the family of deceased has been considered and also his financial condition,⁸¹ and his probable accumulations,⁸¹ care of his family,⁸² and the reasonable expectation of pecuniary benefit from his continued life⁸³ are important factors. In case of absolute divorce there is, as a rule, no pecuniary loss,⁸⁴ although where, notwithstanding a divorce, the husband frequently sent the wife money to aid in the support of his children, they may recover their pecuniary loss.⁸⁵ Again, evidence of marriage may become material in certain cases,⁸⁶ although the general rule is that it is immaterial,⁸⁷ for it is not important until the distribution whether the claimed widow is so in fact or not, nor is it material who the next of kin are, it being sufficient to show that a widow and next of kin exist.⁸⁸ In an action for damages for the widow and her minor children, she cannot be questioned on cross-examination whether she was entitled to a pension and its amount, her husband having drawn one, since the amount as fixed by congress is not properly a subject of testimony by her.⁸⁹ Other matters, such as expenses of the funeral, sickness, etc., and the question of solatium have been fully considered elsewhere.¹⁰⁰

§ 628. Same subject—Annuity—Dower, etc.—Instruction

Ill. App. 334, *aff'd* 151 Ill. 232; 27 N. E. 897; *Chicago, Edison Co. v. Moren*, 86 Ill. App. 152, *aff'd* (Ill.) 57 N. E. 773; *Friend v. Burleigh*, 53 Neb. 674; 74 N. W. 50. See secs. 607, 608, *herein*.

⁸⁰ *Swift v. Foster*, 55 Ill. App. 280.

⁸¹ See secs. 607, 608, *herein*.

⁸² See sec. 622, *herein*.

⁸³ *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550; 31 S. W. 571. See sec. 632, *herein*.

⁸⁴ *St. Louis, I. M. & S. R. Co. v. Maddry*, 57 Ark. 506; 21 S. W. 472; 58 Am. & Eng. R. Cas. 327; *Chicago & A. R. Co. v. Kelley*, 182 Ill. 267; 54 N. E. 979, *aff'g* 80 Ill. App. 675. See sec. 616, *herein*.

⁸⁵ See *North Chicago v. Brodie*, 156 Ill. 317; 40 N. E. 942.

⁸⁶ *St. Louis, I. M. & S. R. Co. v. McCain*, 67 Ark. 377; 55 S. W. 165.

⁸⁷ *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245.

⁸⁸ *Conant v. Griffin*, 48 Ill. 410.

⁸⁹ *Conant v. Griffin*, 48 Ill. 410. See last note to sec. 629, *herein*. See as to nominal damages where it appears that such widow and next of kin exist, *Johnson v. Missouri P. R. Co.*, 18 Neb. 690, and secs. 625, 629, *herein*.

⁹⁰ *St. Louis, I. M. & S. R. Co. v. Maddry*, 57 Ark. 506; 21 S. W. 472; 58 Am. & Eng. R. Cas. 327.

¹⁰⁰ See secs. 610, 623, *herein*.

and opinion of court.—In a frequently cited case in the Federal court,¹ the question of annuity and the manner of ascertaining the amount thereof as well as the factor of dower was incorporated in the charge to the jury among other instructions not criticised.² The court, per Sanborn, Cir. J., said: "Aside from the palpable errors arising from the unsuccessful attempt to divide the cause of action given by the statute, one vice of this instruction is that it positively directs the jury to measure plaintiff's damages by mathematical calculation based upon the yielding power of money when invested in an annuity. It was undoubtedly proper for the jury to consider under the evidence what amount of money so invested would yield the yearly amount the widow and next of kin would probably have received from the deceased if he had lived, but they were not bound to allow damages based upon that method nor any particular method of investment of money. It would be proper for a jury upon proper evidence to consider what amount, invested in government bonds, well secured mortgages on real estate or

¹ St. Louis, I. M. & S. R. Co. v. Needham (U. S. C. C. A. 8th C. E. D. Ark.), 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. 371, 375, 377; 54 Am. & Eng. R. Cas. 88.

² The following is a part of the charge: After stating the rule as to pecuniary loss and the factors to be considered, the court added: "When this is ascertained you will allow plaintiff such sum not to exceed the probable earnings of deceased, nor the amount named in the complaint, as will purchase an annuity for such sum as will yield annually during the term of expectancy of deceased, an amount equal to the annual value of the pecuniary benefits that plaintiff would have received from her said husband during said time. But if the jury find that the probable duration of plaintiff's life is shorter than that of her said husband, then she should only be allowed such sum as will equal the value of the

benefits she would have received during the term of her life, and if the jury believe that plaintiff's expectancy of life is greater than that of her said husband, then they will add such additional sums as will equal the present value of any property that she would probably receive from her said husband as dower in the event she should so survive him, provided the jury find that the said deceased would have accumulated any such property, in excess of what was required for the support and maintenance of himself and family. In plaintiff's case the amount of such dower interest would be one half of any personal property and a life estate in one half of any realty, which her husband would own at his death if no children survived him, and if he left children her interest would be one third instead of one half."

any other safe security, would yield the annual amount the injured parties would probably have received from deceased had he lived, but it would not be the province of the court to direct them to allow an amount based upon any one of these methods of investment. Indeed if after considering all of the evidence they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and sound judgment." It was also declared that "the same vice runs through that portion of the instruction where the jury was directed in case they believed the plaintiff's expectancy of life was greater than that of her husband to add to the amount that would purchase the annuity referred to, the present value of any property that she would probably have received from her said husband as dower if he had not been killed. At the death of the husband the plaintiff was 20 years old and her expectancy of life, according to the tables, was 41.53, while her husband was 22 years old and his expectancy of life was 40.85 years. He was a fireman earning \$75 or \$80 a month and the expenses of his household during his lifetime, had consumed all his wages. Under this evidence so many chances and contingencies of life and death, of sickness and health, of accident and injury, of marriage and divorce, of the birth and rearing of children, conditioned the lives and relations of this husband and wife, that no court was authorized to instruct the jury that they must allow the widow one third or one half of the present value of the husband's future accumulations if they were of the opinion she would probably have outlived him if he had not been killed."*

§ 629. "Fair and just compensation with reference to the pecuniary injuries"—Death of wife.—In Illinois a husband may recover, in an action by him as administrator, the pecuniary injuries resulting to him as husband for the negligent killing of his wife, since a liberal construction of the statute

* It was further decided in this case that a widow suing must join all persons having an interest in- cluding a half-brother, who is entitled to share in the damages.

⁴ See secs. 596 n, 602, 603, 609, 610, 613, and chap. 37, herein.

does not limit the damages to those resulting to her and her next of kin,⁵ although in case of absolute divorce there is no pecuniary loss recoverable.⁶ The amount of damages, however, is subject to the statutory limitation.⁷ Again, in case of death through malpractice in performing a surgical operation, the husband as such cannot maintain an action for the killing of his wife, although he is entitled to damages for the loss of her services for the time she survives the operation and for his consequent expense during that period.⁸ There are other factors which enter into the measure of damages for a wife's death which are not peculiar to the relation of wife, and this is true of actions where the husband and next of kin survive. The limitation of damages to the pecuniary loss, the exclusion of mental suffering as an element, the relevancy of the survival act, the questions of dependency, instantaneous killing and other material factors are considered elsewhere herein, and the reader is therefore referred to the several sections covering these points.

§ 630. Same subject continued—Married woman's act.—

It is decided that a widower is not a beneficiary or a party under the Arkansas statute of 1889,⁹ and therefore cannot recover under that enactment for the killing of his wife.¹⁰ But it is also determined that the married woman's act of that state does not so far preclude a husband's right to his wife's services, or relieve her from the ordinary legal duties arising from the relation, as to prevent his recovering the pecuniary loss sustained by her death. Nothing, however, can be recovered by him except the value of her services to him in dollars and cents, as shown by the proof.¹¹

⁵ *Cleveland, C. C. & St. L. R. Co. v. Baddeley*, 150 Ill. 328; 36 N. E. 965, aff'g 52 Ill. App. 94. That the measure of damages is the pecuniary loss to the surviving husband and next of kin, see *Illinois C. R. Co. v. Chicago Title & T. Co.*, 79 Ill. App. 623. See secs. 598, 602, 603, herein.

⁶ See *North Chicago R. Co. v. Brodie*, 156 Ill. 317; 40 N. E. 942. But

see *St. Louis, I. M. & S. R. Co. v. McCain*, 67 Ark. 377; 55 S. W. 165.

⁷ *Illinois C. R. Co. v. Chicago Title & T. Co.*, 79 Ill. App. 623.

⁸ *Nixon v. Ludlam*, 50 Ill. App. 273.

⁹ Secs. 4518, 4519.

¹⁰ *Western Un. Teleg. Co. v. McGill* (U. S. C. C. A. 8th C. Dist. Kan.), 57 Fed. 699.

¹¹ *St. Louis S. W. R. Co. v. Henson*

§ 631. "Fair and just compensation with reference to the pecuniary injuries"—Death of parent.—Under this fair and just compensation statute, the rights of children as beneficiaries as well as the general construction of the statutes and the meaning of the words "pecuniary injury"¹² are of some importance. Primarily minor children are, as a rule, entitled to support, so that such right as well as the extent of contribution to such support is a most material factor¹³ upon which the reasonable expectation of pecuniary benefit¹⁴ must largely depend. The amount of compensation to be awarded also rests somewhat

(U. S. C. C. A. 8th C. E. D. Ark.), 58 Fed. 531. The charge and opinion was as follows: "I will say to you, in regard to the relation of husband and wife, that while in this state it is true that so long as the wife chooses, her earnings and her property are her own, and not subject to the control or direction or management of her husband, yet if she chooses to give him her services then he may have them, and in determining this question as to the value of her services, if you find from the testimony that she did, from the time of her marriage up to the time of her death, give him her services and her earnings, that is a circumstance to consider in determining whether or not she would continue to do so. If you shall find from the testimony that her services were given to him, the next question is what were they worth in dollars and cents." "The act provides that a married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business and perform any labor or service on her sole and separate account, and that the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own

name. The contention of the plaintiff in error is that under this act the husband has no valuable right in the services of his wife, and that he suffers no pecuniary loss by her death. This act does not put the wife on a footing of a concubine to her husband. It does not relieve her from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all Christian people. The statute does not purport to relieve a wife, and was not intended to relieve her from the legal duty of performing those services which it is the pleasure of every good housewife to render her husband in sickness and in health, independently of any mere technical obligation, and which she would render despite any statute that could be enacted to the contrary. These rights and duties are imposed by a law having a much higher and better source than the common law, which simply imparts to them that legal sanction essential to their maintenance and protection in a court of law against invasion from any quarter." *Id.* 533, per Caldwell, Cir. J.; 7 C. C. A. 349.

¹² See secs. 598, 602, 603, herein.

¹³ See secs. 613-615, herein.

¹⁴ See sec. 616, herein.

upon the general elements of damages such as age, etc., of deceased,¹⁵ and undoubtedly every material and relevant fact and circumstance should be considered to enable the jury to determine what is a fair and just compensation.¹⁶ Again the question of the admissibility in evidence showing the physical condition and dependency of children has been the subject of considerable discussion¹⁷ in the states which come within this fair and just compensation clause, and inasmuch as the cases are not in exact harmony, we must refer the reader to the section wherein this subject is considered.¹⁸ In the case of adult sons who have suffered pecuniary injury by a mother's death, the facts that she lived with them and rendered services in keeping house for their benefit has been considered in determining whether or not the actual damages awarded are excessive.¹⁹ If the court is not requested to limit the damages to the minor children by an instruction to that effect, and evidence is admitted without objection in regard to adult children, this cannot be availed of on appeal.²⁰ And it seems that the facts that the children have reached majority and are self-supporting and not living with the deceased, are not of themselves sufficient evidence to controvert such children's pecuniary loss.²¹

§ 632. "Fair and just compensation with reference to the pecuniary injuries"—Training, etc., of children—Death of parent.—If the father was a careful, painstaking, temperate, industrious man, spent part of his time at home, was trustworthy and possessed of good business ability, or otherwise fitted to train, care for or educate his minor children, the value of such

¹⁵ See secs. 607, 608, herein.

¹⁶ Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 344; 3 S. W. 50, and Chicago v. Powers, 42 Ill. 173, are cited upon this point in Gulf, Colorado & S. F. R. Co. v. Younger, 90 Tex. 387; 38 S. W. 1,112; 1 Am. Neg. Rep. 380.

¹⁷ Chicago, P. & St. L. R. Co. v. Woolridge, 72 Ill. App. 551, rev'd 714 Ill. 330; 51 N. E. 701.

¹⁸ See secs. 617-619, herein.

¹⁹ Chicago & W. L. R. Co. v.

Ptacek, 62 Ill. App. 375; 1 Chic. L. J. Wkly. 53.

²⁰ Hughes v. Richter, 161 Ill. 409; 43 N. E. 1066, aff'g 60 Ill. App. 616.

²¹ Salem v. Harvey, 29 Ill. App. 21, aff'd 129 Ill. 344; 21 N. E. 1076. Where the youngest child was 19 years old at the time of the trial and deceased was a shoemaker 65 years old—\$5,000 was held excessive. Chicago, B. & Q. R. Co. v. Gunderson, 65 Ill. App. 638.

training, care or education may be considered in awarding the damages for the parent's negligent or wrongful killing.²² So the loss of instruction, physical, moral and intellectual training by the parent is material and relevant.²³ But it seems that there should be some evidence that such parent, whether father or mother, was able or fitted to render such services.²⁴

§ 633. "Fair and just compensation with reference to the pecuniary injuries"—Death of children.—The first proposition to be considered is the right of parents as beneficiaries or to share in the distribution, or their right of action.²⁵ Also the right to recover if death had not ensued.²⁶ So it is important whether or not one or more actions can be maintained.²⁷ And in Arkansas the question of conscious suffering or instantaneous death is material and relevant.²⁸ Again, the measure of com-

²² St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550; 31 S. W. 571; St. Louis & S. F. R. Co. v. Townsend (Ark. 1901), 63 S. W. 994. See cases cited in next following note.

²³ St. Louis, I. M. & S. R. Co. v. Maddry, 57 Ark. 506; 21 S. W. 472; 58 Am. & Eng. R. Cas. 327. See Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 344; 3 S. W. 50; Chicago v. Powers, 42 Ill. 173, both cited upon the point of the loss of such training, etc., through a mother's death and the fact that the temperament, education, etc., of different mothers affect their fitness to discharge the duty, in Gulf, Colo. & S. F. R. Co. Younger, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378; Baltimore, etc., R. Co. v. Stanley, 54 Ill. App. 215. If it is alleged that minor children have been deprived of means of education, it is a sufficient allegation to admit evidence of pecuniary loss. Chicago & A. R. Co. v. Carey, 115 Ill. 115; 3 N. E. 519; 2 West. 73.

²⁴ Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426, cited in Walker

v. Lake Shore & M. S. R. Co., 111 Mich. 518; 69 N. W. 1114; 3 Det. L. N. 775; 1 Am. Neg. Rep. 267 (which was an appeal from a trial after new trial granted in 104 Mich. 606; 2 Det. L. N. 34; 62 N. W. 1032), which held that such damages as loss of training, etc., could not be considered, especially in the absence of evidence on the matter, and where deceased rendered only such assistance as any parent would give his children. Illinois C. R. Co. v. Welden, 52 Ill. 290.

²⁵ See Chicago & A. R. Co. v. Lyons, 47 Ill. App. 292; Bradley v. Sattler, 156 Ill. 603; 41 N. E. 171, aff'g 54 Ill. App. 504; Chicago v. Major, 18 Ill. 349; Meehan v. Chicago & N. W. R. Co., 67 Ill. App. 39. See sec. 901, herein.

²⁶ Chicago v. Major, 18 Ill. 349.

²⁷ See Illinois Cent. R. Co. v. Slater, 139 Ill. 190; 28 N. E. 830; 49 Am. & Eng. R. Cas. 480, aff'g 39 Ill. 69. See sec. 597, herein.

²⁸ See St. Louis, S. W. R. Co. v. Mahoney, 67 Ark. 617; 55 S. W. 840. See sec. 609, herein.

pensation depends upon whether the deceased child was a minor or an adult, since in the former case the right of the father to the services and earnings of such child and the latter's right to support, etc., are necessarily involved.²⁹

§ 634. Same subject continued.—The general rule, therefore, is that the parent, whether father or mother, who is so entitled and upon whom such obligation rests may recover for the loss of services or earnings of a minor child less the cost of maintenance, education and like expenses.³⁰ But the loss of wages from the time of death until the child would become of age is not the proper measure of damages for the killing of a minor son,³¹ and the question whether or not the damages are confined to minority is important.³² Again, it is decided in Arkansas, that for loss of services of a minor the damages are limited to those which accrued during the period between the injury and the death and cannot include those accruing after the death.³³

²⁹ Until the Ark. act of 1873 a female was a minor in that state until the age of 21. *Roland v. McGuire*, 64 Ark. 412; 42 S. W. 1068. In Illinois a mother upon the father's death is entitled to the services and earnings of her minor children as she is the head of the family. *Bradley v. Sattler*, 156 Ill. 603; 41 N. E. 171, aff'g 54 Ill. App. 504. See as to mother's obligation to provide for her children when she had sufficient means, *Mowbry v. Mowbry*, 64 Ill. 383, cited in *Wing v. Hibbert*, 9 Ohio C. P. Dec. 65. Father entitled to son's earnings. *Gilley v. Gilley*, 79 Me. 92. As to emancipation, see *Nicolaus v. Snyder*, 56 Neb. 531. That consent to emancipation may be inferred, see *Bucksport v. Rockland*, 56 Me. 22, *Examine White v. Henry*, 24 Me. 531. As to earnings and instruction as to same and damages, see *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418, case affirms 23 Ill. App. 73. Mother can recover for killing of illegitimate child. *Security Title*

& T. Co. v. West Chicago St. R. Co., 91 Ill. App. 332.

³⁰ *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 198; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; 19 Am. & Eng. R. Cas. 195, 212; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483 (These last two cases are cited in *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191.); *Bradley v. Sattler*, 156 Ill. 603; 41 N. E. 171, aff'g 54 Ill. App. 504; *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418, aff'g 28 Ill. App. 73; *Stafford v. Rubens*, 115 Ill. 196; 1 West. 640; *Chicago v. Keefe*, 114 Ill. 222; 2 N. E. 267; *Chicago v. Hesing*, 83 Ill. 204.

³¹ *Illinois C. R. Co. v. Reardon*, 157 Ill. 372; 41 N. E. 871.

³² See sec. 635, herein.

³³ *Davis v. St. L. I. M. & S. R. Co.*, 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; 44 Am. & Eng. R. Cas. 690.

In case of the death of a very young child incapable of earning anything or of rendering services of value, the difficulty of proving any actual damages is obvious, and necessarily much must be left to the jury's sound discretion for there can be no rule of damages in such cases.³⁴ But it is proper to consider the child's general, mental and physical ability or capacity, and personal characteristics, as that he was bright, intelligent, industrious, obedient and the general character of such services as are rendered, etc.,³⁵ although where the parent is entitled to earnings and services of the minor, damages may be allowed, even though there is no proof of the value of the services, such evidence being unnecessary.³⁶ And the value of a child's services will not be based on the parent's estimate thereof.³⁷ Other factors are involved, but they are considered elsewhere herein.³⁸ Again, there can be no recovery for a minor child's death where the father has abandoned the mother and has not aided the family for years.³⁹ But it is held that evidence should go to the jury, that the father was a foreigner and had received no aid from his son after the latter's arrival in this country a short time prior to his decease.⁴⁰

§ 635. "Fair and just compensation with reference to the pecuniary injuries"—Death of children—Minority and majority.—The recovery for death of a minor child may include

³⁴ Chicago, M. & St. P. R. Co. v. Wilson, 35 Ill. App. 346; Callaway v. Spurgeon, 63 Ill. App. 571. See sec. 604, herein.

³⁵ Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 350; 34 Am. Rep. 44; Chicago v. Scholten, 75 Ill. 468; Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 198.

³⁶ Callaway v. Spurgeon, 63 Ill. App. 571; Little Rock & Ft. S. R. Co. v. Barker, 39 Ark. 491; Bradley v. Sattler, 156 Ill. 603; 41 N. E. 171, aff'g 54 Ill. App. 504; Stafford v. Rubens, 115 Ill. 196; 1 West. 640; West Chicago St. R. Co. v. Scanlan, 68 Ill. App. 626; 2 Chic. L. J. Wkly.

113, aff'd 168 Ill. 34; 48 N. E. 149. But see sec. 625, herein.

³⁷ St. Louis, I. M. & S. R. Co. v. Freeman, 36 Ark. 41.

³⁸ The questions of the physical and financial condition of parents' dependency for support and contribution thereto by the child, the parents' and child's age, sex, etc., the reasonable expectation of pecuniary benefit, mental suffering, loss of society or companionship, etc., have been considered under appropriate headings, herein.

³⁹ Thompson v. Chicago, M. & St. P. R. Co. (U. S. C. C. D. Neb.), 104 Fed. 845, per Munger, Dist. J.

⁴⁰ Johnson v. Missouri, 18 Neb. 690; 26 N. W. 347.

the reasonable expectation of pecuniary benefit for a period beyond minority, where the deceased has manifested an intention to contribute to his parents' support after attaining majority. This has been expressly so decided in a case where a deceased minor son had contributed to his father's support prior to the injury resulting in death.⁴¹ Other cases do not, however, extend the estimate of probable damages beyond minority of the child, but restrict the pecuniary loss to that period.⁴² Again, the amount of the yearly expenses of a son and the disposition of his earnings above his living expenses are factors.⁴³ In another decision an adult daughter who earned only small wages, had given her parents about one quarter thereof and they relied upon such contributions, and these facts were considered in determining the amount of damages for such daughter's death.⁴⁴ And it is held that the question is not what disposition the deceased may have had to aid his mother, but that the point was, did he aid her, was he bound so to do and what was her loss in this respect arising from her son's death.⁴⁵ In Arkansas, the fact that the deceased had contributed to his father's support and maintenance and showed an intention so to do after his majority, may be availed of for such parent's benefit as the next of kin in an action to recover damages for the loss occasioned by the child's wrongful or negligent killing.⁴⁶ So the intention of the deceased to continue his assistance to his parent or parents after his majority is material and relevant evidence for the jury.⁴⁷ In Illinois the loss of a minor son's wages by the father during the period between his death and his attaining majority had he lived,

⁴¹ *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628.

⁴² *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; 19 Am. & Eng. R. Cas. 196, 212; dis'd in *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424; 49 Pac. 599; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41.

⁴³ *Fordyce v. McCants*, 55 Ark. 384; 18 S. W. 371. Deceased's expectancy of life was 17 years and he sent his father all his earnings above his living expenses which were only

\$125 yearly. See also *Fordyce v. McCants*, 51 Ark. 509; 11 S. W. 694.

⁴⁴ *Armour v. Czichki*, 59 Ill. App. 17. \$4,140 held excessive.

⁴⁵ *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197.

⁴⁶ *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462; 18 S. W. 628. Examine *St. Louis, etc., R. Co. v. Freeman*, 36 Ark. 41.

⁴⁷ *McLean, etc., Co. v. McVey*, 38 Ill. App. 158. See *Armour v. Czichki*, 50 Ill. App. 17.

is held not the proper measure of damages.⁴⁸ In that state, however, the pecuniary benefits which the next of kin might have derived had the minor child not met with premature death, include what the next of kin might have received from the child at any age or every reasonable expectation they had of obtaining any pecuniary advantage, as shown by the evidence from the continuance of his or her life, and the recovery is not limited to the value of the deceased's services or earnings before becoming of age.⁴⁹

§ 636. "Fair and just compensation with reference to the pecuniary injuries"—Death of children—Adults.—In determining the measure of damages for the death of adult children under this statutory provision as to a fair and just compensation, the principal factors are the reasonable expectation of pecuniary benefit or the extent of the contributions to the support of, or the aid rendered to the parent by deceased, and in this connection the latter's ability and willingness to assist, evidenced by his acts, will be considered, as will also his occupation, earnings, expenditures, the increasing or diminishing value of his services, the disposition of his earnings with relation to the parent or parents, the character and amount of his contributions to them, their physical and financial condition are all important and relevant in Arkansas, and the reasonable expectation of pecuniary benefit depends upon the proof.⁵⁰ Substantially the same rule

⁴⁸ *Illinois C. R. Co. v. Reardon*, 157 Ill. 372; 41 N. E. 871. The jury are not limited to the earnings of deceased until he should attain majority. *West Chicago St. R. Co. v. Dooley*, 76 Ill. App. 424; 3 Chic. L. J. Wkly. 238; *McLean Coal Co. v. McVey*, 38 Ill. App. 158. See further *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575.

⁴⁹ *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535; 42 N. E. 971, aff'g 59 Ill. App. 561, deceased was a girl. *Illinois Cent. R. Co. v. Reardon*, 157 Ill. 372; 41 N. E. 871, deceased was a son. *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91; 21 N. E. 575; 6 L. R. A.

418, aff'g 28 Ill. App. 73; *West Chicago St. R. Co. v. Dooley*, 76 Ill. App. 424; 3 Chic. L. J. Wkly. 238; *McLean Coal Co. v. McVey*, 38 Ill. App. 158. See *Chicago Consol. B. Co. v. Tietz*, 37 Ill. App. 599. *Examine Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 198; *Chicago v. Scholten*, 75 Ill. 468.

⁵⁰ *Fordyce v. McCants*, 55 Ark. 384, 388; 18 S. W. 371; 51 Ark. 509; 4 L. R. A. 296; 11 S. W. 694; *Little Rock & Ft. S. R. Co. v. Voss* (Ark.), 18 S. W. 172. See sec. 616 herein as to reasonable expectation.

prevails in Illinois, subject to such exceptions as may exist in relation to proof of the physical or financial condition of the parent or next of kin.⁵¹ There is, however, an early decision in that state which excludes the question of mere disposition to aid the mother as a determining factor, for it expressly holds that the point is, in such cases, did he help her, was he bound to do so, and what did she lose in this respect?⁵² Other elements which have been considered are whether the deceased was married or not, lived with his parents or elsewhere,⁵³ age, earning capacity, etc.⁵⁴

§ 637. "Fair and just compensation with reference to the pecuniary injuries"—Collateral kindred.—The nearness of the degree of relationship is declared to be immaterial in case of collateral kindred, where there has been no pecuniary assistance and no need thereof, but it is also said that if there exists a dependency for support upon deceased, it is then immaterial how remote the relationship,⁵⁵ and this question of support and dependency⁵⁶ is most material in considering the amount of dam-

⁵¹ Adult son contributed to support and for the benefit of his mother paid a life insurance premium on father's life. The latter had some property also. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 388. Adult son gave his wages amounting to \$18 a week to his father. *Webster Mfg. Co. v. Mulvaney*, 68 Ill. 607, aff'd 168 Ill. 311; 48 N. E. 168. Adult son supported parents over 70 years old. *Leiter v. Kinnare*, 68 Ill. App. 368. Adult daughter earned but 85 cents a day and had given her parents \$60 to \$75 a year. *Armour v. Czichki*, 59 Ill. App. 17. Adult daughter aided in support of family. She was a school-teacher, and left a father, mother, and other kindred. *City of Salem v. Harvey*, 29 Ill. App. 483, aff'd 129 Ill. 344; 21 N. E. 1076. Adult son gave his wages to his mother and otherwise aided her. *Chicago & A. R. Co. v. Adler*, 28 Ill. App. 102. See further, *Chicago &*

A. R. Co. v. Kelly, 182 Ill. 267; 54 N. E. 979, aff'd 80 Ill. App. 675; *Illinois Cent. R. Co., v. Barron*, 5 Wall. (U. S.) (Stat. Ill.) 90. As to physical and financial condition, see secs. 617-619, herein.

⁵² *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197.

⁵³ *Chicago & A. R. Co. v. Shannon*, 43 Ill. 388. Son lived with father part of time. *Webster Mfg. Co. v. Mulvaney*, 68 Ill. App. 607, aff'd 168 Ill. 311; 48 N. E. 168. Son was unmarried. *Leiter v. Kinnare*, 68 Ill. App. 368. Son was unmarried. *City of Salem v. Harvey*, 29 Ill. App. 483, aff'd 129 Ill. 344; 21 N. E. 1076. Daughter lived with her father, mother and sister.

⁵⁴ See secs. 602, 604, 607, 608, 625, 626, herein.

⁵⁵ *Chicago & A. R. Co. v. Shannon*, 43 Ill. 388.

⁵⁶ See secs. 617-619, herein.

ages to be awarded to collateral kin.⁵⁷ Although it is not essential that the evidence should be such as to enable the loss to be ascertained with a reasonable degree of certainty where the action is by a sister for a brother's death,⁵⁸ and the evidence shows assistance rendered and her necessities.⁵⁹ But the damages recoverable for a brother's death may be limited, where by reason of habitual drunkenness he was unable to support himself.⁶⁰ Outside of the above decisions, it may be stated that much the same general rules apply to the damages in case of collateral next of kin as govern in other cases.

§ 638. Defenses—Mitigation of damages—Insurance.—Insurance money on the life of deceased cannot operate as a reduction of the compensation for the negligent or wrongful killing,⁶¹ although the fact that the father's life was insured for the mother's benefit, and that the deceased son paid and had promised to keep paid the premium thereon will be considered.⁶²

§ 639. "Fair and just compensation with reference to the pecuniary injuries"—Defenses—Remarriage and marriage.—Remarriage by a widow and the securing thereby of a new means of support cannot be considered upon the question of the measure of damages for the former husband's killing.⁶³

⁵⁷ See *Pennsylvania Co. v. Keane*, 143 Ill. 172; 32 N. E. 260; *Chicago v. Hesing*, 83 Ill. 204; *Chicago v. Scholten*, 75 Ill. 468; *Illinois C. R. Co. v. Barron* (Ill. Stat.), 5 Wall. (U. S.) 90; 18 L. Ed. 591; *Barron v. Illinois C. R. Co.*, 1 Biss. (U. S. C. C.) 412; *Falkenan v. Rowland*, 70 Ill. App. 20; 3 Am. Neg. Rep. 530 (citing *North Chicago R. Co. v. Brodie*, 156 Ill. 317); *City of Salem v. Harvey*, 29 Ill. App. 483, aff'd 129 Ill. 344; 21 N. E. 1076; *Illinois & St. L. R. Co. v. Whalen*, 19 Ill. App. 116; *Serensen v. Northern P. R. Co.* (U. S. C. C. D. Mont.), 45 Fed. 407. See secs. 625, 626, herein.

⁵⁸ *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138; 38 N. E. 760.

⁵⁹ *Ohio & M. R. Co. v. Wangelin*, 43 Ill. App. 324.

⁶⁰ *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317; 40 N. E. 942, rev'g 57 Ill. App. 564, under Ill. act Feb. 12, 1853.

⁶¹ *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138.

⁶² *Chicago & A. R. Co. v. Shannon*, 43 Ill. 388.

⁶³ *O. S. Richardson Fueling Co. v. Peters*, 82 Ill. App. 508. As to plaintiff's marriage with deceased and evidence thereof, see *Toledo R. Co. v. Brooks*, 81 Ill. 245; *Conant v. Griffin*, 48 Ill. 410. As to remarriage being consistent with allegation of being widow, see *St. Louis, I. M. & S. R. Co. v. Yocum*, 34 Ark. 493.

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Nor is the fact material that the living husband stands in loco parentis to deceased's children by reason of said remarriage.⁶⁴ But it is at least intimated that the probability that a bachelor might marry, and his property descend through another may be considered.⁶⁵

§ 640. Death—Defenses—Pension to widow and children in mitigation.—It cannot be shown in mitigation of damages that the widow and children are under an act of congress entitled to a pension.⁶⁶

§ 641. Damages assessed on affirmance of judgment.—Ten per cent damages may be assessed upon affirmance of the judgment under the Arkansas statute, which is in force in Indian Territory.⁶⁷

⁶⁴ O. S. Richardson Fueling Co. v. Maddy, 57 Ark. 506; 21 S. W. 472; Peters, 82 Ill. App. 508. 58 Am. & Eng. R. Cas. 327.

⁶⁶ Illinois C. R. Co. v. Barron (Ill. Stat.), 5 Wall. (U. S.) 90; 18 L. Ed. 591; Barron v. Illinois C. R. Co., 102 Fed. 96, under Mans. Dig. Ark. sec. 1311. 1 Biss. (U. S. C. C.) 412, 453.

⁶⁷ Missouri, K. & T. R. Co. v. Elliott (U. S. C. C. A. 8th C. Ind. Ty.), 102 Fed. 96, under Mans. Dig. Ark. sec. 1311.

⁶⁸ St. Louis, I. M. & S. R. Co. v.

CHAPTER XXVIII.

DEATH—"FAIR AND JUST" DAMAGES "WITH REFERENCE
TO THE PECUNIARY INJURY."

- § 642. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Sta-
 tutes—Generally.
643. Same subject continued.
644. Same subject concluded.
645. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Pe-
 cuniary loss.
646. Same subject continued.
647. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Dam-
 ages for the jury.
648. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Fac-
 tors generally to be con-
 sidered.
649. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Sev-
 erance of contract rela-
 tions—Partnership.
650. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Suf-
 ferings of the person in-
 jured.
651. "Fair and just" damages
 "with reference to the
 pecuniary injury"—So-
 latium—Mental suffering.
652. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Re-
 lationship, legal and ac-
 tual, of deceased to bene-
 ficiaries.
653. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Le-
 gal or moral obligation—
 Legal right—Support and
 dependency.
654. Same subject continued.
655. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Rea-
 sonable expectation of pe-
 cuniary benefit.
656. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Pros-
 pect of inheritance.
657. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Phy-
 sical and financial condi-
 tion, age, number, of
 family, etc.—When ad-
 missible.
658. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Fin-
 ancial condition—When
 inadmissible.
659. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Prob-
 able accumulations.
660. "Fair and just" damages
 "with reference to the
 pecuniary injury"—Ex-
 pense of funeral, sickness,
 etc.

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| <p>661. "Fair and just" damages "with reference to the pecuniary injury"—Life expectancy and mortuary tables.</p> <p>662. "Fair and just" damages "with reference to the pecuniary injury"—Nominal damages.</p> <p>663. "Fair and just" damages "with reference to the pecuniary injury"—Death of husband—Husband and father.</p> <p>664. "Fair and just" damages "with reference to the pecuniary injury"—Death of wife.</p> <p>665. "Fair and just" damages "with reference to the pecuniary injury"—Death of parent.</p> <p>666. "Fair and just" damages "with reference to the pecuniary injury"—Training, etc., of children.</p> | <p>667. "Fair and just" damages "with reference of the pecuniary injury"—Death of children.</p> <p>668. Same subject continued.</p> <p>669. Same subject concluded.</p> <p>670. "Fair and just" damages "with reference to the pecuniary injury"—Death of adults.</p> <p>671. Death of children—Minority and majority.</p> <p>672. "Fair and just" damages "with reference to the pecuniary injury"—Death of children—Minority and majority.</p> <p>673. "Fair and just" damages "with reference to the pecuniary injury"—Mother's sickness from child's death.</p> <p>674. "Fair and just" damages "with reference to the pecuniary injury"—Collateral kindred.</p> |
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§ 642. "Fair and just" damages "with reference to the pecuniary injury"—Statutes—Generally.—In Michigan, New Jersey and Wisconsin, the jury may give such damages as they shall deem fair and just with reference¹ to the pecuniary injury resulting from the death to the persons designated by the statute; and the action lies against the person who would have been liable if death had not ensued, and such parties are liable in the two first named states, although the death shall have been caused under such circumstances as amount in law to a felony; while in all these states the action lies where death is caused by wrongful act, neglect or default such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, and the action must be brought by the personal representative of deceased. In New Jersey the amount recovered is for the exclusive benefit of the widow and next of kin, while in Wisconsin the beneficiaries are

¹ In Wis. "in reference."

the surviving husband or widow, if any, otherwise his or her lineal descendants and in default thereof to his or her lineal ancestors, and in this last state the amount recoverable is limited to five thousand dollars. The Michigan statute also provides for recovery against railroad companies with like provisions as those above noted in that state, but the beneficiaries under, with these statutory provisions in this state, are the persons who would be entitled to distribution of personal property left by persons dying intestate. Again, a peculiar provision of the New Jersey enactment requires a delivery to and upon request, by defendant or his attorney, of a particular account in writing of the nature of the claim in respect to which damages shall be sought and recovered.² Other factors involved in the determination of damages are the survival acts and these would also include the question as to the effect of these acts and whether or not the death loss statutes give a new and different cause of action from that under such revival enactments, or whether they rest upon the same principles, and also whether the surviving beneficiaries' right of action is exclusive, being only connected with the injured party's right of action by the provision of the death loss statutes as to the beneficiaries' right of recovery being dependent upon the injured person's cause of action had death not resulted. We have given some consideration to these questions elsewhere. But we may state here that in Michigan, New Jersey and Wisconsin there are survival statutes for the recovery of damages to the person.³

²Mich. Comp. Laws, 1897, p. 3151, secs. 10427, 10428; id. p. 1989, sec. 6308; id. p. 1997, sec. 6309; id. p. 2026, secs. 6389, 6390; id. p. 2975; sec. 9728; Howell's Ann. Stat. 1883, sec. 8313; 2 Howell's Ann. Stat. 1882, secs. 8313, 8314, 3391, 3392, 3491, 3492; Dewey's Comp. Laws, 1872, pp. 188, 771, 814; Rev. Stats. 1857, ch. 515, secs. 1, 2, p. 1329. As to survival of actions, see Mich. Comp. Laws, 1897, p. 3067, secs. 10118 et seq. N. J. Gen. Stat. 1895, p. 1188, sec. 10 (sec. 1), sec. 11 (sec. 2), sec. 12 (sec. 3); Am'd Sess. Laws, 1897, p. 134, ch. 58, sec. 2; Rev. Stat. 1878, p. 294,

secs. 1-3; Approved Act, March 3, 1848, P. L. 1848, p. 151; 1 Rev. Laws, 1877, p. 293. Wis. Sanborn & Berryman's Stat. 1898, secs. 4255, 4256, 4219, 4224, subd. 3; Annot. Stat. 1889, secs. 4255, 4256; Taylor's Rev. Stat. 1858, ch. 135, secs. 12, 13, p. 800 (see Rev. Stat. 1878, sec. 1816, repealed 1880). As to bill of particulars, see Telfer v. Northern R. Co., 30 N. J. L. 188.

³Howell's Ann. Stat. (Mich.) sec. 7397; 2 N. J. Gen. Stat. p. 1426, secs. 4, 5; 1 N. J. Gen. Stat. pp. 919, 925, secs. 65, 92; Wis. Rev. Stat. 1898, sec. 4253; Wis. Laws, 1887,

§ 643. *Same subject continued.*—In Wisconsin the beneficiaries designated in the statute must be shown to be in being by the allegations of the complaint, otherwise the action for damages for the death cannot be sustained. Nor will the court uphold the claim that by the statutes the right of action for the wrongful death of a person is conditional only upon the circumstances being such that if death had not ensued the decedent could have proceeded against the wrongdoer for damages.⁴ So

ch. 280. Action does not abate on death of beneficiary, although the duration and extent of the personal injury is limited to the beneficiary's lifetime. *Cooper v. Shore Elec. Co.* (N. J. 1899), 44 Atl. 623. As to effect of Dakota survival statute (Comp. Laws, sec. 5498) in Wisconsin, see *Belding v. Black Hills & Ft. P. R. Co.* (Wis.), 53 N. W. 750; 52 Am. & Eng. R. Cas. 624. That action survives and is separate and distinct from action for death loss, and that the latter is exclusive, and for an exhaustive discussion of this question, see *Brown v. Chicago & Northwestern R. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, rehearing denied 78 N. W. 771; 44 L. R. A. 585; 13 Am. & Eng. R. Cas. N. S. 603. This last case cites *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44; *Lehman v. Farwell*, 95 Wis. 185; 70 N. W. 170, and numerous other cases. See also *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365, cited in *Sachs v. City of Sioux City*, 109 Iowa, 224; 80 N. W. 336; as to survival of action and suit being barred by failure to give notice, etc., to corporation defendant, other Wisconsin cases are also cited therein to the same point. That second husband cannot continue suit after the widow's death brought by her for damages for the death of her former

husband, see *Schmidt v. Menosha Wooden Ware Co.*, 99 Wis. 300; 74 N. W. 797. The Michigan survival act, sec. 7397, applies only where the death results from other causes than the injuries, and damages are not recoverable by the heirs for the pecuniary loss to them, and also by the personal representative for the benefit of the estate under the survival act. 3 How. Ann. Stat. sec. 7397; and the death act, 2 How. Ann. Stat. secs. 8313, 8314; *Sweetland v. Chicago & G. T. R. Co.*, 117 Mich. 329; 75 N. W. 1066; 43 L. R. A. 568; 5 Det. L. N. 283. As to abatement by death under General Statutes, see *Plume v. Lockwood*, 10 N. J. L. J. 119; *Ferguson v. Wilson* (Mich. 1899), 80 N. W. 1006; *Beith v. Porter*, 119 Mich. 365; 78 N. W. 336; 5 Det. L. N. 837; *Wisconsin, M. & N. R. Co. v. Weselins*, 119 Mich. 505; 78 N. W. 544; 5 Det. L. N. 873. The power to proceed against a corporation judicially is wholly divested by its dissolution, except by special statutory authority. *Combes v. Milwaukee & M. R. Co.*, 89 Wis. 297; 62 N. W. 89; 27 L. R. A. 369.

⁴ *Brown v. Chicago & Northwestern R. Co.*, 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, rehearing denied 78 N. W. 771; 44 L. R. A. 585; 13 Am. & Eng. R. Cas. N. S. 603, citing several Wisconsin cases. See *Wiltse v. Tilden*, 77

in Michigan the complaint should show the existence of a wife and children who would be entitled to damages.⁵ And in this state the children's right of action, no husband or widow surviving, constitutes no part of deceased's estate and a final settlement thereof is not a bar to a suit by the personal representative for such children's benefit.⁶ Another peculiarity of the Wisconsin enactment, noted under the preceding section, is that only the surviving husband or widow is entitled in the first instance to the damages, then his or her lineal descendants, and finally his or her lineal ancestors.⁷ And infant children are the only proper beneficiaries and the complaint should show that some of the children are minors.⁸ While in New Jersey the words for the "exclusive benefit of the widow and next of kin" do not prevent bringing an action by the next of kin when no widow survives, for the statute does not apply solely to the cases where deceased leaves surviving a widow.⁹ And in Michigan the persons entitled to distribution of the personal estate of intestate are the beneficiaries.¹⁰ Another factor which has a bearing upon the right to recover damages for death by negligence, etc., is that under the Wisconsin statute.¹¹ Railroad companies are liable to employees for the negligence of co-employees and where a railroad employee is killed by such fellow servant's negligence

Wis. 52; 46 N. W. 234; *McKeigue v. Janesville*, 68 Wis. 50; 31 N. W. 298.

⁵ *Walker v. Lake Shore & M. S. R. Co.* (Mich.), 62 N. W. 1032; 5 Det. L. N. 34. See *Charlebois v. Gogebie & M. R. Co.*, 91 Mich. 59; 51 N. W. 812.

⁶ *Hubbard v. Chicago & N. W. R. Co.*, 104 Wis. 160; 80 N. W. 454. See *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 132; 78 N. W. 771; 44 L. R. A. 585, denying rehearing 77 N. W. 748; 44 L. R. A. 579; 5 Am. Neg. Rep. 255; 13 Am. & Eng. R. Cas. N. S. 603; *Gores v. Graff*, 77 Wis. 174; 46 N. W. 48. Examine also *Abbott v. McCaddan*, 81 Wis. 563; 51 N. W. 1079; *Schadelwald v. Milwaukee, L. S. & W. R. Co.*, 55 Wis. 569; 13 N. W. 458.

⁷ *Gores v. Graff*, 77 Wis. 174; 46 N. W. 48; *Schmidt v. Deegan*, 69 Wis.

300; 34 N. W. 83. See also *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 137; 78 N. W. 771; 44 L. R. A. 585, denying rehearing 77 N. W. 748; 44 L. R. A. 579; 5 Am. Neg. Rep. 255; 13 Am. & Eng. R. Cas. N. S. 603, and opinion of Marshall, J.; and see cases in last note herein. *Lierman v. Chicago, M. & St. P. R. Co.* (Wis.), 52 N. W. But a special administrator may maintain an action. *Swan v. Worvell*, 107 Wis. 625; 83 N. W. 934.

⁸ *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365.

⁹ *Haggerty v. Central R. R. Co.*, 31 N. J. L. 349, under *Nixon's Dig.* 211.

¹⁰ See Michigan statutes cited at beginning of this section.

¹¹ Laws, 1893, ch. 220. See Wis. Rev. Stat. 1898, sec. 1816.

an action lies therefor under the death loss enactment which permits an action where deceased could have sued if the injury had not been fatal.¹² Again, a right of action against a city for death resulting from defects in a highway, given by the Michigan death loss statute, is not taken away by the enactment making cities liable for defective highways and abrogating the common-law liability although it contains no provisions for damages to any person other than the one injured.¹³

§ 644. Same subject concluded.—So in New Jersey the board of chosen freeholders in a county is liable under the death loss statutes where the circumstances are such that it would have been liable to the injured person if death had not ensued.¹⁴ Nor is there any presumption that the intent of the death loss statute of Michigan was to create a different rule of damages against private and other corporations in case of death from that in such actions against a railroad company.¹⁵ It is apparent therefore, that although the prescribed statutory measure of damages is in the same language in these states, nevertheless, there are other peculiarities of the statutes which will affect the beneficiaries' rights either as a class or otherwise, so that any decision in one state which applies to a certain class of those entitled should be carefully examined, except perhaps upon certain general questions, before being relied on in another state as an authority.

§ 645. "Fair and just" damages "with reference to the pecuniary injury"—**Pecuniary loss.**—The measure of recovery is the pecuniary loss solely, either present or prospective, sustained by those entitled to recover.¹⁶ In Michigan, however,

¹² *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis. 69; 69 N. W. 997; 1 Am. Neg. Rep. 537. See extended note at end of chapter 29, herein, as to fellow servants.

¹³ *Racho v. Detroit (Mich.)*, 51 N. W. 360, under Pub. Acts, 1887, No. 264, and How. Ann. Mich. Stat. secs. 8313, 8314.

¹⁴ *Murphy v. Mercer County Free-*

holders (N. J.), 31 Atl. 229, under N. J. Act, March 3, 1848.

¹⁵ *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321.

¹⁶ *Walker v. Lake Shore & M. S. R. Co.*, 111 Mich. 518; 69 N. W. 1114; 3 Det. L. N. 775; 1 Am. Neg. Rep. 267 (see S. C., 104 Mich. 606; 62 N. W. 1032; 2 Det. L. N. 34), citing

while the damages recoverable are those sustained by the statutory beneficiaries who have suffered pecuniary loss, nevertheless persons who have not been subjected to pecuniary loss may be entitled to a share of the amount recovered.¹⁷ In determining what constitutes a pecuniary loss within the intent of the statute, the decisions in two of these states are that the injury must be such as is capable of a money compensation and that no other loss can be considered.¹⁸ Thus it must be shown that advice and counsel relates to the pecuniary affairs of

Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582; 62 N. W. 993, 2 Det. Leg. N. 33; *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321; *Balch v. Grand Rapids & S. R. Co.*, 67 Mich. 394; 34 N. W. 884; 11 West. 476; *Mynning v. Detroit, L. & N. R. Co.*, 59 Mich. 261; 26 N. W. 514; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 214. See also *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361; 10 Ry. & Corp. L. J. 324; 49 Am. & Eng. R. Cas. 367; *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 271; 33 N. W. 306; 10 West. 104; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; 20 L. Ed. 571 (in error to U. S. C. C. S. E. D. Wis.); *Graham v. Consolidated Tract. Co.*, 64 N. J. L. 10; 44 Atl. 994, per Magle, Ch. J.; *Consolidated Tract. Co. v. Hone*, 60 N. J. L. 244; 38 Atl. 759; 9 Am. & Eng. R. Cas. N. S. 249, case reverses 59 N. J. L. 275; 35 Atl. 899; 5 Am. & Eng. R. Cas. N. S. 679; *Consolidated Tract. Co. v. Graham*, 62 N. J. L. 90; 40 Atl. 773; 58 Alb. L. J. 93; 31 Chic. L. News, 35; 17 Nat. Corp. Rep. 213; 4 Am. Neg. Rep. 660, per Gummere, J.; *May v. West Jersey & S. S. R. Co.*, 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417, a case

of child's death; *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163, a case of wife and mother's death; *Myers v. Holborn*, 58 N. J. L. (29 Vr.) 193; 33 Atl. 389; 30 L. R. A. 345; *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Telfer v. Northern R. Co.*, 30 N. J. L. (1 Vr.) 188; *Nickerson v. Bigelow* (U. S. D. C. E. D. Wis.), 62 Fed. 900; *Bauer v. Richter*, 103 Wis. 412; *Thompson v. Johnston Bros.*, 86 Wis. 576; 57 N. W. 298; *Topping v. Lawrence*, 86 Wis. 526; 57 N. W. 365; *Lierman v. Chicago, M. & St. P. R. Co.* (Wis.), 52 N. W. 91; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 614; *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.

¹⁷ *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 621; 49 Am. & Eng. R. Cas. 367; 10 Ry. & Corp. L. J. 344; *Howell's Annot. Stat. sec. 3392*, and under statute of distributions.

¹⁸ *Mynning v. Detroit, L. & N. R. Co.*, 59 Mich. 257; 26 N. W. 514; *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28. "It is simply an action to recover in dollars and cents a compensation for the loss and damages which have actually been sustained." *Telfer v. Northern R. Co.*, 30 N. J. L. (1 Vr.) 188, 209, per Van Dyke, J.

the next of kin and would probably result in a pecuniary benefit, the loss of which would bring the case within the statute.¹⁹

§ 646. Same subject continued.—And the pecuniary loss must be alleged and proved, at least to some extent, particularly so where the damages are for the loss of prospective earnings which are special in their character and must be specially pleaded and established by evidence.²⁰ Although in Michigan if the fact appears from the proof that the next of kin have sustained damages from the death of the intestate the declaration may be amended so as to show such fact.²¹ In New Jersey, however, it seems that there is no absolute requirement as to averring that there has been a pecuniary loss,²² but it is evident from another decision in that state there must be sufficient proof to justify the award of damages, otherwise the amount of the verdict will be reduced to the compensation which the evidence shows to be a proper sum, since the plaintiff, it was declared, could recover nothing but the pecuniary loss sustained by those

¹⁹ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163.

²⁰ *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44, citing *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 271; 33 N. W. 306; 10 West. 184, per Champlin, J., and numerous other cases. Must allege facts showing that some person entitled thereto has suffered pecuniary loss. *Charlebois v. Gogebie & M. R. Co.*, 91 Mich. 59; 51 N. W. 812. Evidence of pecuniary loss to some person essential in action against railroad company. *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321. See further *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365; *Regan v. Chicago, M. & St. P. R. Co.*, 51 Wis. 599; 8 N. W. 292; *Kelley v. Chicago, etc., R. Co.*, 50 Wis. 381. Allegations that plaintiff was intestate's mother and showing the extent of her dependency for support, and averring pecuniary loss and damage, sufficiently allege

plaintiff's representative character. *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234. And if there is evidence to support the general verdict for plaintiff and a finding against contributory negligence, a nonsuit is properly refused, nor will the verdict be set aside on such ground. Averments that plaintiff's intestate was a widow and had small children dependent upon her for support, nurture and education are sufficient in action for children for her death. *McKeigue v. Janesville*, 68 Wis. 50; 31 N. W. 298. Examine *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613, as to there being no necessity of averring special damages to admit proof thereof. A case of proof of pension.

²¹ *Garrity v. Detroit Citizens St. R. Co.*, 112 Mich. 369; 70 N. W. 1018; 2 Chic. L. J. Wkly. 277; 4 Det. L. N. 46; 37 L. R. A. 529.

²² *McGlone v. New Jersey R. Co.*, 8 Vr. (N. J.) 304, per Beasley, J.

entitled to the damages. The effect of this decision as well as those below cited is that the amount of substantial damages must depend upon the proof of pecuniary injury,²³ for the recovery cannot be in excess of any possible calculation based upon the evidence which must furnish some standard for the estimation of the amount of damages.²⁴

§ 647. "Fair and just" damages "with reference to the pecuniary injury"—Damages for the jury.—The amount of damages to be awarded rests largely in the jury's discretion, but it must be founded upon the evidence, otherwise the verdict will not be sustained for the sum fixed thereby.²⁵

²³ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417. See *Telfer v. Northern R. Co.*, 30 N. J. L. (1 Vr.) 188 and *Consolidated Traction Co. v. Graham*, 62 N. J. L. 90; 40 Atl. 773; 58 Alb. L. J. 93; 31 Chic. L. N. 35; 17 Natl. Corp. Rep. 213; 4 Am. Neg. Rep. 660, upon the point of necessity of some evidence to recover substantial damages.

²⁴ *Jackson v. Consolidated Tract. Co.*, 59 N. J. L. (30 Vr.) 25; 35 Atl. 754. See *Walker v. Lake Shore & M. S. R. Co.*, 104 Mich. 606; 62 N. W. 1032; 2 Det. L. N. 34. See also *S. C.*, 111 Mich. 518; 69 N. W. 1144; 3 Det. L. N. 775; 1 Am. Neg. Rep. 267. In this last case there was no evidence as to nurture, etc., of children and this was considered, although the court held that damages therefor were not recoverable, but this intimation of no evidence and that it was not claimed that deceased was a tutor to his children leaves room for the inference of a possibility of alleging and recovering upon proof of special damages in this respect. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 271; 33 N. W. 306; 10 West. 184,

where the court says, "The jury was not warranted in giving damages not founded upon the testimony or beyond the measure of compensation for the injury inflicted," and this is quoted by the court in *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44. See *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582; 62 N. W. 993; 2 Det. L. N. 33.

²⁵ *Walker v. Lake Shore & M. S. R. Co.*, 104 Mich. 606; 62 N. W. 1032; 2 Det. L. N. 34; *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44, quoting *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 271; 33 N. W. 306; 10 West. 184; *North Jersey St. R. Co. v. Morhatt*, 64 N. J. L. 236; 45 Atl. 812; *Jackson v. Consolidated Tract. Co.*, 59 N. J. L. (30 Vr.) 25; 35 Atl. 754; *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. (U. S. C. C. Wis.) 282; 13 Wall. (U. S.) 270; *Wiltse v. Town of Tilden*, 77 Wis. 156; 46 N. W. 234; *Staal v. Grand Rap. & I. R. Co.*, 57 Mich. 245; 23 N. W. 795. Both these cases are cited, upon the point that the jury should be informed of every fact and circumstance to assist them, in *Gulf, Colo. & S. F. R. Co. v. Younger*, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378, per Brown, J. That jury not limited

§ 648. "Fair and just" damages "with reference to the pecuniary injury"—Factors generally to be considered.—The factors generally to be considered are deceased's age, sex, health, occupation, earnings and probability of increase thereof or otherwise, earning capacity, including the qualification, or otherwise for a more remunerative position, and the increase or diminution of such capacity, as well as the education, capacity, social standing, the ability, skillfulness or unskillfulness of deceased in his employment or business, his personal qualities, his life expectancy, habits as to industry, sobriety, expenditure or otherwise, whether he was married or not, his care of his family, if there be any family or dependents, and plaintiff's or the beneficiaries' age and life expectancy. There are other elements, such as probable accumulations, dependency for support or extent of contributions thereto, which enter into the reasonable expectation of pecuniary benefit, etc., which are specially considered elsewhere herein.²⁶

by any definite and exact rule, examine *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613; *Cooper v. Chicago & N. W. R. Co.*, 22 Wis. 615. Damages rests largely in jury's discretion. *Whiton v. Chicago & N. W. R. Co.* (U. S. C. C. E. D. Wis.), 2 Biss. 282, 289, per *Drummond, J.* See also secs. 667-672, herein, as to death of children.

²⁶ Deceased was a woman 56 years old; only proof was as to boarding husband and minor children, and clothing latter—\$7,000 excessive. *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582; 62 N. W. 993; 2 Det. L. N. 33. Life expectancy of deceased and of mother to be considered. *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361; 10 Ry. & Corp. L. J. 344; 49 Am. & Eng. R. Cas. 367. Prospective earnings in Mich. when pleaded. *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44. Age, health and strength of deceased girl considered. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich.

261; 33 N. W. 306; 10 West. 184. Deceased's age, contributions to support, life expectancy and earnings. *Balch v. Grand Rapids & S. R. Co.*, 67 Mich. 394; 11 West. 476; 34 N. W. 884. Deceased son's age, earnings and disposition thereof, and father's age. *North Jersey St. R. Co. v. Morhart*, 64 N. J. L. 236; 45 Atl. 812. Deceased son's age and probabilities of pecuniary benefits from son's earnings. *Graham v. Consolidated Tract. Co.* (N. J.), 44 Atl. 964; *Consolidated Tract. Co. v. Graham*, 62 N. J. L. 90; 40 Atl. 773; 58 Alb. L. J. 93; 31 Chic. L. N. 35; 17 Natl. Corp. Rep. 213; 4 Am. Neg. Rep. 660. Deceased son's age, occupation, wages, exclusive of board, and as compared with earnings of full grown able-bodied men at the same labor, no evidence that any increase of wages could be anticipated during minority; no evidence that he was qualified or would be qualified during minority for any more remunerative position. Held

§ 649. "Fair and just" damages "with reference to the pecuniary injury"—Severance of contract relations—Partnership.—The severance of relations of contract by the death,

that pecuniary benefits would not reach amount of verdict and \$3,000 reduced to \$1,500. *May v. West Jersey & S. R. Co.*, 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417. Next of kin were two sons, one married, and the other 17 years old. Deceased kept house for husband, and aided him incidentally in his occupation—\$5,000 excessive. *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163. Deceased was 57 years old at time of the accident, a bricklayer by trade, and followed the business of contracting and building. He was sober, industrious and prosperous in business, and had accumulated property out of his earnings. At the time of the accident, he was in good health and never known to be sick, although it was claimed that he had Bright's disease. He left surviving him a widow and three children, aged 17, 14 and 11—\$3,800 not excessive. *Williams v. Camden & Atlantic R. Co.* (N. J.), 37 Atl. 1107; 3 Am. Neg. Rep. 569. Deceased's probable accumulations, and that he had acquired a competence considered. (See this case also as to age and situation of the parties, increasing or decreasing mental and physical ability as applied to business.) *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28. See *Telfer v. Northern R. Co.*, 30 N. J. L. (Vr.) 188. Yearly earnings and probable value of an annuity for term of expectancy. *Nickerson v. Bigelow* (U. S. D. C. E. D. Wis.), 62 Fed. 900. Earning capacity, mental and physical ability, personal qualities, social standing and char-

acter. *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. (U. S. C. C. Wis.) 282; *Chicago & N. W. R. Co. v. Whiton*, 13 Wall. (U. S.) 270. Deceased was 4½ years old, strong and healthy. *Decker v. McSorley*, 111 Wis. 91; 86 N. W. 554. Deceased's son was 17 years old, intelligent, in good health, capable of earning considerable money and unmarried. *Luesen v. Oshkosk Elec. L. & P. Co.*, 100 Wis. 94; 85 N. W. 124. Deceased was a strong, healthy man, 38 years old. *Carpenter v. Roeling*, 107 Wis. 559; 83 N. W. 953. Deceased husband's life expectancy and widow's reasonable expectations from his earnings and amount sufficient for her support, but not gross earnings for life expectancy. *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292; 77 N. W. 169; 12 Am. & Eng. R. Cas. N. S. 196. Deceased was a freight handler; railroad company liable to employee for negligence of co-employee. *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis. 69; 69 N. W. 997; 1 Am. Neg. Rep. 537. Deceased was a workman 33 years old—\$4,000 not excessive. *Bright v. Barnett & R. Co.*, 88 Wis. 290; 60 N. W. 418; 26 L. R. A. 524. Deceased's age, occupation and financial condition, and reasonable expectation of pecuniary benefit. *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897. Deceased's education and capacity for earning money. *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234. Deceased's age, health, earnings and dependency of family considered—\$2,500 not excessive. *Annas v. Milwaukee & N. R. Co.*, 67

such as that of partnership, cannot be considered as an element of damages.²⁷

§ 650. "Fair and just" damages "with reference to the pecuniary injury"—Sufferings of person injured.—In determining whether or not the sufferings of the person injured constitute an element of damages, it must be remembered that, as we have elsewhere stated, in Michigan there is a survival statute which covers negligent injuries to the person, and such enactment only includes those cases where death results from other causes than the injuries, while the death loss act applies where death is occasioned by the negligent or wrongful act, and results in pecuniary injury to the heirs.²⁸ And we have also seen that there are survival statutes in the other states which come under this provision as to fair and just damages with reference to the pecuniary injury, viz: New Jersey and Wisconsin.²⁹ In so far, therefore, as those actions rest upon different principles, and are separate and distinct, the death loss statute cannot include the mental or physical sufferings of the person injured, for these appertain only to the person and the survival action, and it is clearly apparent that the legislature in enacting both a death loss and survival enactment could not have intended that the heirs or designated beneficiaries should recover for other than the pecuniary injuries resulting solely from the death.³⁰

Wis. 46. Deceased was 55 years old, married and unskilled laborer—\$2,000 not excessive. *Mulcairns v. Janesville*, 67 Wis. 24. Deceased son 18 months old—\$2,000 not excessive. *Schrier v. Milwaukee*, L. S. & W. R. Co., 65 Wis. 457; 27 N. W. 167. Deceased son was 7 years old; character of his services and condition of parents considered—\$2,500 not excessive. *Johnson v. Chicago & N. W. R. Co.*, 64 Wis. 425; 25 N. W. 223. Deceased and parents' ages, and latter's condition and circumstances considered—\$1,000 not excessive. *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 359; 21 N. W. 227. Age and services

of minor, situation and condition of parents—\$2,000 not excessive. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.

²⁷ *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28.

²⁸ *Sweetland v. Chicago & G. T. R. Co.*, 117 Mich. 329; 75 N. W. 1066; 5 Det. L. N. 283; 43 L. R. A. 568, under death Stat. 2 How. Ann. Stat. secs. 8313, 8314, and survival act, 3 How. Ann. Stat. sec. 7397.

²⁹ See secs. 642-644, herein.

³⁰ See *Mynning v. Detroit L. & N. R. Co.*, 59 Mich. 257; 26 N. W. 514; *Telfer v. Northern R. Co.*, 30 N. J. L. 188, and cases cited; secs. 642-644, herein, as to statutes.

§ 651. "Fair and just" damages "with reference to the pecuniary injury"—Solatium—Mental suffering.—In an action to recover under the death loss statute, nothing can be allowed for the mental suffering of those entitled to damages.³¹ Nor can a declaration in a cause of action for a child's death be amended by inserting an averment for injuries inflicted and suffered up to the time of the death.³²

§ 652. "Fair and just" damages "with reference to the pecuniary injury"—Relationship, legal and actual, of deceased to beneficiaries.—The question of relationship, legal and actual, of deceased to the beneficiaries, is certainly important and material in so far as the existence of statutory beneficiaries is necessary to be alleged and proven. This point of relationship is also involved in that of reasonable expectation of pecuniary advantage, since the probability of the continuance of past benefits would, to some extent at least, be evidenced both by the legal and actual relations between deceased and those entitled to recover for his death, and the question of dependency of survivors upon deceased ought to be relevant, as is instanced by the case of a widow's sole support being cut off by her husband's negligent or wrongful killing, the family also being dependent.³³ Other illustrations of the above points are where allegations that plaintiff was the mother of intestate and dependent upon him, are facts showing her right to sue, and that she has sustained pecuniary loss.³⁴ So the facts that a deceased son was unmarried and that there were a number of other sons surviving, are relevant, and affect the measure of recovery.³⁵ And the right

³¹ Telfer v. Northern R. Co., 30 N. J. L. 188. Nothing for injury to a father's feelings for death of a son, killed by railroad company, under N. J. Act, March 3, 1848. Demarest v. Little, 47 N. J. L. 28, a case of husband for wife's killing. Whiton v. Chicago & N. W. R. Co., 2 Biss. (U. S. C. C. E. D. Wis.) 282, 289, per Drummond, J. See Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582; 62 N. W. 993; 2 Det. L. N. 33; Mynning v. Detroit, L. & N. R. Co., 59

Mich. 257; 26 N. W. 514; Castello v. Landwehr, 28 Wis. 522; Potter v. Chicago & N. W. R. Co., 21 Wis. 372. Examine also cases cited under secs. 645, 646, herein.

³² Hurst v. Detroit City R. Co., 84 Mich. 539; 48 N. W. 44.

³³ Annas v. Milwaukee & N. R. Co., 67 Wis. 46; 30 N. W. 282.

³⁴ Wiltse v. Tilden, 77 Wis. 152; 46 N. W. 234.

³⁵ Innes v. Milwaukee, 103 Wis. 582; 79 N. W. 783.

of a divorced woman to the custody of her children under a decree of divorce is material.³⁵ Again, that the father was next of kin and the actual relations between him and a deceased son with reference to the disposition of such son's earnings and the loss thereof by the premature death, affect the right to and the measure of the damages as well, also, as the possible future relation of dependency, in case the father should become necessitous.³⁷ But a father and brother of intestate were not permitted a recovery where they were not dependent on deceased.³⁸ These general illustrations might be continued indefinitely if it were necessary, but it is not, for the reason that like cases appear throughout the chapters covering this subject, especially so in connection with those sections which relate to prospective gifts and contributions to support, as well as to the question of legal and moral obligation to render aid or support. It is not intended however, to assert by reason of what is above stated that proof of the legal and actual relations of deceased to the beneficiaries is absolutely necessary to be alleged and proven as a prerequisite to a recovery, for that is another question, viz., that of the right to nominal damages, which we have elsewhere considered, but nevertheless, such relationship does affect the extent of the recovery in numerous cases.³⁹

§ 653. "Fair and just" damages "with reference to the pecuniary injury"—Legal or moral obligation—Legal right—Support and dependency.—In Michigan the recovery does not depend upon any moral obligation of deceased to supply the needs or wants of the beneficiaries, although in case of the death of a young child, evidence which should be received with caution, might perhaps be given, when it tends to establish a moral obligation to demand assistance in the future from such child, had it lived.⁴⁰ This ruling has been frequently cited as supporting the claim that damages do not depend upon any legal obligation of deceased to support or aid the beneficiary.

³⁵ *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234.

³⁷ *North Jersey St. R. Co. v. Morhart*, 64 N. J. L. 236; 45 Atl. 812.

³⁸ *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321.

³⁹ See secs. 652, 662, herein.

⁴⁰ *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, per Cooley, C. J.

In this connection it is pertinent to state that although the right to recover rests upon the terms of the death loss statute, nevertheless, that enactment bases the damages upon the pecuniary loss sustained. This point also involves numerous other factors which enter into what proof is obligatory to recover any damages, and what evidence may be given to enhance the damages, and the old questions of nominal damages and what beneficiaries are entitled are again brought up, so that the difficulty of deducing any positive rule is obvious. It certainly is true that the right of a wife or minor child to support rests upon a legal liability as does also the right of a father to a son's earnings during the latter's minority, and where the loss of such support or earnings is cut off by premature death, it is but reasonable to assert that the consequent, pecuniary loss to the widow, child or parent rests upon a pre-existing legal obligation, and a corresponding legal right. But where damages are recoverable, not for the benefit of specifically designated beneficiaries, but in reality for the estate, to be distributed as the law provides, it might be a question how far such statutory provision would bring such indirectly named distributees within the law of legal liability and legal right, as affecting the measure of recovery, and this, again, takes us back to the question elsewhere herein considered, as to the necessity of alleging the existence of persons entitled to recover. Irrespective, however, of any other question, that of contribution to support is material and relevant, and the extent of the loss may be measured by and based upon an estimate of the customary contributions by deceased.⁴¹ So it has also been declared that deceased must have left some one dependent upon him for support or some one who had a reasonable expectation of receiving some benefit from him during his lifetime.⁴² Again, where deceased was a

⁴¹ *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, per Cooley, C. J.

⁴² *Grand Trunk R. Co. of Can. v. Ives*, 144 U. S. 406; 36 L. Ed. 485, under How. Ann. Mich. secs. 3391, 3392, citing *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261. Defendant

insisted that no one was left dependent here, and therefore there was no right of action. Court stated that above was according to decisions of Michigan, but that no question as to this phase of the case arose, for the action alleged that it was brought for the benefit of three daughters and one son, whose names were given, although the only evi-

woman fifty-six years old, and the amount of recovery was affected by the fact that the only evidence was that she boarded her husband and two minor children and clothed the latter, but it did not appear what was spent for clothing,⁴³ and where deceased contributed to the support of his mother and invalid sister, but he did not aid other members of the family, the recovery was limited to those whom he had assisted.⁴⁴ So there can be no recovery by lineal or collateral relatives where there is no dependency.⁴⁵

§ 654. Same subject continued.—Again, the cost of an annuity which will furnish the support to which the person is entitled is the measure of recovery for the loss of support.⁴⁶ And the present value of deceased's annual contributions to the support of his family, not to exceed the highest amount contributed for one year, and the present value of the same for two years, and so on for his life expectancy, should be considered, and the sums added together will represent the present value of the amount.⁴⁷ So the parents' dependency for support may be considered,⁴⁸ as well as the possibility of the father's or mother's dependency in the future,⁴⁹ although the fact that a deceased adult son was not the only child upon whom the mother could depend for support may be considered.⁵⁰ But the aid and as-

dence as to this allegation was brought out incidentally and not directly, and the record failed to show that any exception was taken on the trial as to lack of any evidence in this particular and it was therefore not before this court, and the legal presumption is there were beneficiaries, and the general charge assumed that such evidence had been introduced and a requested charge of defendant proceeded on that assumption. *Id.* per Mr. Justice Lamar.

⁴³ *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582; 2 Det. L. N. 33; 62 N. W. 993.

⁴⁴ *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361;

10 Ry. & Corp. L. J. 344; 49 Am. & Eng. R. Cas. 367.

⁴⁵ *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321.

⁴⁶ *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708.

⁴⁷ *Balch v. Grand Rapids & S. R. Co.*, 67 Mich. 394; 11 West. 476; 34 N. W. 884.

⁴⁸ *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 10 West. 184; 33 N. W. 306. See sec. 657, herein.

⁴⁹ *North Jersey St. R. Co. v. Morhart*, 64 N. J. L. 236; 45 Atl. 812; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576; 57 N. W. 598; *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234.

⁵⁰ *Innes v. Milwaukee*, 103 Wis. 582; 79 N. W. 783.

sistance rendered by a wife to her husband in his occupation are not a ground of recovery by the next of kin,⁵¹ and a verdict of substantial damages will be set aside where it rests only upon evidence of a general character, where the deceased, an adult, left a mother and minor brothers, and the mother was able to support herself, nor is a legal right to support necessary.⁵² So where a deceased widow had supported a daughter and assisted a son from time to time with small sums of money, the reasonable expectation of support or other benefit constitutes a factor.⁵³ And an obligation of a surviving mother to support minor children is an element of damages.⁵⁴ Again that the widow or family was largely or wholly dependent upon deceased for support is material and important,⁵⁵ and the relations of deceased to his father and mother, their dependence upon him and his obligation to support them is relevant and admissible testimony.⁵⁶

§ 655. "Fair and just" damages "with reference to the pecuniary injury"—Reasonable expectation of pecuniary benefit.—The reasonable expectation of pecuniary benefit or of the continuance thereof is the important consideration, and in New Jersey the damages are limited thereby, and it may be generally stated that the basis thereof is age and the factors elsewhere noted.⁵⁷ Necessarily the nature of this reasonable expectation depends upon the character of the relation sustained by those entitled as beneficiaries, since elements showing a loss to a parent would probably differ from the factors proving pecuniary damage to a widow, and in this connection what we have stated elsewhere concerning the differences in

⁵¹ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163.

⁵² *Paulmier v. Erie R. Co.*, 34 N. J. L. (5 Vr.) 151, 156.

⁵³ *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

⁵⁴ *Mulcairns v. Janesville*, 67 Wis. 24; 29 N. W. 365.

⁵⁵ *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46; 30 N. W. 282. See further as to dependency and support, *Johnson v. Chicago & N. W.*

R. Co., 64 Wis. 425; 25 N. W. 223; *Strong v. Stevens Point*, 62 Wis. 255; 22 N. W. 425; *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 359; 21 N. W. 227; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613; *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372; 22 Wis. 615. See sec. 657, herein.

⁵⁶ *Bright v. Barnett & R. Co.*, 88 Wis. 299; 60 N. W. 418; 26 L. R. A. 524.

⁵⁷ See sec. 648, herein.

the statutes as to those entitled to recover is material.²⁸ But the general rule is that what it is reasonably probable deceased would have earned, or accumulated, or contributed towards support, or care of those entitled to recover, or what the latter would have derived from the continuance of life except for the fatality, or any deprivation of a reasonable expectation of pecuniary advantage cut off by the premature death is properly an element of damages. The facts evidencing this loss must however vary in each particular case and all the available, admissible, material and relevant circumstances in each case should be proven, for the extent of the damages depends largely upon the proof.²⁹

²⁸ See secs. 642-644, herein.

²⁹ *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; 36 L. Ed. 485, under Howell's Ann. Mich. Stat. secs. 3391, 3392; *Sweetland v. Chicago & G. T. R. Co.*, 117 Mich. 329; 75 N. W. 1066; 43 L. R. A. 568; 5 Det. L. N. 283; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 621; 49 Am. & Eng. R. Cas. 367; 10 Ry. & Corp. L. J. 344; *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 33 N. W. 306; 10 West. 184; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, where the court says: "What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime." *Graham v. Consolidated Tract. Co.*, 64 N. J. L. 10; 44 Atl. 964, holding that damages must be limited to compensation for the loss of such reasonable expectation of pecuniary benefit (under act N. J. March 3, 1848; 1 Gen. Stat. p. 1188), and the probabilities as to the pecuniary benefits which a father would receive should be considered. *May v. West Jersey & S. R. Co.*, 62 N. J. L. 90; 40 Atl. 773; 31 Chicago L. N. 35; 58 Alb.

L. J. 93; 17 Nat. Corp. 213; 4 Am. Neg. Rep. 660, where Gummerts, J., says, the pecuniary injury "'is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased,'" quoting *Beasley, Ch. J.*, in *Paulmier v. Erie R. Co.*, 34 N. J. L. 158; *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163, holding that the claimed injury must be such as would have resulted in a pecuniary benefit or the deprivation thereof in the case of a wife's death. *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28, a case of loss of parent. See *Decker v. McSorley*, 111 Wis. 91; 86 N. W. 554; *Bauer v. Richter*, 103 Wis. 412; 79 N. W. 404, a case where an employee was killed by the fall of a derrick erected by employees of another. *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292; 77 N. W. 169; 12 Am. & Eng. R. Cas. N. S. 196. This case considers wife's reasonable expectations from husband's earnings, etc. See further as to reasonable expectations, *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897; *Kaspari v. Marsh*, 74 Wis. 562; *Annas v. Milwaukee &*

§ 656. "Fair and just" damages "with reference to the pecuniary injury"—Prospect of inheritance.—The prospect of inheritance in so far as it is involved in the deceased's increase of property or probable accumulations, and the reasonable expectation of sharing therein is considered under that heading.⁶⁰

§ 657. "Fair and just" damages "with reference to the pecuniary injury"—Physical and financial condition, age, number of family, etc.—When admissible.—In the three states⁶¹ which we have placed together, for the reason that the statutes therein prescribe the rule as to damages in the same terms, the designation of beneficiaries differs,⁶² so that it is important to remember this fact in considering the admissibility of evidence as to the physical and financial condition of such beneficiaries, the age, sex and number of family surviving, their dependency, etc. In Michigan, dependency, or the existence of some one dependent upon deceased, seems to be material.⁶³ And this dependency is the turning point in relation to the admission or rejection of evidence of the character under discussion. Thus the ages and number of dependent children of deceased may be proven where plaintiff sues as a personal representative for the benefit of those entitled to damages for the pecuniary loss.⁶⁴ In another case it was in evidence that the deceased wife had clothed and boarded two minor children.⁶⁵ Again, the aid furnished a mother and invalid sister confined the pecuniary loss to them, although there were other members of the family.⁶⁶ And the minority of the children and the marriage of the daughter should, it seems, be considered in an action by the widow.⁶⁷

N. R. Co., 67 Wis. 46, 48; 30 N. W. 282; *Lawson v. Chicago*, St. P. M. & O. R. Co., 64 Misc. 448; 24 N. W. 618; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613; *Potter v. Chicago & N. W. R. Co.*, 22 Wis. 615; 21 Wis. 372.

⁶⁰ See sec. 655, herein.

⁶¹ Mich. N. J. and Wis.

⁶² See secs. 624-644.

⁶³ See secs. 652-654, herein.

⁶⁴ *Breckenfelder v. Lake Shore & M. S. R. Co.*, 79 Mich. 560; 44 N. W. 957.

⁶⁵ *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 502; 2 Det. L. N. 33; 62 N. W. 993, a case where the damages were held excessive.

⁶⁶ *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361; 49 Am. & Eng. R. Cas. 367; 10 Ry. & Corp. L. J. 344. See *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530; 44 N. W. 321.

⁶⁷ *Rouse v. Detroit Elec. R. Co.* (Mich. 1901), 87 N. W. 68; 8 Det. L. N. 577.

So evidence is admissible as to the pecuniary circumstances of the parents of a deceased child.⁶⁸ And the jury should be permitted the fullest insight as to the family circumstances where the head of the family and its support is killed, in order that they may ascertain the exact extent of the pecuniary loss.⁶⁹ In New Jersey the fact that the father, who was next of kin, might become necessitous and dependent, is relevant and material upon the question whether he had suffered pecuniary loss by his son's death.⁷⁰ And where deceased left a widow, the number and ages of the surviving children were noticed as factors by the court in determining whether or not the damages awarded were excessive.⁷¹ So the age of a surviving mother, her ability to support herself, and the number and ages of surviving brothers appeared as facts in another case where the damages were held excessive.⁷² Again, in Wisconsin, the age of a surviving mother suing for her son's death, and also the number and ages of her other surviving sons were in evidence and considered upon the question of the reduction of the amount of the verdict.⁷³ And the husband's circumstances and financial condition may be shown in an action for the negligent killing of his wife in order to enable the jury to assess fair and just damages.⁷⁴ So proof of a mother's pecuniary circumstances may properly be given in an action for her son's death in order to show her possible dependency upon such child after his minority.⁷⁵ And a widow suing for the killing of her husband may show the number and ages of her dependent children,⁷⁶ and

⁶⁸ *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 10 West. 184; 33 N. W. 306.

⁶⁹ *Staal v. Grand Rap. & I. R. Co.*, 57 Mich. 239; 23 N. W. 795. See next section herein.

⁷⁰ *North Jersey St. R. Co. v. Morhart*, 64 N. J. L. 236; 45 Atl. 812.

⁷¹ *Williams v. Camden & A. R. Co.* (N. J.), 37 Atl. 1107; 3 Am. Neg. Rep. 569. The question was not discussed, however, it being evidently conceded that the evidence was properly before the court.

⁷² *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.

⁷³ *Innes v. Milwaukee*, 103 Wis. 582; 79 N. W. 783. *Examine Decker v. McSorley*, 111 Wis. 91; 86 N. W. 554.

⁷⁴ *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129; 68 N. W. 548; 6 Am. & Eng. R. Cas. N. S. 101.

⁷⁵ *Thompson v. Johnston Bros.*, 86 Wis. 576; 57 N. W. 298; *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.

⁷⁶ *Abbott v. McCadden*, 81 Wis. 563; 51 N. W. 1979; *Mulcairns v. Janesville*, 67 Wis. 24; 29 N. W. 565.

that her only means of support has been cut off by such death.⁷⁷ So the fact that the children have reached majority does not preclude their reasonable expectation of pecuniary benefit.⁷⁸ Again, a mother who had been given the custody of the intestate child under a decree of divorce may prove such fact and also her pecuniary necessities.⁷⁹ And special pecuniary loss to decedent's minor children may be shown by evidence that some of them are in poor health.⁸⁰ So the parents' ages and poverty, the father's poor health, the nature of his physical afflictions and the character of his and the mother's occupation, as evidencing their necessitous condition, are proper factors for consideration as well also as the fact that a large family survived.⁸¹ In addition to the physical and financial condition of the beneficiaries, we have seen that the health, industry, habits, earning capacity⁸² and probable accumulations of deceased⁸³ are factors, and these necessarily include a consideration of his or her financial condition, either as affecting dependency upon deceased for support, or the question of reasonable expectation of pecuniary advantage.⁸⁴

⁷⁷ *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46; 30 N. W. 282.

⁷⁸ *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

⁷⁹ *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234.

⁸⁰ *McKeigue v. Janesville*, 68 Wis. 50; 31 N. W. 298, a case where deceased was the mother.

⁸¹ *Johnson v. Chicago & N. W. R. Co.*, 64 Wis. 425; 25 N. W. 223; *Strong v. Stevens Point*, 62 Wis. 255; 22 N. W. 425; *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 359; 21 N. W. 227; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613, all cases as to excessive damages. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 472; 22 Wis. 615. In this last case the indigent condition of the parents was declared necessary to be shown, otherwise the damages would be limited. This decision, in so far as it is relied upon as an authority upon the point relat-

ing to evidence of poverty being admissible, is criticised as a "dictum" and the *Ewen* case is explained as within that class of decisions "in which perhaps such evidence must be received, because it tends to establish a moral obligation to demand assistance in the future from one at the time incapable of giving it, as where the person killed was a very young child and at present contributing nothing in aid of anyone." Per Cooley, J., in *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

⁸² See sec. 648, herein.

⁸³ See sec. 659, herein.

⁸⁴ See also as to financial condition of deceased, *Williams v. Camden & A. R. Co. (N. J.)*, 37 Atl. 1107; 3 Am. Neg. Rep. 569. The facts, however, are only noticed as being proven and there is no discussion in this case. *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

§ 658. "Fair and just" damages "with reference to the pecuniary injury"—Financial condition—When inadmissible.—Notwithstanding the decisions under the preceding section, it is evidently the law in Michigan that the damages recoverable have no regard to the needs of the persons entitled to recover under the statute, and that the poverty of the family can have no tendency to prove the extent of their reasonable expectations of receiving pecuniary benefit; that is, that the amount of the loss is not and cannot be measured by the wealth or poverty of the beneficiary.⁸⁵ This decision is followed in a later case which holds that the extent of the family's property, and of the incumbrance thereon, cannot be proven where a recovery is sought for the killing of plaintiff's husband.⁸⁶

§ 659. "Fair and just" damages "with reference to the pecuniary injury"—Probable accumulations.—The fact that the deceased husband and father had been prosperous in business, and had accumulated property, has been considered in determining whether or not the damages awarded were excessive.⁸⁷ But where deceased had already accumulated a competence, his physical and mental health and vigor, as affecting his ability to safely invest and keep the same during his life expectancy and the probability of such property remaining intact at his death for his children's benefit should be considered by the jury.⁸⁸ Again, the damages may include compensation to a widow for the share which she might reasonably have expected to receive from her husband's increased property, had he not been killed.⁸⁹ So adult children's reasonable expectation of pe-

⁸⁵ *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

⁸⁶ *Hunn v. Michigan C. R. Co.*, 78 Mich. 513; 44 N. W. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. N. S. 452. See sec. 873, herein.

⁸⁷ *Williams v. Camden & A. R. Co.* (N. J.), 37 Atl. 1107; 3 Am. Neg. Rep. 569. No discussion was had, however on the point, the facts being merely stated.

⁸⁸ *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28.

⁸⁹ *Bauer v. Richter*, 103 Wis. 412; 79 N. W. 404. *Examine Kaspari v. Marsh*, 74 Wis. 563; 43 N. W. 368; *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46, 50; 30 N. W. 282; *Lawson v. Chicago, St. P. M. & O. R. Co.*, 64 Wis. 448; 24 N. W. 618; *Castello v. Landwehr*, 28 Wis. 522.

cuniary benefit from deceased's probable increase of property or accumulations constitute a factor.⁹⁰

§ 660. "Fair and just" damages "with reference to the pecuniary injury"—Expenses of funeral, sickness, etc.—Funeral expenses are not recoverable as a part of the damages in New Jersey,⁹¹ and in Wisconsin where the complaint alleged the payment by intestate's children and heirs at law, of expenses of the funeral and of sickness, it was held fatally defective because it did not show that any of the children were minors, as under the death loss statute of that state, the damages are for the benefit of the infant children who have sustained pecuniary loss.⁹² It may, therefore, be reasonably inferred that if it had been averred that the minor children had been pecuniarily damaged by such payment of expenses, the complaint would have been sufficient.⁹³

§ 661. "Fair and just" damages "with reference to the pecuniary injury"—Life expectancy and mortuary tables.—Life expectancy is a question for the jury, and although standard or statutory annuity, mortality or mortuary tables are admissible in evidence, they are not conclusive, for they are subject to variation by proof as to age, health, habits, etc., of the parties and are to be considered in the light of such evidence.⁹⁴ This

⁹⁰ *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

⁹¹ *Consolidated Tract. Co. v. Hone*, 60 N. J. L. 244; 38 Atl. 759; 9 Am. & Eng. R. Cas. N. S. 249, rev'g 59 N. J. L. 275; 35 Atl. 899; 5 Am. & Eng. R. Cas. N. S. 679, which held that in case of the death of a child, funeral expenses were part of the pecuniary damages when such expenses had been paid by the father and could be recovered by him as administrator. The reversing case cites *Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296; *Blake v. Midland R. Co.*, 18 Q. B. 93. *Examine Telfer v. Northern R. Co.*, 30 N. J. L. 188, 209, where the court intimates that the expenses growing out of

child's injuries are recoverable, although the point is not discussed. See *Sullivan v. Horner*, 41 N. J. Eq. 299; 7 Atl. 411, cited in *Rowe v. Ruper*, 23 Ind. App. 27; 54 N. E. 770, as to funeral expenses of minor child not being a charge against his estate, where he leaves a father able to pay them.

⁹² *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365.

⁹³ *Examine Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 33 N. W. 306; 10 West. 184.

⁹⁴ *Damm v. Damm*, 109 Mich. 619; 67 N. W. 984; 3 Det. L. N. 310. Mortuary tables in *How. Mich. Statutes*, sec. 4245, are admissible. *Hunn v. Michigan C. R. Co.*, 78 Mich. 513; 44

rule, however, as to conclusiveness of such tables is subject to this qualification, viz, that they are controlling, when in evidence in the absence of proof varying or tending to vary their effect.⁹⁵ But they are not admissible to show the life expectancy of a child of an age less than any age computed in such tables.⁹⁶ It does not, however, constitute error as to defendant, in an action for a child's death to admit in evidence English tables showing the life expectancy to be less than that shown by American experience under the statute.⁹⁷ In New Jersey the rule is substantially the same as that stated at the beginning of this section, since the standard mortality table may be used there to establish probable life expectancy without proof of its repute. The rule of computation furnished thereby is not, however, an absolute one, for the conditions of each case must affect the conclusion. In determining the admissibility of such table, the court should be satisfied as to its authenticity by proof as where witnesses familiar with it and its use testify thereto.⁹⁸ In determining the pecuniary loss to a mother and sister who were dependent beneficiaries and to whose support deceased had contributed, the computation as to them should be confined to the period between the mother's life expectancy and that of deceased.⁹⁹ So in case of a husband's death, the annuity given as a compensation for her support should be based upon his probable duration of life.¹⁰⁰ And the probable duration of a parent's life affects the reasonable expectation of pecuniary benefit to surviving children.¹ It is unnecessary, however, to continue these illustrations as the question of life expectancy of deceased or of

N. W. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452. See also *McKeigue v. Janesville*, 68 Wis. 50; 31 N. W. 298; *Mulcairns v. Janesville*, 67 Wis. 24; 29 N. W. 565.

⁹⁵ *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582; 62 N. W. 993; 2 Det. L. N. 33.

⁹⁶ *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 15; 41 N. W. 847. Child in this case was 5 years old; no age under 10 years was given in tables.

⁹⁷ *Cooper v. Lake Shore & M. S. R.*

Co., 66 Mich. 261; 33 N. W. 306; 10 West. 184.

⁹⁸ *Camden & A. R. Co. v. Williams*, 61 N. J. L. (32 Vr.) 646; 40 Atl. 634; 11 Am. & Eng. R. Cas. N. S. 600.

⁹⁹ *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361; 10 Ry. & Corp. L. J. 344; 49 Am. & Eng. R. Cas. 367.

¹⁰⁰ *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292; 77 N. W. 169; 12 Am. & Eng. R. Cas. N. S. 196.

¹ *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

survivors is involved in nearly every case where damages are sought for a negligent or wrongful killing.

§ 662. "Fair and just" damages "with reference to the pecuniary injury"—Nominal damages.—In Michigan nominal damages cannot be recovered for a death in the absence of evidence showing some pecuniary injury or loss,² and in New Jersey the rule has been, as we have shown elsewhere, very positively affirmed and constantly followed, that nothing but the pecuniary loss can be recovered, although there does not seem to exist as strict a requirement with regard to pleading such injury as exists in some other states.³ So in that state a verdict for the benefit of the next of kin of a deceased wife and mother will be deemed excessive, where the pecuniary loss to the sons as such next of kin is only nominal.⁴ In Wisconsin, however, the facts that deceased was a widow and had small children dependent upon her sufficiently show a pecuniary injury to them.⁵ But it is also decided that there must be some evidence showing pecuniary loss to justify an award of nominal damages.⁶

§ 663. "Fair and just" damages "with reference to the pecuniary injury"—Death of husband—Husband and father.—Outside of the general factors which enter into the consideration of the pecuniary loss and the measure of damages, those elements which should be placed before the jury as a basis of their award in case of the death of a husband or of a husband and father have been stated herein under the various headings to which they more properly belong. They are involved in the consideration of dependency upon him as the sole support of

² Hurst v. Detroit City R. Co., 84 Mich. 539; 48 N. W. 44, citing and quoting from Cooper v. Lake Shore & M. S. R. Co., 66 Mich. 261, 271; 33 N. W. 306; 10 West. 184. See also Charlebois v. Gogebie & M. R. Co., 91 Mich. 59; 51 N. W. 812; Van Brunt v. Cincinnati, J. & M. R. Co., 78 Mich. 530; 44 N. W. 321. See also as to wife's services, Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582;

62 N. W. 998; 2 Det. L. N. 33. See sec. 674, herein, as to collateral kindred.

³ See secs. 645, 646, 662, herein.

⁴ May v. West Jersey & S. R. Co., 62 N. J. L. 63; 42 Atl. 163.

⁵ McKeigue v. Janesville, 68 Wis. 50; 3 N. W. 298.

⁶ Regan v. Chicago, M. & St. P. R. Co., 51 Wis. 599; 8 N. W. 292.

the family and the family circumstances;⁷ the measure of compensation to children for a parent's death, their loss of care, education and training;⁸ the reasonable expectation of pecuniary benefit, probable accumulations and prospective losses;⁹ the legal and moral obligation to support and the beneficiaries' right thereto;¹⁰ solatium, and various other factors.¹¹ Again the terms of the statutes providing for fair and just compensation with reference to the pecuniary injury must be construed in the light of their provisions as to the beneficiaries in those states which come within this specific wording as to the measure of damages. Thus in Wisconsin the surviving widow's right is exclusive, and her damages do not include the money value of his life to the children.¹² But it is also decided that the measure of damages may be an allowance based upon the pecuniary loss of the widow and children within the five thousand dollar limitation, and although it should not be such a sum as will produce at six per cent interest deceased's yearly earnings, yet there should be awarded the probable value of an annuity charge to produce such income for the term of expectancy,¹³ or as the rule has also been stated, the widow is not entitled to an amount covering her husband's gross earnings during his life expectancy, but she may recover within the statutory limitation of five thousand dollars, a sum which will yield an amount which will support her during a period covering what would have been deceased's expectation of life, together with such sum as she might reasonably have expected to receive from his earnings.¹⁴ Again, the value

⁷ *Staal v. Grand Rap. & I. R. Co.*, 57 Mich. 239; 23 N. W. 795; *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46; 30 N. W. 282; *Mulcairns v. Janesville*, 67 Wis. 24; 29 N. W. 565. See *Rouse v. Detroit Elec. R. Co.* (Mich. 1901), 87 N. W. 68; 8 Det. L. News, 577. See secs. 653, 654, 657, herein.

⁸ See sec. 666, herein.

⁹ See sec. 655, herein.

¹⁰ See sec. 653, herein.

¹¹ See secs. 648, 653, herein.

¹² *Lierman v. Chicago, M. & St. P. R. Co.* (Wis.), 52 N. W. 91; *Abbott v. McCadden*, 81 Wis. 563; 51 N. W. 1079; *Gores v. Graff*, 77 Wis. 174; 46

N. W. 48; *Schmidt v. Deegan*, 69 Wis. 300; 34 N. W. 83. See *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365. As to beneficiaries in Michigan and New Jersey, see secs. 642-644, herein. As to statutes that widow's second husband cannot continue her action as administrator of her estate and that of her former husband, see *Schmidt v. Menasha Wooden Ware Co.*, 99 Wis. 300; 74 N. W. 797.

¹³ *Nickerson v. Bigelow* (U. S. D. C. E. D. Wis.), 62 Fed. 900.

¹⁴ *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292; 77 N. W.

of the widow's support and protection does not constitute the limitation of her damages, but the share in her husband's increased property had he lived, and which she had a reasonable expectation of receiving may be included.¹⁵

§ 664. "Fair and just" damages "with reference to the pecuniary injury"—Death of wife.—In Michigan the value of the wife's services to the husband must be proven in an action for her killing,¹⁶ and where defendant's malpractice results in her death, this does not prevent an action for the loss to the husband of her services between the injury and death, although the damages are limited to such period of time.¹⁷ In New Jersey the husband's damages are limited to such as can be compensated for in money, or by a pecuniary standard.¹⁸ And the wife's services in and about the ordinary household duties, or rendered him by way of assistance and aid in his occupation, belong exclusively to him. The continuance of such services during his life does not afford a basis of recovery to her next of kin, for they do not constitute a pecuniary benefit to them within the statute. Nor can the question whether her services after her husband's death constitute such a benefit to said next of kin be considered because it is too remote.¹⁹ Nor does the statutory remedy extend to injuries suffered by the husband for the immediate killing of his wife.²⁰ Nor is he entitled to any damages for his mental distress or anguish.²¹ In considering the husband's damages for the death of his wife, the statutory provisions of these three states should not be overlooked,²² especially so, since

169; 12 Am. & Eng. R. Cas. N. S. 196.

¹⁵ *Bauer v. Richter*, 103 Wis. 412; 79 N. W. 404. See further as to widow's damages, *Kaspari v. Marsh*, 74 Wis. 563; 43 N. W. 368; *Lawson v. Chicago, St. P. & M. O. R. Co.*, 64 Wis. 448; 24 N. W. 618; *Castello v. Landwehr*, 28 Wis. 522; *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.

¹⁶ *Nelson v. Lake Shore & M. S. R. Co.*, 104 Mich. 582; 62 N. W. 993; 2 Det. L. N. 33.

¹⁷ *Hyatt v. Adams*, 16 Mich. 180.

¹⁸ *Telfer v. Northern R. Co.*, 30 N. J. L. 188. See secs. 645, 646, herein.

¹⁹ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163.

²⁰ *Grosso v. Delaware, L. & W. R. Co.*, 50 N. J. L. 317; 13 Atl. 233; 11 Cent. 574, under Act, N. J. March 3, 1848 (Rev. 294).

²¹ See sec. 651, herein, as to condition of surviving wife, consequent on child's death and husband's loss. See sec. 673, herein.

²² See secs. 642-644, herein.

in Wisconsin, he is expressly named as entitled to recover in the first instance, and in this state the deceased's mental qualities, earning capacity, social standing, ability, services and general superiority as a wife and mother, may be considered.²²

§ 665. "Fair and just" damages "with reference to the pecuniary injury"—Death of parent.—In case of the negligent or wrongful killing of a parent, the fair and just damages under the above statutory provision cannot include elements of which there is no evidence showing special pecuniary loss nor damages based upon mere inference of such loss, nor for injuries based upon duties which a parent is supposed to render his children and which are in their very nature incapable of measurement by any pecuniary standard.²³ Inasmuch, however, as minor children are entitled to support, the damages should be an annuity which would furnish the same.²⁴ In New Jersey in an action for the benefit of two sons who were the next of kin of the deceased wife and mother, the facts were considered that one was a minor, seventeen years of age and the other married, that the damages to them were merely nominal, and although she had rendered services of benefit to her husband, yet the question whether such services could benefit said next of kin, after her husband's death, will be too remote to be considered. But it may be shown that her advice and counsel would relate to the pecuniary affairs of the next of kin and would probably result in a pecuniary benefit to them, the deprivation of which would constitute a pecuniary loss.²⁵ The above case is important in that it involves not only the question of advice and counsel of a parent, but also the factors were in evidence, that deceased was a wife and mother and had assisted her husband in the household and in his occupation, and the children were an adult and a

²² *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. (U. S. C. C. Wia.) 282; 13 Wall. (U. S.) 270.

²³ *Walker v. Lake Shore & M. S. R. Co.*, 111 Mich. 518; 69 N. W. 1114; 3 Det. L. N. 775; 1 Am. Neg. Rep. 267, rev'g new trial granted in 104 Mich. 606; 62 N. W. 1032; 2 Det. L. N. 34, per Montgomery, J.

²⁴ *Brockway v. Patterson*, 72 Mich. 122. See *Nickerson v. Bigelow* (U. S. D. C. E. D. Wis.), 62 Fed. 900.

²⁵ *May v. West Jersey & S. R. Co.*, 62 N. J. L. 63; 42 Atl. 163. \$5,000 was held excessive in this case. See also *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28.

minor, so that the age and situation of the parties were evidently relevant. The case is also noteworthy by reason of the decisions noted elsewhere herein, as to nurture, training and education being a pecuniary loss.²⁷ But in view of the decisions in that state which so strictly construe the meaning of pecuniary loss,²⁸ it is evident that the rule of compensation will not be extended in this class of cases and that the reasonable expectation of pecuniary benefit will be limited thereby.²⁹ In Wisconsin, as we have stated elsewhere, the right of the children to recover must depend upon the existence of a surviving parent, since the parties entitled in the first instance are the surviving husband or wife and in the absence of such survivor then the children may recover through the personal representative.³⁰ And the children must be minors since the pecuniary loss must be sustained by them, the infant children being the only proper beneficiaries,³¹ although it seems to be also true that children who are all of the age may recover damages upon the basis of a reasonable expectation of pecuniary benefit from a mother's increased property or of such expectation by way of support or otherwise.³² The effect, therefore, of this last mentioned decision is that the damages are not confined to the surviving children's minority. But it may, however, be reasonably argued that the later decision in point of time overrules such a qualification and does limit the recovery to minors, that is, if the decisions are not in harmony. But, however this may be, the children's right of recovery for the parent's death must rest largely upon the surviving parent's right of recovery and the measure of compensation to such parent.³³ In the case of a mother's death, the children's health constitutes an important element of damages.³⁴ There are

²⁷ See sec. 666, herein.

²⁸ See secs. 645, 646, 667-672, herein.

²⁹ See *Demarest v. Little*, 47 N. J. L. (18 Vr.) 28. See secs. 655, 659, herein.

³⁰ See *Hubbard v. Chicago & N. W. R. Co. (Wis.)*, 80 N. W. 454. See cases in next note.

³¹ *Topping v. St. Lawrence*, 86 Wis. 526; 57 N. W. 365, a case of death caused by want of repair of a highway. *Lierman v. Chicago, M. & St.*

P. R. Co. (Wis.), 52 N. W. 91; *Abbott v. McCadden*, 81 Wis. 563; 51 N. W. 1079; *Gores v. Graff*, 77 Wis. 174; 46 N. W. 48; *Schmidt v. Deegan*, 69 Wis. 300; 34 N. W. 83. See sec. 663, herein.

³² *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505; 46 N. W. 897.

³³ See secs. 663, 664, herein.

McKeigue v. Janesville, 68 Wis. 50; 31 N. W. 298. See also sec. 657, herein.

other factors such as age, etc., of deceased, legal and moral obligation and dependency, income of property or probable accumulations, etc., which have been fully considered under appropriate headings herein, to which the reader is referred.

§ 666. "Fair and just" damages "with reference to the pecuniary injury"—Training, etc., of children.—The jury may not, in Michigan, in an action for a parent's death, consider the nurture, instruction, physical, moral and intellectual training which children would have received from their father had he lived during their minority, and an instruction to this effect will be erroneous. But notwithstanding this express ruling the court which asserted the rule declared, evidently by way of qualification, that there was no evidence on this matter; that it was not claimed that deceased was in any sense a tutor to his children. "The most that can be inferred is that he rendered to them occasional assistance such as a parent is supposed to render his children, but which in its very nature is as incapable of measurement by a pecuniary standard as is the loss of love, affection and sympathy."⁵⁵ In Wisconsin, however, the fact that young children were dependent upon the deceased widow for support, nurture and education, is an averment showing pecuniary loss to such children.⁵⁶

§ 667. "Fair and just" damages "with reference to the pecuniary injury"—Death of children.—In case of the negligent or wrongful killing of a minor child under the above statutory provision, there are two principal factors: first the right of the father to the services and earnings of such child, and the right of support to which the latter is entitled.⁵⁷ After a child,

⁵⁵ Walker v. Lake Shore & M. S. R. Co., 111 Mich. 518; 69 N. W. 1114; 3 Det. L. N. 775; 1 Am. Neg. Rep. 267, per Montgomery, J., rev'g judgment on new trial granted in 104 Mich. 666; 2 Det. L. N. 34; 62 N. W. 1032, and citing on last point Railroad Co. v. Austin, 69 Ill. 426; State v. Balt. & O. R. Co., 24 Md. 106.

⁵⁶ McKeigue v. Janesville, 68 Wis. 50; 31 N. W. 298. See Castello v.

Landwehr, 28 Wis. 522. And see also secs. 665, 666, herein, as to death of parent, including advice and counsel of parent as an element of damages.

⁵⁷ Prima facie a father is entitled to a minor child's earnings. Reeder v. Moore, 95 Mich. 594; 55 N. W. 436. When mother is obligated to support infant, see Alling v. Alling (N. J. Ch.), 27 Atl. 685. As to cus-

however, has reached majority, other and different elements affecting the measure of recovery enter into the question of the relative rights and obligations of parent and child, as will hereinafter appear. In New Jersey the father cannot maintain the action,³⁸ but only the deceased son's personal representative.³⁹ Irrespective, however, of the question whether or not the action must be brought by the personal representative, the measure of damages rests upon the right to the infant's earnings and services during minority, and the reasonable expectation of pecuniary benefit therefrom, having in view the right of the minor to support, education and maintenance until majority. The father's liability therefor, and the probable value of such support should be estimated and deducted.⁴⁰

§ 668. Same subject continued.—In New Jersey, the father being entitled to his children's services until they become twenty-one years old, he can recover only what those services might reasonably have been expected to be worth, subject to the burdens

tody and control of child, see *Griffin v. Gascoigne* (N. J. Ch. 1900), 47 Atl. 25; *Lemmin v. Lorfeld*, 107 Wis. 264; 83 N. W. 350; *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234. As to emancipation, evidence thereof and earnings, see *Monaghan v. School Dist. No. 1*, 38 Wis. 100; *Wambold v. Vick*, 50 Wis. 456.

³⁸ Under 1 N. J. Gen. Stat. p. 1188.

³⁹ *Fitzhenry v. Consolidated Tract Co.* (N. J.), 42 Atl. 416. It was also held in this case that when father as such had brought the action instead of the personal representative, the summons and declaration could not be amended after demurrer filed, by substituting the personal representative as plaintiff. That amendment of cause of action for loss of services of child cannot be made by inserting claim for injuries, etc., before death, see *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44. That mother may be appointed administratrix where she is jointly

interested with father, see *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 15; 41 N. W. 847. In case of divorce a mother to whom the decree has given custody of her children may show that fact. *Wiltse v. Tilden*, 77 Wis. 152; 46 N. W. 234.

⁴⁰ *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 15; 41 N. W. 847; *Graham v. Consolidated Tract Co.* (N. J.), 44 Atl. 964. See also *Schrier v. Milwaukee, L. S. & W. R. Co.*, 65 Wis. 457; 27 N. W. 157; *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 359; 21 N. W. 227; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613. These last three cases are cited to the point that the measure of damages for the death of an infant is the difference between such infant's probable gross income based on his life expectancy and the probable cost of his living in *Russell v. Windsor Steamboat Co.*, 126 N. C. 961; 36 S. E. 191.

and encumbrances which that relationship imposes upon him, and perhaps the expenses growing out of the injury are elements.⁴¹ As a rule the question of damages and of the value of decedent's services, less the expense of care and support, are for the jury,⁴² although an excessive verdict will be set aside.⁴³ So where the deceased son was over eighteen years of age, in an action by the administrator who was next of kin, the father's age was considered, and the weekly earnings of the son; also the facts that such earnings were paid to the father, who had furnished the intestate with board, lodging and small pocket money, and the question of the father's pecuniary loss by the deprivation of his son's earnings, was left to the jury,⁴⁴ although it is error, where deceased was about six years old, to instruct them that the parent is entitled to his son's services until he becomes twenty-one, but that it costs a good deal more to raise such child than the parent would suffer, and that the court cannot see what damages the parent would suffer from the loss of a child of that age.⁴⁵ The New Jersey court, however, notwithstanding the same statutory provision as to fair and just damages with reference to the pecuniary injury, has asserted a rule not precisely in harmony with the above decision, for it has expressly and clearly declared that children are more often an expense than a pecuniary benefit to the father, and that in a majority of cases the money expended for the child's benefit will be far in excess of the amount received from the latter, and it criticises as absurd, any claim that the father could be reasonably expected to be benefited in dollars and cents in the sum of five thousand dollars, which was the amount of the verdict in that case, from the continuance of the life of a deceased child between four and five years of age, and the verdict was set aside, the court declaring that where the amount was grossly and palpably excessive as in this case, it would continue so to do just as often as the jury rendered such verdicts.⁴⁶ So in another case in that state the court

⁴¹ *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

⁴² *McCahill v. Detroit City R. Co.*, 96 Mich. 156; 55 N. W. 668.

⁴³ *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

⁴⁴ *North Jersey St. R. Co. v. Mor-*

hart, 64 N. J. L. 236; 45 Atl. 812. See sec. 647, herein.

⁴⁵ *McCahill v. Detroit City R. Co.*, 96 Mich. 156; 55 N. W. 668.

⁴⁶ *Consolidated Trac. Co. v. Graham*, 62 N. J. L. 90; 40 Atl. 773; 31 Chic. L. N. 35; 58 Alb. L. J. 93; 17

applied the strict rule of construction under which it had continuously limited the damages to the actual pecuniary loss, and reduced a verdict for the killing of a boy fifteen years old, because the pecuniary benefit to the father by a continuance of the life during minority, did not in the court's estimation reach the sum awarded as damages, having in view the boy's occupation; that he was earning the highest amount of wages he could earn; that there was no evidence that during his minority any increase thereof could be reasonably anticipated, nor any evidence that he was qualified or would be qualified during such period for any more remunerative employment. It was also declared that the father was bound if he received his wages to clothe him appropriately, to educate him and to support and maintain him when he was sick or could not obtain employment, and that these were burdens which were imposed upon his father by law.^a

§ 669. Same subject concluded.—It is therefore apparent that although the question of damages in cases of this character is for the jury, nevertheless in New Jersey the rule, especially in case of young children, might better be expressed thus: the question of damages is primarily for the jury provided, however, that the verdict must come within the reviewing court's estimation of compensation according to the law under a strict construction, and this rule of strict construction will always be applied against what the court may consider to be a large verdict, basing the recovery upon the facts actually in evidence and this, notwithstanding a reasonably liberal rule exists in other states by reason of the extreme difficulty of exact and certain proof of pecuniary loss, and although the courts generally hesi-

Natl. Corp. Rep. 213; 4 Am. Neg. Rep. 660, per Gummere, J. This was a second verdict of the jury for \$5,000, the former having been set aside as "absurdly excessive," and a venire de novo issued unless the plaintiff would agree to reduce the verdict to \$1,000, which he refused to do, and the rule was made absolute. The child had been killed by the cars of the defendant.

^a May v. West Jersey & S. R. Co., 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417, \$3,000 was reduced to \$1,500. Deceased were sons of 13 and 15 years of age—\$936 and \$1,066 held excessive. Telfer v. Northern R. Co., 30 N. J. L. 188. See Jackson v. Consolidated Tract Co., 59 N. J. L. (30 Vr.) 25; 35 Atl. 754, noted under secs. 645, 646, herein.

tate to disturb a jury's verdict in the absence of a clearly apparent prejudice, bias, etc., on their part. In Michigan, in determining the pecuniary value to a parent of a son, from five to twenty-one years of age, over and above his support and education, such value may be proven by the testimony of fathers who have reared children from infancy to majority.⁴⁸ In many cases actual services are rendered in the household by the infant, and there is also a reasonable probability that as it approaches majority, services of pecuniary benefit directly or indirectly may be rendered to the family. Undoubtedly these should be considered, and in fact they have been so considered, although the question of their admissibility has not been discussed, apparently being conceded or rather asserted as being evidential factors.⁴⁹ Again the loss of a pension by the mother through the death of a minor son has been considered, and also her dependency.⁵⁰

§ 670. "Fair and just" damages "with reference to the pecuniary injury"—Death of adults.—As we have stated under a prior section,⁵¹ the measure of damages for the death of adult children rests in some particulars upon other and different elements than in case of minors. By this statement, however, it is not intended to exclude certain factors common to both minor and adult children, such as age, health, dependency, etc., but only principally, such matters as relate to the relative legal rights, and obligations of parent and child and which exist by virtue of the child's minority.⁵² In the case of deceased adult children, the questions of the dependency of the parent or parents and of the reasonable expectation of benefit from such adult child's continued aid or assistance by way of support or otherwise, had he or she lived, are material and relevant.⁵³ The facts that the

⁴⁸ *Rajnowski v. Detroit*, B. C. & A. R. Co., 74 Mich. 15; 41 N. W. 847.

⁴⁹ *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 33 N. W. 306, and cases throughout the sections herein relating to death of children in Michigan, New Jersey and Wisconsin.

⁵⁰ *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613. See secs. 648, 653, 654, herein.

⁵¹ See sec. 667, herein.

⁵² See sec. 671, herein.

⁵³ See secs. 653, 654, 657, herein; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374; 49 N. W. 361; 10 Ry. & Corp. L. J. 344; 49 Am. & Eng.

son was unmarried and the age of the mother, that he boarded with her, paying her therefor, and that there were other children from the ages of twelve to twenty-two, have been considered in determining whether or not the damages were excessive.⁵⁴ Such other elements of damage, however, as are involved in determining the amount of recovery for the death of an adult child, such as age, health, earnings, earning capacity, etc., have been considered elsewhere herein, under their appropriate headings.

§ 671. Death of children—Minority and majority.—The question whether a parent's pecuniary loss for the death of a minor is confined to the child's minority, or includes under the statute a reasonable expectation of pecuniary benefit from the continuance of the child's life beyond that time, has been a subject of considerable discussion. Necessarily, when a child becomes of age certain relative legal rights and obligations springing from the relation of an infant and the parent cease, and in so far as the damages depend exclusively upon such rights and obligations, the determination thereof would preclude the recovery of damages dependent solely upon such a source. But to hold that the measure of recovery is restricted to such sources is in effect to assert as the law that a child's minority is the limit of his life expectancy, beyond which period the parent could not reasonably hope to derive any benefit. To thus arbitrarily fix the expectation of life is certainly not permitting a parent to recover the pecuniary loss according to the reasonable expectation of pecuniary benefit from a continuance of the child's life. It is a matter of general knowledge that as a rule in a majority of cases a greater pecuniary benefit may be derived by a parent from a child after it passes its minority than has resulted during that period. This is also apparent from the large number of decisions where the facts in evidence in an action for the death of adult children show the great dependency of parents upon them for support or contributions thereto or for aid and assistance of some kind. But however favorable the argument

R. Cas. 367; Van Brunt v. Cincinnati, J. & M. R. Co., 78 Mich. 530; 44 N. W. 321; Paulmier v. Erie R. Co., 34 N. J. L. 151; Innes v. Milwaukee, 103 Wis. 582; 79 N. W. 783; Wiltse v. Tilden, 77 Wis. 152; 46 N. W. 234.
⁵⁴ Innes v. Milwaukee, 103 Wis. 582; 79 N. W. 783.

may be in support of a rule which will not limit the recovery for the death of a minor to its minority, it will probably not change the decision of any court which has adhered to the opposite rule, especially in view of the doctrine of *stare decisis*, and although there may be a modification or extension of a rule of law in some cases, nevertheless the rule remains, and the modification or extension thereof is the exception. We believe, however, that the weight of authority should be that the pecuniary loss is not measured by the child's minority but that a reasonable expectation of pecuniary benefit to the parent by a continuance of a minor's life after majority may constitute a basis of recovery.⁵⁵

§ 672. "Fair and just" damages "with reference to the pecuniary injury"—Death of children—Minority and majority.—In Michigan it seems that the courts have kept in view the relative legal rights and obligations springing from the relations of parent and minor, and have upon this basis, or the loss of services, confined the pecuniary loss of a parent for such child's death to the period of its minority.⁵⁶ In New Jer-

⁵⁵ "The rule for measuring damages in actions like that now under consideration is not open to doubt in this court. The statute which permits such action has been uniformly construed to limit the damages to compensation for the deprivation of pecuniary advantage from the continuance of the life of the deceased person. . . . The damages properly to be awarded in the case were such as would compensate the father for the reasonable expectation of pecuniary benefit from the deceased during his period of minority when he owed service to his father and thereafter when he would become emancipated by being of full age. . . . It is not impossible to determine that \$5,000 far exceeds any reasonable probability of pecuniary benefit from the continued life of deceased. Looking at the liability

of the father for the support, maintenance and education of the child during minority, and considering what pecuniary benefit the father would receive from the son's earnings during or after minority in its most favorable aspect, it is plain that the award far exceeds any possible amount of such pecuniary benefit." *Graham v. Consolidated Tract. Co.*, 64 N. J. L. 10; 44 Atl. 964, per Magie, Ch. J. But examine *Decker v. McSorley*, 111 Wis. 91; 86 N. W. 551; *Luessen v. Oshkosh Elec. L. & P. Co.*, 109 Wis. 94; 85 N. W. 124.

⁵⁶ *Hurst v. Detroit City R. Co.*, 84 Mich. 539; 48 N. W. 44; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261; 33 N. W. 306. In this case the deceased was a daughter, healthy, 11 years old, born of poor parents, living with and being cared for by her grandmother.

sey, however, the jury may consider the reasonable expectation of pecuniary benefit to the father from such contributions after minority as the son might reasonably be expected to make, either voluntarily or by compulsion, in case the father should become necessitous.⁵⁷ In another case in that state, however, where the action was for the killing of a boy of about fifteen years of age, and in which the damages were reduced one half, the courtsaid that "the cause was tried upon the basis that the father was entitled to the earning capacity of the deceased until he should arrive at the age of twenty-one years, and not beyond that time," and the instructions of the court below were to that effect. The court further declared that there was a misapprehension, perhaps, of the instructions, and in discussing the facts evidencing the pecuniary loss, the court confined itself to those relating to deceased's minority and the loss of earnings or services during that period, and based its ruling that there was an excessive verdict upon the principle that the pecuniary benefit which would accrue to the father by a continuance of life of the son during his minority could not reach the sum awarded by the verdict.⁵⁸ This decision was based upon an early case⁵⁹ in the same court, which expressly limited the damages to the pecuniary loss only, and affirmed said ruling with others of the same tenor. In the early case the court also expressly declared that nothing more than what the services of a deceased child were reasonably expected to be worth until minority, less support, etc., could be recovered.⁶⁰ So that it may be reasonably inferred from all of the above that the principle as to minority was affirmed by the subsequent decision. In Wisconsin the jury may consider evidence showing that a mother might have become dependent upon her son after majority, and also her reasonable expectation of pecuniary benefit from the continuance of

⁵⁷ North Jersey St. R. Co. v. Morhart, 64 N. J. L. 236; 45 Atl. 812. Deceased son was over 18 years old in this case. Graham v. Consolidated Tract. Co. (N. J.), 44 Atl. 984. Deceased boy was 4 years old, and the probabilities as to benefit from son's earnings, before or after majority, considered.

⁵⁸ May v. West Jersey & S. R. Co., 62 N. J. L. 67; 42 Atl. 165; 13 Am. & Eng. R. Cas. N. S. 517; 5 Am. Neg. Rep. 417.

⁵⁹ Telfer v. Northern R. Co., 30 N. J. L. 188.

⁶⁰ Id., per Van Dyke, J.

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